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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1889.

VOLUME XXVII.

D. A. CAMPBELL,

OFFICIAL REPORTER.

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BY D. A. CAMPBELL, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

Rec. Sept. 19, 1891

THE SUPREME COURT

OF

NEBRASKA,

1890.*

CHIEF JUSTICE,
AMASA COBB.

JUDGES,
SAMUEL MAXWELL,
T. L. NORVAL.

OFFICERS.

ATTORNEY GENERAL,
WILLIAM LEESE.

CLERK AND REPORTER,
D. A. CAMPBELL.

DEPUTY CLERK,
W. B. ROSE.

*On January 9, 1890, the court was reorganized, Chief Justice M. B. Reese retiring, Amasa Cobb succeeding him, and T. L. Norval taking the oath of office. The decisions reported in this volume were rendered under the former organization of the court.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

FIRST DISTRICT.

JEFFERSON H. BROADY,	Beatrice.
THOMAS APPELGET,	Tecumseh.

SECOND DISTRICT.

SAMUEL M. CHAPMAN,	Plattsmouth.
ALLEN W. FIELD,	Lincoln.

THIRD DISTRICT.

ELEAZER WAKELEY,	Omaha.
GEORGE W. DOANE,	Omaha.
MELVILLE R. HOPEWELL,	Tekamah.
JOSEPH R. CLARKSON,	Omaha.

FOURTH DISTRICT.

A. M. POST,	Columbus.
WILLIAM MARSHALL,	Fremont.

FIFTH DISTRICT.

WILLIAM H. MORRIS,	Crete.
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SIXTH DISTRICT.

JEROME H. SMITH,	Aurora.
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SEVENTH DISTRICT.

ISAAC POWERS JR.,	Norfolk.
W. F. NORRIS,	Ponca.

EIGHTH DISTRICT.

WILLIAM GASLIN JR.,	Alma.
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NINTH DISTRICT.

FAYETTE B. TIFFANY,	Albion.
T. O. C. HARRISON,	Grand Island.

TENTH DISTRICT.

FRANCIS G. HAMER,	Kearney.
A. H. CHURCH,	North Platte.

ELEVENTH DISTRICT.

JAMES E. COCHRAN,	McCook.
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TWELFTH DISTRICT.

MOSES P. KINKAID,	O'Neill.
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STENOGRAPHIC REPORTERS.

FIRST DISTRICT.

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P. E. BEARDSLEY,	Lincoln.

SECOND DISTRICT.

O. A. MULLON,	Lincoln.
M. E. WHEELER,	Lincoln.

THIRD DISTRICT.

B. C. WAKELY,	.	.	.	.	Omaha.
C. C. VALENTINE,	.	.	.	.	Omaha.
A. M. HOPKINS,	.	.	.	.	Omaha.
THOS. P. WILSON,	.	.	.	.	Omaha.

FOURTH DISTRICT.

FRANK J. NORTH,	Columbus.
E. R. MOCKETT,	Fremont.

FIFTH DISTRICT.

C. L. TREVITT,	Lincoln.
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SIXTH DISTRICT.

FRANK TIPTON,	Seward.
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SEVENTH DISTRICT.

EUGENE MOORE,	West Point.
GEORGE COPELAND,	Neligh.

EIGHTH DISTRICT.

F. M. HALLOWELL,	Kearney.
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CHARLES W. PEARSALL,	Grand Island.

TENTH DISTRICT.

JOHN W. BREWSTER,	Hastings.
E. A. CARY,	North Platte.

ELEVENTH DISTRICT.

A. D. GIBBS,	McCook.
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TWELFTH DISTRICT.

A. L. WARRICK,	Ainsworth.
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RULE OF COURT.

ADOPTED SINCE THE PUBLICATION OF VOL. XXVI.

3a. **ADVANCING CAUSES ON DOCKET.**—Cases brought to this court on error or appeal where important public interests are involved requiring an early decision, may, upon notice to the opposite party and a proper showing in writing under oath, be advanced on the docket. Such cases, when brought too late to be placed on the calendar under rule 2, may, upon such notice and showing, be placed thereon in an advanced position.

The syllabus in each case was prepared by the judge writing the opinion, in accordance with rule 20.

A table of statutes and constitutional provisions cited, construed, etc., numerically arranged, will be found on pages 29-32.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1889.

PRESENT:

HON. M. B. REESE, CHIEF JUSTICE.
 " AMASA COBB, } JUDGES.
 " SAMUEL MAXWELL, }

A. J. DURLAND, ADMINISTRATOR, APPELLANT, V.
 ANNIE B. SEILER, APPELLEE.

[FILED JUNE 13, 1889.]

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1. **Homestead.** Where a homestead was selected or severed from the separate property of the husband, and at the time of his death he resided upon it with his family, the title thereto vested in his wife during her life, exempt from the payment of any debt or liability existing against either the husband or wife at the time of the death of the husband, except such as were valid liens as against the husband at the time of his death.

2. ———. In such case neither the life estate vested in the wife, nor the remainder vested in the heirs of the decedent or wife, would be liable for the debts of either husband or wife existing at the time of the death of the husband; and this would be the case whether they occupied the property as a homestead or not, the exempt quality of the property not depending upon such occupancy.

APPEAL from the district court of Madison county.
Heard below before POWERS, J.

White & Mapes, and *H. C. Brome*, for appellant, cited: *Dawley v. Ayers*, 23 Cal., 108; *Alston v. Ulman*, 39 Tex., 157; *Finley v. Sly*, 44 Ind., 269.

Wigton & Whitham, for appellees, cited: *Guthman v. Guthman*, 18 Neb., 105-6; *Johnson v. Gaylord*, 41 Ia., 362, 367; *Bradshaw v. Hurst*, 11 N. W. Rep., 672 [87 Ia., 745]; *Estate of Orr*, 29 Cal., 101, 104; *Estate of Busse*, 35 Id., 310; *Schadt v. Hepppe*, 45 Id., 433; *Graham v. Stewart*, 9 Pac. Rep. (Cal.), 556-9; *Lake v. Page*, 1 Atl. Rep., 113, 115 [63 N. H., 318].

REESE, CH. J.

This was an application by the administrator of J. F. Woodruff to the district court, for license to sell real estate for the purpose of paying the debts against the estate of the owner at the time of his death. The facts, as stated by appellant in his brief, are substantially correct, and are as follows:

On the 11th day of September, 1884, appellee became the wife of J. F. Woodruff. On October 1, Woodruff purchased the premises in controversy, to-wit, lots ten and eleven in block four, in the town of Norfolk Junction, in Madison county, and with his family moved upon and occupied the premises in controversy, and was so occupying at the time of his death, which occurred October 24 of the same year. The property is worth about one thousand dollars. At the time of his death Woodruff owed Emma I. Furguson, the person from whom he purchased the premises, \$320, being an unpaid portion of the purchase price. This debt was evidenced by a promissory note signed by Woodruff and his wife, the appellee herein. On

the 8th day of August, 1885, appellant Durland was appointed administrator of Woodruff's estate by the county court of Madison county. The claim of Emma I. Furguson, evidenced by the note above mentioned, was duly filed and allowed against the estate. There being no personal property or other real estate belonging to the estate in the hands of the administrator, from the proceeds of which said debt could be paid, on the 20th day of September, 1887, Durland filed in the office of the clerk of the district court of Madison county a petition for license to sell the real estate in controversy, for the purpose of paying the debts and the expenses of administration. Appellee, who was formerly the wife of Woodruff, answered on the 3d of November, 1887, claiming that said premises were occupied as a homestead at the time of Woodruff's death, and that since his death she had obtained a conveyance to herself of said property from the heirs at law of Woodruff, and asking that plaintiff's petition be dismissed. Appellant's reply, filed November 28, admitted the occupation by Woodruff and wife at the time of his death; but alleged a subsequent abandonment of the homestead by appellee; that appellee became after such abandonment a non-resident of the state of Nebraska, and is now a non-resident thereof; that as to the averment in appellee's answer, asserting a subsequent conveyance from the heirs at law of Woodruff to appellee, appellant had no knowledge, but asserting that such conveyance, if made, was upon the express condition and consideration that appellee would pay the claim of Emma I. Furguson for the unpaid balance of the purchase price of the premises in controversy; and that the heirs at law of Woodruff are, and at all times have been, non-residents of Nebraska. In addition to the facts disclosed by the pleadings it is shown by the evidence that the debt for which appellant sought to sell these premises is for the purchase money, and the note is signed by the appellee. The heirs at law of Woodruff are, and at

all times have been, non-residents of Nebraska. Appellee, after the death of her husband, remained upon and occupied the premises in controversy until June 1, 1885, when she abandoned them, removing to the city of Norfolk, where she resided until December 9, 1885, when she removed to Clinton, Ohio, where she resided three months, and was there married to her present husband, Seiler, and then removed with her husband to Wichita, Kansas, where she has since continued to reside. On the 19th day of March, 1885, Mrs. Seiler conveyed these premises by warranty deed to G. W. Keel. Upon these facts the district court found for appellee, and from the judgment of dismissal the administrator appeals.

It is claimed that the real estate should be held liable for the payment of the debts of the estate of the decedent, and that the judgment of the district court should be reversed on the ground that the removal by appellee, subsequent to the death of her husband, was a forfeiture of her title to the premises. That is, that she abandoned the homestead, and the homestead character was thereby lost. This calls for an interpretation of section 17 of chapter 86 of the Comp. Stats., entitled Homesteads. The section under consideration is as follows:

"SEC. 17. If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter."

The conditions referred to as being such as would subject the homestead to sale are doubtless those mentioned in sec-

tion three of the act, and which are limited to mechanics', laborers', or vendors' liens on the property. There being no vendors' liens in this state, it is clear that the property in dispute does not come within the exceptions named in section three. It will be seen that by this section it is provided that the homestead, upon the death of the person from whose property it was selected, vests in the survivor for life, and afterward in his or her heirs forever. There is no limitation contained in the section which causes the title so vested to depend upon occupancy, nor is there any requirement that the property should retain its homestead character. During the life of the owner of the fee the exempt character of the property was made to depend upon its occupation as a homestead. But upon his or her death a new title is created which vests in the survivor for life unconditionally; and it is expressly provided that the property is not subject to the payment of any debts or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of such husband or wife's death. The propriety of this sweeping language in the enactment is not for us to consider; it is sufficient to know that it is there. It has been the universal holding of this, as well as substantially all other courts in the union, that homestead laws, being remedial in their character, should receive a liberal construction; at least, that the language used by the legislature should not be restricted by judicial interpretation. (*Tipton v. Martin*, 12 Pac. Rep., 245 [71 Cal., 325]; *Johnson v. Gaylord*, 41 Ia., 362; *Bradshaw v. Hurst*, 11 N. W. Rep., 672 [57 Ia., 745]; *Estate of Orr*, 29 Cal., 101; *Estate of Busse*, 35 Id., 310; *Schadt v. Heppe*, 45 Id., 433; *Graham v. Stewart*, 9 Pac. Rep., 556 [68 Cal., 374].

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

GEORGE A. JOSLYN ET AL. V. CHARLES H. KING.

[FILED JUNE 13, 1889.]

Bailment; NEGLIGENCE. A letter carrier in the city of O., received a registered letter directed to "F. E. R., St. Charles Hotel, Omaha, Nebraska." He delivered the letter to the clerk of the hotel, who signed the return receipt, also the letter carrier's book; but before the letter was delivered to the person to whom it was addressed, and who was a guest at the hotel, it was lost. It contained \$100 in money. The loss becoming known, the letter carrier was required by the post office department to pay to the person to whom the letter was addressed the sum of \$100. In an action by the carrier against the person to whom he delivered the letter, it was held, that a liability existed, and the judgment of the district court in favor of the letter carrier was affirmed.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

A. N. Ferguson, for plaintiff in error, cited: 2 Thompson on Negligence, p. 1149; *Omaha Horse Railway Co. v. Doolittle*, 7 Neb., 481; *Brooks v. R. Co.*, 25 Barb., 600.

Estabrook & Irvine, and *W. N. Williams*, for defendant in error.

REESE, CH. J.

This is a proceeding in error to the district court for Douglas county. The facts as shown by the pleadings and bill of exceptions may be briefly stated to be substantially as follows:

George A. Joslyn was the proprietor of the St. Charles hotel, in the city of Omaha, and Fred A. Joslyn was his clerk in said hotel. Defendant in error was a letter carrier under the employment of the post office department of the United States, and in the course of his business re-

Joslyn v. King.

ceived for delivery a registered letter addressed to "Frank E. Blackmar, St. Charles Hotel, Omaha, Nebraska." He took the letter to the hotel, but the person to whom it was directed not being present, he delivered it to Fred A. Joslyn, the clerk of the hotel, taking his receipt therefor both upon the letter carrier's book and upon the card for return to the sender of the letter. After accepting and receipting for the letter, F. A. Joslyn placed it in the letter box in the office of the hotel. This was about noon in the day. A part of his duties being to act as night clerk in the hotel, he soon after retired to his room and went to sleep, and did not arise until about six o'clock of that evening, when it was discovered that the letter had been purloined from the letter box, in which he had placed it in the office, and could not be found. Under a regulation of the post office department, it was the duty of the carrier, defendant in error, to have delivered the letter only to the person to whom it was directed, or upon his written order. Having failed to do this, he was held responsible to the person to whom the letter was directed; and it being shown that the letter contained \$100 in money, he was required to pay the same to Mr. Blackmar, which he did, and then brought suit against plaintiffs in error for the amount so paid out, charging them with negligence in failing to deliver it to the person to whom it was directed. The trial in the district court resulted in a finding and judgment in favor of defendant in error, and for the purpose of reversing this judgment plaintiffs in error bring the cause to this court by proceedings in error.

The facts seem to be substantially conceded as herein above stated, the only question presented being whether or not plaintiffs in error were liable under these conditions. It is contended that this liability does not exist, for the following reasons:

"First—Defendant in error was negligent himself, in delivering the letter to Fred A. Joslyn for Blackmar and

taking his receipt therefor, instead of delivering it to the person to whom it was directed.

"*Second*—That plaintiffs in error are not liable, for the reason that it is not shown that defendant in error communicated to Fred A. Joslyn, at the time that he delivered the letter to him and accepted his receipt, that it contained the remittance referred to, or that it was a valuable letter."

While it may be assumed that defendant in error was guilty of negligence in delivering the letter to plaintiffs in error, and that in so doing he became personally liable to the person to whom the letter was directed, yet we fail to see why this should relieve them from responsibility for their own negligence in the matter. In other words, the negligence of defendant in error, in delivering to plaintiffs a letter which should have been delivered to another person, cannot in any degree relieve them of the liability growing out of their own negligence. It is contended that as Fred A. Joslyn did not know that the letter contained a remittance, or was upon a matter of importance, and that he had never at any time before that received a registered letter, and did not know what it was, he should not be held liable. To this we cannot agree. The fact that a receipt was required both upon the carrier's book and upon the card to be returned to the sender was sufficient to notify him that it was at least an unusual letter, and one which required special care. He seeks to avoid this by saying that he supposed that it was simply what is known as an "immediate delivery" letter, and not of much importance. This fact would not relieve him, for had it been simply an immediate delivery letter, the fact of its being such would have been notice to him that it was of more than ordinary importance, and the same care would have been required. The receipt signed by F. A. Joslyn was introduced in evidence. It is the usual printed form in use by the post-office department, with the heading, "Registry return receipt," and immediately above the signature "F. E.

Gifford v. Faubion.

Blackmar" placed there by him, are also the words "received the above described registered letter" in large letters. This, in addition to his signature being required on the carrier's book, was sufficient to charge him with notice that the letter receipted for was of more than ordinary importance, and that special care was required. The bailment was voluntarily assumed upon his part, and care should have been proportionately increased.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

J. S. GIFFORD V. JOHN T. FAUBION.

[FILED JUNE 13, 1889.]

Verdict: EVIDENCE. There is no question of law presented. The evidence, as shown by the bill of exceptions, is examined, and *held*, to sustain the verdict of the jury for \$105.94. The verdict and judgment having been for \$118, the judgment is reversed unless defendant in error remit therefrom the sum of \$13.06.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

C. C. Flansburg, for plaintiff in error.

J. G. Thompson, for defendant in error.

REESE, CH. J.

This cause was originally instituted before a justice of the peace in Harlan county. After trial it was appealed

to the district court, where it was agreed that the trial in that court should be had upon the issues formed, or pleadings filed, before the justice of the peace. By the bill of particulars it was alleged that there were one hundred and seventy-five dollars due from defendant in error to plaintiff in error for money had and received, and which had not been paid. The answer of plaintiff in error consisted, first, of a general denial, and second, a plea of settlement by which it was found that nine dollars and forty-four cents were due to defendant in error, which sum it was alleged had been tendered to him. It was conceded upon the trial that the tender had been made and had been kept good. A jury trial was had which resulted in a verdict in favor of defendant in error for the sum of one hundred and eighteen dollars, for which, after a motion for a new trial had been overruled, judgment was rendered. Defendant below, as plaintiff in error in this court, brings the cause for review upon proceedings in error. The only contention on the part of plaintiff in error is that the verdict of the jury was not sustained by sufficient evidence. The evidence upon which the case was submitted to the jury was conflicting, and it was doubtless as impossible for them to harmonize all the testimony as it would be for us to do so at the present time. Defendant in error testified in substance that he held a note for five hundred dollars which he proposed selling to plaintiff in error, and which he did sell to him for four hundred and fifty dollars; that there was a sight draft of forty-five dollars and sixty-one cents to be paid by defendant in error, a note on defendant in error which at that time amounted to seventy-eight dollars, and that there was also deducted from the four hundred and fifty dollars another note of thirty-two dollars, a claim for twenty dollars, a note for thirty-two dollars and eighty-three cents, another note for twenty-two dollars and sixty-two cents, amounting in all to about two hundred and eighty-one dollars, leaving a balance due defendant in error

of about one hundred and sixty-eight dollars, for which he claimed judgment; while upon the other hand it was contended by plaintiff in error that plaintiff and defendant had had a full and complete settlement, and it had been ascertained that the amount due to defendant in error from plaintiff in error was nine dollars and forty-four cents, and no more, and for this amount a tender was made.

Had the jury returned a verdict in favor of defendant in error for the one hundred and sixty-eight dollars claimed by him, we know of no rule of law which would authorize a reversal of the judgment upon the ground that the verdict was not sustained by sufficient evidence; for as well as testifying to the matter himself positively, he was corroborated by some other facts and circumstances which were developed in the trial. It is claimed by defendant in error, and was so claimed upon the trial, that upon the note of ninety-one dollars, which he admitted there was due the sum of seventy-eight dollars, usurious interest had been charged by plaintiff in error, and the principal question was whether or not it had been actually paid by defendant in error; and upon this point the court instructed the jury that if they found that defendant in error had voluntarily actually paid this money—this usurious interest—it could not be recovered back. But if it had not been paid, it could not be credited to plaintiff in error. Upon his cross-examination defendant in error testified that plaintiff in error "Tried to figure two per cent interest upon him, and at that rate the note would amount to about one hundred and thirty-one dollars." In order to find in favor of defendant in error the jury must have adopted the theory of the case presented by him. But for the purpose of arriving at their verdict of one hundred and eighteen dollars, instead of one hundred and sixty-eight dollars, they must have found that the usurious interest was paid by him, and that he could not recover it back. If this was true, the whole amount with which defendant in error should have been charged

was three hundred and thirty-four dollars and six cents, instead of two hundred and eighty-one dollars and sixty cents, as testified to by him in his testimony. The three hundred and thirty-four dollars and six cents deducted from the four hundred and fifty dollars, the purchase price of the note, would leave a balance due defendant in error of one hundred and five dollars and ninety-four cents. It is quite probable that to this amount the jury added interest. But as there is no date given in the testimony from which to compute interest, and as there is no demand in the bill of particulars for interest, it is quite clear that interest could not be allowed, nor could it be computed, there being no data before the jury from which to make the computation. Assuming, as we must, that the jury found that the usurious interest had been paid by defendant in error and could not be recovered back, and that interest could not lawfully be computed upon the amount they found due, it is apparent that the verdict of the jury was excessive, and was for thirteen dollars and six cents more than it should have been. The judgment of the district court will therefore be reversed, unless defendant in error, within thirty days from this date, files a remittitur from the judgment, of thirteen dollars and six cents. In case such remittitur is filed, judgment will be entered for one hundred and five dollars and ninety-four cents in favor of defendant in error.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

CHARLES S. SCHROEDER ET AL. V. BAKER MANUFACTURING COMPANY.

[FILED JUNE 13, 1889.]

Trial: EVIDENCE: PRESUMPTION. The cause was tried to the district court on conflicting evidence. All presumptions being in favor of the findings and judgment, and no reason being shown why the rule should not be applied to this case, the judgment is affirmed.

ERROR to the district court for Platte county. Tried below before Post, J.

G. G. Bowman, for plaintiffs in error.

Sullivan & Reeder, for defendant in error.

REESE, CH. J.

This action was instituted in the district court of Platte county for the purpose of recovering the amount alleged to be due upon a promissory note made by plaintiffs in error to defendant in error. An answer was filed by plaintiffs in error in which the execution of the note was admitted, but it was alleged that the consideration of the note was an invoice of windmills and other machinery, and that the machinery so purchased was warranted to be properly made, and of sound material, suitable for the purpose for which they were manufactured; and that in case of failure to comply with the terms of the warranty, the defective part would be replaced and the machinery which proved defective should be made to work to the satisfaction of the purchaser; and that defendant in error would reimburse plaintiff in error for all expenses which he might be to in making such repairs, etc. It was further alleged that at the time of the execution of the note it was agreed that it

was to be paid in guaranteed and indorsed notes, taken by plaintiff in error for the mills and other property for which the note upon which this suit is based was given; that expenses had been incurred to the extent and amount of five hundred and ten dollars and seventy cents, and that certain payments specifically set out had been made by the transfer of guaranteed notes to the amount of sixteen hundred and fifty-two dollars and fifty-six cents. An affirmative judgment for ten hundred and sixty dollars and forty-four cents was demanded. The reply was a general denial.

A trial was had to the court without the intervention of the jury, which resulted in a general finding in favor of defendant in error upon all the issues in the case. A motion for a new trial was filed, which was overruled, when judgment was entered in favor of defendant in error for the full amount sued for. The case is brought to this court by plaintiff in error, who was defendant in the district court, and is submitted without brief or argument upon either side.

The grounds assigned in the motion for a new trial were, first, "The findings of the court are not sustained by sufficient evidence;" second, "the findings of the court are contrary to law." These assignments are again made in the petition in error, with the additional one that "the court erred in overruling the motion for a new trial." We have carefully examined the bill of exceptions, and find a sharp conflict in the evidence submitted at the trial upon every issue presented in the case. No reason being presented why the usual presumption in favor of the finding of the court and the regularity of the judgment do not exist in this case, the judgment cannot be molested, and must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

KATE A. GRIFFITH V. ALBERT C. SMITH.

[FILED JUNE 14, 1889.]

27	47
39	454
27	47
53	150

Limitation of Actions: ADVERSE POSSESSION. One who is in the adverse possession of land does not impair his right to rely upon the statute of limitations, by purchasing the land at a tax sale, and receiving and recording a tax deed therefor; nor does such purchase or recording, or both together, cause a break in the running of the statute of limitations.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Joseph H. Blair, for plaintiff in error, cited: *Armstrong v. Morrill*, 14 Wall., 121, 145, 146; 3 Washburn on Real Property, 5th Ed., 148; Sedgwick & Wait on Trial of Title, 2d Ed., sec. 746; Wood on Limitations, p 577.

Lake & Hamilton, appearing by special leave of the court, cited: Am. and Eng. Encyc. of Law, vol. 1, p. 273; *Parsons v. Viets*, 9 S. W. Rep., 908.

COBB, J.

This was an action *quia timet* in the district court of Douglas county by Albert C. Smith, plaintiff, against Kate A. Griffith, defendant.

The petition alleges that the plaintiff is the owner in possession, and for more than ten years prior to the bringing of this suit had been in the actual, open, adverse, peaceable, and continued possession, of lot six in block nineteen, in the city of Florence, in said county, and by reason thereof had acquired title thereto.

2. That the defendant claims some title, estate, or interest, in and to said lot, adverse to the plaintiff by reason of an instrument of record, purporting to convey the same

to her; but whatever interest she may have had by reason of such conveyance in and to said lot, is subject and inferior to the title of plaintiff, and casts a cloud thereon which should be removed; with prayer that the title to and possession of said lot may be quieted in him.

The answer of the defendant sets up that her name is Katherine A. Griffith Boyd; that she is the identical person named as grantee in a certain deed of conveyance of lot six in block nineteen, in the city of Florence, in said county, from Henry J. Runnels, grantor, dated April 2, 1862, and recorded, and that she has been ever since that date the owner thereof.

She admits that since about March 28, 1874, the plaintiff and his immediate grantor, Mary Dunk, have been in the continued possession of said lot, but denies that such possession has been during all this time adverse to the defendant, for the reason that there has been an acknowledgment and recognition of defendant's ownership by the plaintiff and his immediate grantor within ten years, and that since such acknowledgment and recognition, ten years prior to the commencement of this suit had not elapsed.

3. That in or about the month of March, 1874, Mary Dunk, the immediate grantor of plaintiff, entered into possession of said lot, and was in possession on March 28, 1874, when the same was sold for taxes.

4. That from and after April 1, 1862, the date of Runnels's deed to defendant, and up to and including the year 1872 (except 1865), all of the taxes against said lot became delinquent and remained so on March 28, 1874.

5. That on March 28, 1874, the county treasurer of said county pretended to sell said lot to Samuel Scott, at private sale, for the taxes of 1872 alone, and for no other year or years, and issued to Scott a treasurer's certificate of sale; that Scott did not purchase said lot, nor was it sold for the then delinquent taxes of any year other than 1872, leaving the delinquent taxes for the years 1861, 1862, 1863,

1864, 1866, 1867, 1868, 1869, 1870 unpaid and omitted; nor did Scott then or at any time pay the taxes for any of the last-named years.

6. That afterward Scott assigned and delivered his certificate of sale to Mary Dunk, then in possession of the lot, who presented the certificate November 16, 1877, to the county treasurer, demanded and received a treasurer's deed therefor, without paying any of the delinquent taxes for the years last mentioned; that afterward Mary Dunk, without other title than that of said pretended deed, executed and delivered to the plaintiff a deed for said lot; and the plaintiff had full knowledge of the facts stated.

7. That the tax sale was illegal and void, because the lot was not sold for all the taxes then delinquent against it, and because none of the delinquent taxes, other than that of 1872, have ever been paid by Scott, Mary Dunk, or the plaintiff.

8. That the tax deed is void, because at the time of the sale to Scott the county treasurer had not filed in the county clerk's office any return of the sale of real property for taxes, at public sale, for the year in which the sale was made, nor for which such taxes were assessed and delinquent, as required by law, by reason of which he had no power or authority to sell said lot at private sale.

9. That the tax deed is void, because it does not show that the lot was sold "at the court house door," as required by law; nor does it show where the sale was made.

10. That the tax deed is void, because the county treasurer failed to attest the same with his official seal, and the seal of the treasurer was not affixed to it.

11. That the plaintiff's immediate grantor, Mary Dunk, by her purchase of the tax certificate from Scott, and by accepting the tax deed from the county treasurer on November 16, 1877, acknowledged, confessed, and recognized the title and ownership and the right of possession of defendant to said lot, or of some one other than herself, and

that her possession, prior thereto, and up to that time, was inferior and subject to the ownership of defendant, or such other person.

12. That ten years had not elapsed between the date of the tax deed and the commencement of this suit; and denies that the plaintiff for more than ten years prior to the commencement had been in the actual, open, adverse, peaceable, and continued possession of the lot; and denies that the plaintiff and his immediate grantor have been in any possession except as shown herein.

13. That defendant has at all times been ready and willing to repay plaintiff all sums of money he has at any time paid for taxes assessed against said lot that are due and coming to him, with interest, and now tenders the same, and will perform any other order of the court herein, in reference thereto; with prayer that the pretended treasurer's deed, and the deed of Mary Dunk to the plaintiff, be declared void and canceled, and that the petition be dismissed, and for general relief, etc.

The plaintiff interposed a general demurrer to the answer, which was sustained; and the defendant not electing to amend or to further answer, there was a finding and final decree for the plaintiff. The cause is brought to this court on error by the defendant.

The point on which the plaintiff in error relies, and which is presented in an able and exhaustive brief, and was most forcibly argued at the bar, is that the plaintiff's grantor, Mary Dunk, in purchasing a tax certificate of sale of the lot from Samuel Scott, which he had bought from the county treasurer, and taking out a tax deed on such certificate, thereby abandoned her possession of the lot, and acknowledged the superiority of the title of the original and former owner.

The principal case relied upon by counsel is that of *Armstrong v. Morrill*, 14 Wall., 121-146. This cause came to the supreme court of the United States from the United

States district court of West Virginia, involving the title to 1,500 acres of land in that state. The case, in premises and conclusion, is tedious and involved. The opinion of a majority of the court, by Justice Clifford, does, I think, upon the face of the authority, sustain the argument of the counsel for the plaintiff in error in the case at bar; but I hold it altogether inapplicable here, for the reason of the wide difference between the system and theory of land taxation which existed in Virginia at the beginning of the century, and that of this state.

In the first place, it should be borne in mind that by the Virginia law the public domain of that state was the original and ultimate property of the state, never having been under the control of the United States. It was the theory of taxation of that state, at least applied to the unsettled land west of the mountains, that upon non-payment of taxes for a period of years the title became forfeited by the claimant, or grantee of the state, and reverted to the state without process of law or any action of the state. Such were the provisions of an act of the legislature of that state, passed February 27, 1835, as construed by the court of appeals in the case of *Staats v. Board*, 10 Grattan, 400, cited in a note to the opinion considered. In that case, under the provisions of the act of Virginia referred to, the land involved in the controversy became absolutely forfeited to the state for the non-payment of taxes. Before forfeiture, it appears that certain of the defendants had taken adverse possession of small portions of the land, and were in possession at the time and during the continuance of the forfeiture to the state. Afterward the original owners, or their grantees, applied to the legislature and obtained an act allowing them to redeem the whole or any part of lands forfeited by entering them on the books of the commissioners of revenue to be assessed with all the taxes due thereon, and paying the same into the state treasury on the 1st of June of the ensuing year, with six per cent per

annum damages thereon. The defendants, adverse occupants of the land, for aught that appears, were utterly ignorant as well of the forfeiture as of the terms of redemption of their lands. The term of their occupancy before the forfeiture, as shown by evidence, was less than fourteen years, as was also the term of their adverse occupancy after the redemption; fourteen years being the term required by the statute then in force to give title to land by adverse possession. The supreme court, by its majority opinion, sustained the district court of West Virginia, *instructing* the jury that the statute of limitations ceased to run when the land became forfeited to the state; and that the period of adverse possession, before the forfeiture, could not be added to that which elapsed before the suit was commenced subsequent to the time the title, under the act of the legislature, was conveyed to the plaintiff's grantors, to make up the required term of fourteen years to bar the title; and also in *refusing* to instruct the jury that if they find that adversary possession commenced before November 1, 1836, and continued during the time of the forfeiture, as well as from May 8, 1845, the date of redemption, up to the commencement of the suit, and by adding the time of adversary possession before forfeiture to that after redemption, makes a period of fourteen years, then the jury must find for such of the defendants as make out the term of fourteen years.

And though one conversant with the views and maxims of the present day is more likely to agree with the opinion of the minority of the court, expressed in the case by Justice Strong, yet in the spirit and upon the theory of the land and revenue systems of Virginia then in force, it is probable that the majority of the court decided right, and held correctly.

I do not think, however, that the same rule of law is now applicable here. When the public authorities in this state sell the land of an individual for the purpose of col-

lecting an assessment for taxes, they do not proceed upon the theory of forfeiture. Here, the state never owned the body of the land. The land-owner holds by no tenure derived from the state. Hence the theory of forfeiture has no application here; while in Virginia, the title to land being derived from the state, taxes seem to have been laid upon land-holders on the principle that military service, and the like, were exacted from those holding under the feudal lords and barons of England in a remote age. That is not our theory of taxes in this state. The owners of real property, in consideration of the equal protection of the laws, owe to the public authority contributions in proportion to the value of their estate, sufficient to pay the public charges, merely. When this obligation is not voluntarily discharged, the law has provided an expeditious and inexpensive procedure by which a portion of the delinquent's property may be sold, and the proceeds applied to the discharge of the obligation; but this is neither of the principle nor theory of confiscation and forfeiture, but that of the collection of a debt, with provision for its subsequent discharge.

If we apply this principle to the case at bar, we find the plaintiff's grantor in the possession of the lot. Before she took possession, the defendant or her predecessors in the ownership of the lot having failed to pay their taxes for a series of years, the annual amounts stood charged up against it, delinquent. These sums were a lien upon the lot itself, without regard to the individual owner of it. In this condition, Samuel Scott, supposed to be an investor for money and a high rate of interest, became the purchaser of the lot for delinquent taxes. Under the theory of the law, unless the lot was redeemed from this purchase within two years, his title would become absolute. Therefore, if Mary Dunk stood by until this term of two years expired, no matter who was the owner of the lot, it would be lost to her. She could prevent this by one of two

ways: first, by going into the treasurer's office and redeeming the lot by paying the amount of the taxes and costs; or by doing as she did, purchasing of Scott his certificate of the purchase and sale of the lot for taxes. Had she stopped there, it would not probably be now contended that she had acknowledged the title of any former claimant, while she had in fact adopted the act of Scott in purchasing the lot for delinquent taxes.

But it is contended that by presenting the certificate after the expiration of the two years allowed for redemption, and taking a deed to herself, she abandoned her claim of adverse possession, and went into possession under the original owner. To the logic of this argument I cannot concede; but, on the contrary, it seems to me that all this was in defense of her own independent, adverse occupation of the lot. Her adverse possession was against the original owner, and not against the taxing power of the state.

The case of *Parsons v. Viets*, 9 S. W. Rep., 908, counsel for plaintiff in error cites as against his position. In that case the defendant purchased the land at a tax sale and immediately entered into possession; remained in possession the ten years necessary to give title by adverse possession, but at the expiration of two years from the date of purchase, the defendant, or those under whom he claimed, took out a tax deed upon the certificate. These two years, which had already expired at the time of taking out the tax deed, were necessary to be counted in order to make out the term of ten years' adverse possession; and this was allowed by the court. Upon the theory contended for by the plaintiff in error, these two years would have been excluded.

The case of *Hayes v. Martin*, 45 Cal., 559, cited by counsel for defendant in error, is one precisely in point. I quote from the syllabus, that "One who is in the adverse possession of land does not impair his right to rely

State, ex rel. Rudabeck, v. Livsey.

upon the statute of limitations by purchasing the land at a tax sale, unless he makes the purchase for the owner under an agreement to have a lease of the land or a portion thereof, which would amount to a recognition of the owner's title, and stop the running of the statute."

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

THE STATE OF NEBRASKA, EX REL. ADOLPH RUDABECK V. RICHARD LIVSEY.

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60	654

[FILED JUNE 13, 1889.]

A Mandamus will not issue to a justice of the peace to require him to make an order in a case after the cause has been removed to the district court by proceedings in error, the judgment of the justice of the peace had been reversed, and the cause retained for trial, even though the justice of the peace should have made the order while the cause was pending before him.

ORIGINAL application for mandamus.

J. E. & T. D. Cobbey, for relator.

Winter & Kauffman, for respondent.

REESE, CH. J.

This is an application to this court, in the exercise of its original jurisdiction, for a peremptory writ of mandamus to the respondent, who is a justice of the peace, requiring him to release the wages of relator from garnishment pro-

ceedings in an attachment action instituted before him, in which notice of garnishment was served on the employer of relator. It is alleged in the petition that relator is a married man, and the head of a family; that an action in attachment was instituted before defendant against him, and his wages which had matured within sixty days prior to the commencement of the action had been garnished in the hands of his employer; that he appeared before the justice of the peace and filed proof of the facts of the exemption, but that the justice had refused to release the money.

To this petition defendant has filed his answer, alleging, among other things, that upon the trial had before him he had rendered judgment; that the relator had removed the cause to the district court by proceedings in error, where the judgment had been reversed, and where the cause is now pending; and that he has no further jurisdiction in the matter. To this answer relator filed a general demurrer, on which the cause is submitted.

We think the demurrer is not well taken. The facts stated in the answer must be held to constitute a defense to the petition.

While it is true that the relator's wages were exempt under the showing made, and that it was perhaps the duty of defendant to release them from the operations of the garnishment proceeding, yet it is equally true that if relator has removed the cause from the jurisdiction of the justice, and rendered it out of his power to make any order in it, which is admitted by the demurrer, a writ of mandamus will not issue to compel action. In order to justify the issuance of a peremptory writ of mandamus, it must appear that the law specially enjoins upon the defendant the performance of the act which it is sought to compel. (Section 645, Civil Code.) No order can be lawfully made in the case by defendant while the cause is pending in the district court. An order so made would probably be void. Relator having pro-

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duced such a condition, even though it were done pending this proceeding, would oust the justice of the peace of jurisdiction, and no order could be legally made by him in the case. The demurrer is overruled and the writ denied.

WRIT DENIED.

THE other Judges concur.

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29 57
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ALEXANDER TOURTELOTTE, APPELLEE, v. A. H. PEARCE
ET AL., APPELLANTS.

[FILED JUNE 27, 1889.]

1. **Action Quia Timet: ADVERSE POSSESSION.** A party who has been in the actual, open, notorious, exclusive, adverse possession of real estate for ten years thereby acquires an absolute title to such real estate, and may maintain an action to have certain deeds which are clouds upon the title set aside and declared void, and quiet his possession in the premises.
2. ———: ———: **PLEADING: EVIDENCE.** The failure to allege in the petition that the plaintiff had been in the *exclusive* adverse possession of the premises for ten years, and of the court to find that fact in the decree, is not a material error after judgment, where the proof shows the possession to have been of that character.
3. **Adverse Possession.** Acts of notoriety, such as building a fence around the land, entering upon it and making improvements thereon, and the payment of taxes on the land, are sufficient to constitute adverse possession.

APPEAL from the district court of Otoe county. Heard below before CHAPMAN, J.

C. W. Seymour, for appellants, cited: *Doolittle v. Tice*, 41 Barb., 181; Wood on Limitation of Actions, 514, sec. 257; *Galling v. Lane*, 17 Neb., 83.

E. F. Warren, for appellee, cited: *Horbach v. Miller*, 4 Neb., 47; *Gatling v. Lane*, 17 Id., 79; *Haywood v. Thomas*, Id., 240; *Pettit v. Black*, 13 Id., 152; *Stettinische v. Lamb*, 18 Id., 626.

MAXWELL, J.

This action was brought in the district court of Otoe county to quiet the plaintiff's title to certain real estate and on the trial a decree was entered in his favor. The plaintiff alleges in his petition:

"1. That he is the owner in fee simple and in the possession of the following described lots or parcels of land, situate in the county of Otoe, in said state of Nebraska, known as lots numbers one and two in block number thirty-one, in Greggspport, an addition to Nebraska City, according to the recorded plat of said addition; that he has been thus in the undisturbed, peaceable, and adverse possession thereof, and of the whole thereof, for the period of seventeen years last past, and especially adverse to the claims of the said defendants above named, and of each of them.

"2. That the said defendant, Milton Fornia, claims to have some title to said described premises by virtue of a certain deed or deeds from one Thomas B. Stevenson to him, but that neither the said Stevenson, nor any of his grantors, nor the said defendant Fornia, ever had possession of the said premises, or any part thereof; that the said defendant, A. H. Pearce, also claims some title thereto, by virtue of certain deeds to him executed from other parties, but that neither he nor his grantors ever had the possession thereof; that the said defendant, Jacob Sichl, has, or claims some title or interest therein, by virtue of certain deeds from one Sarah E. Schoenheit to Richard A. White, and from the said White to the said defendant Jacob Sichl, but that no possession has ever been had thereunder by the said Sichl, or either of his grantors; that said deeds are recorded

Tourtelotte v. Pearce.

in the office of the clerk of said county of Otoe, and that the same constitute clouds upon the title of this said plaintiff in and to the said premises and injure the market value thereof; that neither of the said defendants will institute an action to determine the legal title to the said premises, and that this plaintiff is without remedy in the premises; that the plaintiff has made lasting and valuable improvements thereon.

“Wherefore this said plaintiff prays for a decree of this honorable court in his favor, and against the said defendants, quieting his title in and to said described lots, against the claims and demands of the said defendants and each of them; that the cloud caused by that record of the several deeds to the several defendants, in the office of the clerk of said county, may be removed, and the same and each of them decreed to be no cloud upon the title of the said plaintiff in and to said premises; that the said defendants and each of them may be decreed to have no title in or to said described lots, or to either of them, but that the title thereto may be decreed to be in this plaintiff, discharged of all claim in law or in equity of the claims or demands of the said defendants or of either of them; that the said defendants and each of them may be perpetually enjoined and forbidden from beginning or prosecuting any suit at law or in equity against this plaintiff or his grantees to recover the possession thereof, or any part thereof, and may be perpetually forbidden and enjoined from setting up any claim or claiming any interest or estate therein adverse to the title of this said plaintiff, or from disturbing him and his said grantees in the quiet and peaceable enjoyment of the said premises, or any part thereof, and for such other or further order or relief in the premises as equity and good conscience may require, the circumstances of this case considered, and for costs of suit.

“Plaintiff asks the following deeds declared void, as hereinbefore stated: From Thomas B. Stevenson to Milton

Fornia, dated April 13, 1870, recorded in book 'T' of deeds at page 408; from John E. Shepherd to the defendant Pearce, June 25, 1874, and recorded in book 'Z' of deeds at page 228; from Sarah E. Schoenheit to R. A. White et al., dated October 24, 1887."

The defendant Sichl answered the petition in substance, denying the allegations thereof, and alleging that he has the legal title to said lots, and that the plaintiff's claim is a cloud on the same, and praying for affirmative relief. On the trial of the cause a decree was rendered against Sichl as follows:

"Now on this day this cause came on to be heard upon the pleadings and proof adduced by the several parties upon the issues joined between the said plaintiff and the said defendant, Jacob Sichl; and the court, having duly considered the same and listened to the arguments of counsel, and being well advised in the premises, doth find the issues so as aforesaid joined between the said plaintiff and the said defendant, Jacob Sichl, in favor of the plaintiff, and against the said defendant.

"And the court finds that the said plaintiff has been in the undisturbed, peaceable, notorious, open, and adverse possession of the premises described in the petition, to-wit, lots numbered one and two in block numbered thirty-one, in Greggspport, an addition to Nebraska City, in said county of Otoe, for more than ten years last past, before the commencement of this action, claiming to own the same as against all the world, and especially as against the said defendants herein, and against the claims of the said defendant, Jacob Sichl, and that the plaintiff is entitled to a decree quieting his said title as prayed in his said petition herein.

"It is therefore considered, adjudged, and decreed by the court in said cause, that the title and possession of the said plaintiff in and to the said premises, to-wit, lots numbered one and two in block numbered thirty-one, in Greggspport,

an addition to Nebraska City, in said county of Otoe, be and the same is hereby forever settled and quieted in the plaintiff as against all claims or demands in law or in equity by the said defendant, Jacob Sichl, and those to claim or claiming by, through, or under him.

"That the deeds from Sarah E. Schoenheit to R. A. White et al., dated October 24, 1887, recorded in book of deeds No. 23 of the records of Otoe county, Nebraska, at page 188; the deed from the said R. A. White et al., to the defendant, Jacob Sichl, dated November 8, 1887, and recorded in the records of said county at page 487 of book 22 of deeds, and all other deeds in said chain of title be, and the same are hereby, canceled and removed as clouds upon the title of the said plaintiff in and to said described premises.

"And it is herein further ordered and decreed that the said defendant, Jacob Sichl, and those claiming or to claim by, through, or under him, be, and he and they hereby are, perpetually enjoined and forbidden to claim any right, title, interest, or estate in or to said premises, by virtue of said deeds or either of them, hostile or adverse to the possession and title of the said plaintiff therein; and said defendant, Jacob Sichl, and those claiming under him are hereby perpetually forbidden and enjoined from commencing or bringing any suit at law or in equity to disturb the said plaintiff in his said possession and title thereto, and from setting up any claim or interest or estate therein adverse to the title of the plaintiff therein, and from disturbing the plaintiff in the quiet and peaceable enjoyment of said described premises.

"And it is further considered and adjudged that the plaintiff have and recover his costs in this behalf expended, against the defendant, Jacob Sichl, taxed at \$....., and execution is awarded therefor."

It will be observed that the petition fails to allege and the court to find that the plaintiff has been in the exclu-

sive adverse possession of the property in question for any period of time. This defect will be considered waived after judgment where the testimony shows, as in this case, the plaintiff has been in the open, exclusive, and notorious adverse possession of the lots in question for a period exceeding ten years, viz., seventeen years; that he had partly enclosed the same and cultivated them for more than ten years. Leaving out of consideration the fencing, the cultivation of the lots as owner for the statutory period and payment of the taxes thereon are sufficient to constitute adverse possession and pass a good title to the party in possession. The statute is one of repose, and it is safe to assume that any person who claims a title or interest in the land in opposition to that of the party in possession will assert it within the time fixed by statute. The security of titles and welfare of society are best promoted by closing the doors of the courts against stale claims which experience has shown spring up at great distances of time when important witnesses are dead, or material evidence is lost or destroyed. These stale claims in many cases are bought up for a trifle, or litigated as a speculation and without any real merit in them. The statute, therefore, was designed to protect the occupant in possession of land as owner, and make his title complete after ten years of such possession.

The effect of the statute is very clearly stated by Judge GANTT in *Horbach v. Miller*, 4 Neb., 47, quoting from *Graffius v. Tottenham*, 1 W. & S. (Pa.), 488: "That 'the title of the original owner is unaffected and untrammelled till the last moment; and when it is vested in the adverse occupant by the completion of the statutory bar, the transfer has relation to nothing which preceded it: the moment of conception is the instant of birth.' Therefore 'the operation of the statute takes away the title of the owner and transfers it in legal effect to the adverse occupier;' and 'one who purchases the written title of the owner, buys a title which by operation of law was fairly vested in the adverse

occupant.' (*Schall v. The Williams Valley Railroad Co.*, 35 Penn. State, 204.)" And the character of the possession is stated by the same eminent judge as follows: "It is, however, insisted that this possession must not merely be possession, but that this possession must be under a claim of right for the whole statutory period. This is true; but the question is, what constitutes such a claim of right? In answer to this, it is only necessary to observe that the rule seems to be well settled that acts of notoriety, such as building a fence around the land, entering upon the land and making improvements thereon, raising crops and felling trees thereon, are presumptive evidence and evincive of intention to assert ownership over and possession of the property; and taxation of the land for a series of years to the person claiming it, and the payment of taxes by him, are competent evidence tending to show ownership. (*Elliott v. Pearl*, 10 Pet., 412; *Alden v. Gilmore*, 13 Maine, 178; *Little v. Libbey*, 2 Greenleaf (Me.), 242; *Miller v. Shaw*, 7 Sergt. and Rawle, 136; *Farrar v. Fessenden*, 39 New Hamp., 277; Angell on Limitations, sec. 395.) So is possession made out by placing on the premises buildings and receiving the rents and profits thereof. (*Poignard v. Smith*, 6 Pick., 177; *Galling v. Lane*, 17 Neb., 77.)"

In the case last cited it is said (page 83): "The effect of the statute is to quiet titles to real estate, by fixing a time within which the actual owner must commence his action for the recovery of the estate. If no action is commenced within the statutory period, the occupier obtains an absolute right of exclusive possession of the premises, not only against the former owner but all the world. (*Trim v. McPherson*, 7 Coldw. (Tenn.), 15; *Abell v. Harris*, 11 G. & J. (Md.), 367; *Cooper v. Smith*, 9 S. & R., 26.) And this rule will apply as to the land actually occupied—if the possession was adverse, whether the party held under color of title or not." In *Stettinische v. Lamb*, 18 Neb., 619, it was held that possession may be tacked where one

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comes in under the other and the possessory estates are connected and continuous. (*O'Brien v. Gaslin*, 20 Neb., 349.)

In the case at bar the testimony shows that the plaintiff has a complete and perfect title to the lots in question by adverse possession, and that the claims of the defendants thereto, whatever they may have been, are barred by lapse of time. It also appears that the deeds to the defendants are clouds upon the plaintiff's title which impair its value, and that he is entitled to have the same canceled and set aside.

The decree, therefore, is right and is in all things affirmed.

DECREE AFFIRMED.

THE other Judges concur.

27	64
30	854
32	545
27	64
51	874
27	64
56	580

STATE OF NEBRASKA V. JAMES H. GREEN.

[FILED JUNE 27, 1889.]

1. **Criminal Law: CIVIL LIABILITY.** A village has authority to levy a reasonable occupation tax which conforms to the requirements of the constitution and statute; but such tax is a mere civil liability to be collected by levy and sale of property and not by arrest and imprisonment.
2. ———: **LICENSE: TAXES.** Where it is necessary to license a traffic—as the sale of intoxicating liquors—or a particular kind of business which if not licensed and regulated may be used to defraud individuals or the public, the right to punish by imprisonment for a failure to pay the license fee and take out license is unquestioned, because such power is necessary for the preservation of order and welfare of society, but this power does not apply to a mere occupation tax.

EXCEPTIONS from Cass county, CHAPMAN, J., presiding. Filed under the provisions of section 515, Criminal Code.

J. H. Haldeman, for the state.

T. B. Stevenson, for defendant.

MAXWELL, J.

The defendant in error was arrested for violating an ordinance of the village of Elmwood, in Cass county, by failing to pay an occupation tax, and on the trial before a justice of the peace of that village was found guilty and sentenced to "pay a fine of \$10 and pay the costs of this suit, taxed at \$—, and be committed to the jail of the county until said fine and costs are paid."

Green appealed to the district court of Cass county, where on his motion the proceeding was dismissed. The attorney who appeared for the village thereupon obtained the consent of the attorney of Cass county to appear for him in the supreme court in order to settle the law of the case, and thereupon obtained leave from this court to file a petition in error.

The transcript of the justice contains all the proceedings and is quite lengthy. The complaint, as it appears therein, is as follows:

"THE STATE OF NEBRASKA, }
"Village of Elmwood, } ss:
"Cass County, }

"The complaint of S. D. Eells, of said county, made before me, Wm. Deles, a justice of the peace within Stove Creek precinct, in said village and county of Cass, state aforesaid, who, being duly sworn, deposes and says: That on the 1st day of June, A. D. 1888, in said village of Elmwood and said county, one James H. Green did then and there wrongfully and unlawfully engage in, carry on, and maintain the business and occupation of keeping a drug store and dealing in drugs without having first paid the occupation tax of \$3.00 fixed and provided by ordinance number 3 of

said village, and without first having otherwise complied with the provisions of said ordinance, being an ordinance entitled 'An ordinance to raise a revenue, and levy, define, and provide for the collection of a tax on business professions and occupations in the village of Elmwood, Nebraska,' which ordinance provides that any person, firm, association, company, or corporation who shall carry on and maintain a business of keeping a drug store in said village without having first paid the said tax of \$3.00 as fixed by said ordinance, and complied with all provisions of said ordinance, shall forfeit and pay the sum of not less than \$10.00 and not more than \$25.00 for every five days that the provisions of said ordinance shall be so violated; that said James H. Green has for more than five days from the 25th day of May, 1888, the time said ordinance took effect, violated the provisions of said ordinance, and neglected and refused to pay the tax fixed by said ordinance; that said ordinance was passed and approved the 21st day of May, 1888, and duly published in the *Elmwood Echo*, a newspaper of general circulation and published in said village on the 25th day of May, 1888, and by the provisions thereof said ordinance took effect at the time of its passage, approval, and publication. Further affiant saith not.

"S. D. EELLS.

"Subscribed in my presence and sworn to before me this 10th day of August, 1888.

WM. DELES,

"Justice of the Peace."

No copy of the ordinance appears in the record. It is impossible for this court to determine whether or not the village authorities of Elmwood have properly exercised the power conferred upon them. In that portion of the ordinance set out in the complaint there is no allegation that the punishment for a failure to comply with the ordinance is imprisonment. In fact we are led to infer that the proposed punishment was by a penalty for each five

Buck v. Reed.

days in which there was a delay of payment. There is but little doubt of the power of the village to impose a reasonable occupation tax which conforms to the constitution and statute. Such taxes, however, are to be collected by levy and sale like any other tax, and not by imprisonment.

Where it is necessary to license a traffic as that of the sale of intoxicating liquors or a particular kind of business which, if not licensed and regulated, may be used to defraud individuals or the public, the right to punish by imprisonment for a failure to pay the license fee and take out license is unquestioned, because such power is necessary for the preservation of the order and welfare of society, but the mere collection of revenue cannot be done in this manner. The proceeding against Green by arrest was unauthorized, and he could not be imprisoned for a mere failure to pay a tax on his business. The judgment of the district court, therefore, is right, and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

BUCK & GREENWOOD V. LEWIS B. REED.

[FILED JUNE 27, 1889.]

1. **PRACTICE: DEMURRER.** To obtain the review of a decision sustaining or overruling a demurrer, the party must suffer a judgment in chief to be rendered on the demurrer; if he answers over and goes to trial upon the merits, he waives the demurrer and cannot assign the judgment upon the demurrer as error. (*Poltinger v. Garrison*, 3 Neb., 221, and cases cited in the opinion.)
2. **The evidence examined, and held,** to sustain the verdict.

ERROR to the district court for Franklin county. Tried below before GASLIN, J.

27	67
84	718
27	67
52	135

H. Whitmore, and *E. W. Metcalfe*, for plaintiff in error, cited: *Davidson v. Waldron*, 31 Ill., 120; *Eisendrath v. Knauer*, 64 Id., 396; *Bertholf v. Quinlan*, 68 Id., 297.

E. A. Fletcher, for defendant in error.

COBB, J.

This cause comes to this court on error from the judgment of the district court of Franklin county.

The plaintiff below alleged that the defendants on February 1, 1883, were copartners doing business as a firm in said county, not incorporated; that at about said date, in consideration of five dollars per car load of baled broom corn, the defendants undertook to act as agents for the shipment and sale of said property and to account to plaintiff on demand for the net proceeds thereof; that the plaintiff delivered to defendants 14,000 pounds of such broom corn of the value of \$238 to be shipped in the plaintiff's name, which the defendants failed to do, but shipped the same in their own name, and prevented the same from being sold in the earliest and best market, until the same had become of less value, which facts were concealed from the plaintiff; that after shipment the defendants drew against the consignment and paid plaintiff \$185 thereon and no more; that by reason of the fraudulent conversion of said property and concealment of the facts, plaintiff claims damages in the sum of \$103; that defendants have not settled for the net proceeds of the sale of said property though requested so to do; with prayer for judgment.

The defendants interposed a general demurrer "that the petition does not state facts sufficient to constitute a cause of action," which was overruled.

The defendants answered that they received the 14,000 pounds of baled broom corn, mentioned, to ship to Chicago, Illinois, to sell according to their best judgment through

Buck v. Reed.

commission merchants in that city; that they were to account to the plaintiff for the net proceeds of sale, less five dollars per car load for their services to be performed; that they received and paid to plaintiff \$150 in cash and \$12.25 in credit on account of the shipment and sale of said broom corn, which was kept stored for several weeks and until defendants, by due inquiry, deemed it for the best interest of the plaintiff that it should be sold, which was done for the highest price obtainable; that after deducting from the gross price the railroad freightage, cartage, storage, and other usual and necessary expenses of shipping and selling such broom corn, \$162.25 were found to be the net proceeds of the sale.

The defendants allege that the plaintiff is indebted to them in the sum of \$41.69 for goods sold and delivered, and that said account has no connection with the broom corn transaction, for which defendants ask judgment with interest at seven per cent from January 1, 1887.

The replication of the plaintiff was a denial of every allegation of new matter set up by defendants.

There was a trial to a jury, with finding for the plaintiff and verdict for \$15.25 damages.

The defendants' motion for a new trial was overruled and judgment entered on the verdict.

The plaintiffs in error assign the following errors on the trial in the court below:

1. The court erred in overruling the demurrer to the petition.
2. In overruling defendants' objection to any evidence for the plaintiff.
3. In overruling the motion for a new trial.
4. In entering judgment on the verdict: 1, the allegations of the petition are insufficient; 2, the evidence does not support the verdict; 3, the verdict is contrary to law.
5. In charging the jury orally without the defendants'

consent, and without having the charge afterwards reduced to writing.

The first point of the petition in error is doubly waived and cannot be considered in this court. It will be observed that upon the overruling of the demurrer to the petition the defendants answered over to the merits. The alleged error in overruling the demurrer to the petition was waived by defendants answering over and going to trial upon the merits. So held by the supreme court of Nebraska territory in the case of *Mills v. Paynter*, 1 Neb., 440, and again by the supreme court of the state in *Mills v. Miller*, 2 Id., 299. But in neither of these cases did the point find a place in the syllabus. In the case of *Pottinger v. Garrison*, 3 Id., 221, it was the only point presented by the prevailing party and monopolizes the syllabus. The latter case was followed by those of *Farrar & Wheeler v. Triplett*, 7 Id., 237; *Harral v. Gray*, 10 Id., 186 and *Dorrington v. Minnick*, 15 Id., 397.

In the case of *Tingley v. Dolby*, 13 Id., 375 in an argumentative illustration, the law is stated contrary to that laid down in the foregoing cases, and found a place in the report, doubtless, through inadvertence.

But had the point not been waived by pleading over, it would have been, by the failure of the parties who now seek to avail themselves of it, to call the attention of the trial court to it in their motion for a new trial.

As to the second point, I think that under our liberal system of pleading there is a cause of action set out in the plaintiff's petition. Plaintiffs in error in the brief take the position that the petition does not state a cause of action because—

“1. It does not allege any general or special ownership of the broom corn to be in the plaintiff.

“2. The facts alleged do not constitute a conversion by the defendants.

“3. The petition does not allege that Reed has sustained

any damage; it simply alleges that he 'claims' damage," etc.

Where the action is in the nature of trover and conversion, which is upon the theory that the plaintiff, being the owner and in the possession of the goods in question, casually lost them, and the defendant found them and converted them to his own use, there must be both an allegation of pleading and evidence of either a general or special ownership in the plaintiff, but where the case is founded upon the receipt of the goods from the plaintiff by the defendant as agent, factor, commission merchant, or otherwise, then the element of trover is wanting, and the allegation and proof of the receipt of the goods from the plaintiff by the defendant, in the character or for the purpose alleged, takes the place of an allegation and proof of ownership, and the right of the plaintiff to recover in such case will depend upon proof that the defendant, after receiving the goods in such special character and capacity, refused or failed to account for them or their proceeds, or in any unjustifiable manner deprived the plaintiff thereof.

By placing a liberal construction upon the language and allegations of the petition, it amounts to about this: that defendants were his agents to ship the broom corn, and received it as such, although the plaintiff performed the manual labor of placing it in the car; that it was their duty to ship it, in the name of the plaintiff, to a commission merchant of Chicago for immediate sale, but that defendants made the shipment in their own name, not for immediate sale but to be stored, and concealed the same from the plaintiff for the period of fourteen months. Had these facts been proved, the plaintiff would have been entitled to a verdict for the value of the broom corn at the time and place of the shipment, with interest; and there was evidence on the part of the plaintiff, upon the trial, which tended to prove the above facts, with evidence which was received without objection, that the broom corn was

then worth on the ground—meaning, I suppose, at the place of shipment—fifty dollars per ton; and by another witness, whose testimony was received over defendants' objection, from two and one-half to three cents per pound. It is in evidence that there were 14,000 pounds of the broom corn. This, at fifty dollars per ton, would come to \$350. The book account of defendants against plaintiff, according to the testimony of Mr. Buck, was \$41.69. This sum deducted from \$350 leaves \$308.31. From this last sum deduct \$138, paid to Mr. Black to satisfy a mortgage on the broom corn, which leaves \$170.31. The evidence would sustain a verdict for this last named sum if objected to only by the plaintiffs in error.

Mr. Buck, when on the stand as a witness in behalf of himself and co-defendant, testified that the car load of broom corn was to have been shipped in Mr. Reed's name, and that it was his instruction that it should be sold in Reed's name, "but in order to draw on them it was billed in the name of Buck & Greenwood;" that they got the money and paid Reed \$138, and the balance he paid to Barry; that he was to ship it and be responsible to Black, and that he got a receipt from him for \$138; that he was to ship it, but not to sell for less than \$3 per hundred or \$60 per ton; that he shipped two car loads at that time and drew \$300 on the two, \$150 a piece; that those two car loads were sold; Reed's sold for two and one-half cents per pound, amounting to \$318.24; freight, commission, and expenses amounted to \$106.03, with the \$150 he had drawn, making \$256.03; *then they kept back \$50 for freight on another car*; the proceeds of the two cars were \$472.25; \$300 was advanced by them, *and \$50 retained by them*; that they then sent him \$72, and the part of that coming to Reed was \$12.25.

This is Mr. Buck's testimony as contained in the bill of exceptions. From this it appears that \$50 of Reed's money was retained by somebody to cover advances made on

 Robbins v. O. & N. P. R. R. Co.

another shipment, in which Reed had no interest. If this was possible at all it was rendered so by reason of the goods of plaintiff being shipped in the name of defendants instead of in his own name, which Mr. Buck, according to his own statement, was to have done. The jury doubtless believed, as they had a right to, that the defendants were liable to the plaintiff for this \$50, even if they adopted the defendant's theory of the case. So that even in that case the verdict was not far wrong.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

27	78
37	458

B. J. ROBBINS V. THE OMAHA & NORTH PLATTE
R. R. Co.

[FILED JUNE 27, 1889.]

1. **Railroads: DAMAGES FOR RIGHT OF WAY: APPEAL: PRACTICE.** When a railway company appeals from an award of damages for real estate condemned for right of way, and becomes satisfied of the correctness of the award, and therefore does not desire to prosecute such appeal, the proper motion is to affirm the award, as such motion, if sustained, will carry interest and costs. (*Berggren v. F., E. & M. V. R. R. Co.*, 23 Neb., 620.)
2. ———: ———: ———. Only upon a showing of fraud or undue advantage will such motion be denied.

ERROR to the district court for Saunders county. Tried below before MARSHALL, J.

J. R. & H. Gilkeson, for plaintiff in error.

T. M. Marquett, and *J. W. Deweese*, for defendant in error, cited: *Berggren v. F., E. & M. V. R. R. Co.*, 23 Neb., 620.

COBB, J.

This cause is brought on error from the district court of Saunders county.

The plaintiff below on September 8, 1886, made application under section 97, chapter 16, Compiled Statutes, 1887, to the county judge of said county to have commissioners appointed to assess the damages the plaintiff in error would sustain by the appropriation of the right of way through the west half of the northeast quarter of section two, township thirteen; the southwest quarter of the southeast quarter and the northwest quarter of the southwest quarter of section thirty-five; and the west half of the southeast quarter of section eight, township fourteen, all in range eight east in said county.

The commissioners appointed by the county court on September 10, 1886, reported to the court on the same day the amount of damages sustained by the plaintiff in error at \$650. Thereupon the plaintiff below gave notice of appeal to the district court, and deposited with the county court the amount of the award, and took possession and appropriated ten and three-hundredths acres of the land for the right of way of the railroad.

On November 9, 1886, the plaintiff below filed a transcript of said proceedings in the district court and perfected its appeal. At the succeeding terms of the district court the cause was set for trial, but was not called for trial until the May term, 1888, when it was reached, and the defendant below being ready with his witnesses for trial the plaintiff below moved the court "to affirm the finding and judgment of the county court and the award of the appraisers appointed by said court," to which the defendant

objected and presented his affidavit that he was ready for trial, and demanded that the cause be set for trial, which was overruled and the award of the county court affirmed for the sum of \$727.90.

The following errors are assigned to this ruling of the court :

1. The court erred in sustaining the motion to affirm the award.
2. In overruling the objection to said motion.
3. In overruling the motion to have the cause tried.

After a careful consideration of the argument of counsel for plaintiff in error I am unable to distinguish this case from that of *Berggren v. F., E. & M. V. R. R. Co.*, 23 Neb., 620. In that case the railroad company, having taken an appeal from the award of damages, for the condemnation and taking by it of certain lots in the city of Wahoo, made by the commissioners appointed by the county court, and said appeal having been pending in the district court for one year, moved to dismiss the appeal, which motion was sustained by the court, and the appeal dismissed. Upon error to this court the judgment of the district court was reversed. In the opinion the court says : "If an appeal is taken by the company upon the assumption that the award is too large and it afterwards considers that it is not, and seeks to dismiss its appeal, justice demands that it shall pay interest on the award thus made, as it has caused the land owner to be deprived of the use of said money and it cannot be permitted to dismiss its appeal without payment of such interest. The proper motion is to affirm the award and not to dismiss the appeal. This would carry costs and also interest on the award."

The above opinion was filed on the 14th day of March, 1888, and was followed by the district court in the case at bar. In so doing it ought to be sustained, unless it clearly appears that this court made an erroneous decision and ruling from which it ought to recede. Appeals are creations

Dickenson v. Pelton.

of statutes and the practice of courts in appeal cases is generally regulated by statute; but it often happens as in the case above cited, that the omission of the statutory provisions must be supplied by the appellate court. Rules stated for that purpose can only be judged by their tendency to promote justice and fair play or otherwise. Failing to see that the rule laid down in the case above cited and followed by the lower court in the case at bar tends to injustice or unfair dealing, I think that it ought to be adhered to.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

W. H. DICKENSON V. DANIEL R. PELTON.

[FILED JUNE 27, 1889.]

Practice. Where no particular questions of law arise in the case, and the evidence fully sustains the verdict, the judgment will be affirmed.

ERROR to the district court for Saunders county. Tried below before MARSHALL, J.

S. H. Sornborger, and *George W. Simpson*, for plaintiff in error.

J. R. Gilkeson, and *George I. Wright*, for defendant in error.

MAXWELL, J.

This action was brought in the district court of Saunders county by the defendant in error against the plaintiff

Coleman v. Scott.

in error to recover damages for slander. There are seven causes of action set forth in the petition and the plaintiff in error admits in his answer the speaking of the words alleged in the third, fifth, and seventh counts of the petition and says that the same are true, and denies the allegations of the first, second, fourth, and sixth counts. He also pleads certain matters in mitigation. On the trial of the cause the jury returned a verdict in favor of the defendant in error for seven hundred dollars, and a motion for a new trial having been overruled, judgment was entered on the verdict. There can be no detailed statement of the case without giving unpleasant notoriety to both the plaintiff and defendant; and in view of the fact that we find no material error in the record, either in the weight of evidence, which fully sustains the verdict, or in the instructions given, asked, or refused, nor any particular questions of law in the case, it is unnecessary to extend this opinion. There is no error apparent in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

HOWARD M. COLEMAN V. W. T. SCOTT.

27	77
50	242

[FILED JUNE 27, 1889.]

1. **Garnishment.** An attaching creditor has no greater rights against the garnishee than were possessed by the defendant in the action, therefore where a debt has been assigned in good faith for a valuable consideration before the notice to the garnishee, the assignee will be protected; and if after a garnishee has answered and before judgment he is notified by the assignee, of the assignment of the claim to him before the service of no-

tice, the garnishee should at once bring the matter to the attention of the court by filing a supplemental answer. A garnishee who before answer has notice that the defendant in the action had assigned the debt to another before the notice of garnishment was served must state that fact in his answer to be protected from an action by the assignee of the debt.

2. **Practice.** Where the controlling facts in a case do not sustain the judgment, it will be set aside.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

A. H. Connor, and *John M. Stewart*, for plaintiff in error, cited: *Smith v. Ainscow*, 11 Neb., 476; *Cotta v. O'Neal*, 58 N. H., 572.

Marston & Nevius, for defendant in error.

MAXWELL, J.

This action was brought in the district court of Buffalo county to foreclose a mechanic's lien. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action. The plaintiff alleges in his petition that "on or about the 5th day of July, A. D. 1887, the said plaintiff entered into a verbal contract with the said defendant to furnish him ninety-seven thousand seven hundred and eighty-five bricks at the agreed price of seven dollars per thousand, for the erection of a brick business house on lots numbered one hundred and fifteen and one hundred and sixteen, Kearney Junction, now the city of Kearney.

"In pursuance of said contract the said plaintiff furnished said brick to the defendant for the erection of said business house, on and between the 5th day of July, 1887, and the 16th day of July, 1887, for the sum of seven dollars per thousand, amounting in the aggregate to the sum of six hundred and eighty-four and $\frac{49}{100}$ dollars. The

said plaintiff further says the said defendant at the time the plaintiff furnished said brick claimed to be the owner in fee of said lots numbered 115 and 116.

"The said plaintiff further says, said brick were sold and delivered to the said defendant after the representation and statement of the said defendant to the said plaintiff that he was the owner in fee of said lots, and with the understanding and belief on the part of the said plaintiff that the said defendant at the said time was the owner in fee of said lots and not otherwise.

"The said plaintiff further says the said defendant is the owner in fee of said lots, but alleges the fact to be that the deed records of said county do not disclose that fact for the reason that the said defendant fails and refuses to place on record his deeds to said lots.

"The said plaintiff further says on the 11th day of August, 1887, and within four months from the time of furnishing said brick, he, the said plaintiff, made an account in writing of the items or number of said brick so furnished the said defendant under said contract, and after making oath thereto, as required by law, filed the same in the clerk's office of Buffalo county, claiming a mechanic's lien therefor upon said lots and the building thereon.

"The said plaintiff further says the sum of \$684.49, together with interest from the 16th day of July, 1887, now remains due and unpaid on said account."

The answer consists of a number of specific denials.

The testimony tends to show that one Samuel Coleman, a son of the plaintiff, had for several years prior to 1887 been engaged in the manufacture of brick at the city of Kearney; that from time to time his father had assisted him financially, the whole amount loaned to the time of the trial being in excess of \$1,800; that early in June, 1887, Samuel Coleman had a large kiln of brick ready to burn, but not having means to purchase the necessary fuel he applied to the plaintiff, who furnished the necessary

money for that purpose but took a chattel mortgage on the kiln to secure the amount owing by Samuel Coleman to him. This mortgage is dated June 25, 1887, and was filed for record on the same day. While this mortgage was upon the brick the defendant purchased 97,784 of the same from Samuel Coleman. The latter claims he sold the same as agent for the plaintiff, but the defendant alleges that he sold the same as owner. The plaintiff and one Hoge testify that they informed the defendant soon after the execution of the mortgage of its existence, and that the price of the brick which he had purchased from Samuel Coleman was to be deposited in the Kearney National Bank for the plaintiff. This the defendant denied on his direct examination, but on cross-examination he testified :

Q. Do you remember of Mr. Hoge coming to you and reading a letter to you ?

A. I remember seeing him there with a letter, but I paid no attention to him because he annoyed me so much.

Q. Did you tell him you would never have anything more to do with Sam Coleman ?

A. I told him I would have nothing more to do with bricks until they were burned.

Q. Did you pay for any coal that burned the kiln in question ?

A. I don't know — I did not go responsible for any more coal.

Q. Did Mr. Hoge say to you why he wanted you to pay the draft ?

A. I don't know, only he wanted to know particularly whether I had paid it or not ; he was interested in my purchasing the kiln of brick so he could get his claim.

Q. When was the first conversation you had with Mr. Hoge ?

A. Before they were burned.

Q. How many conversations did you have with him ?

A. I don't know — I could not turn down the street but he followed me.

Q. What for?

A. To get me to purchase those brick.

Q. H. M. Coleman never told you they were his?

A. After they were delivered he came to me and wanted pay for them.

Q. Did Mr. Hoge make you angry when he first talked with you about this draft?

A. Well, I got angry by the way he annoyed me.

Q. Do you remember what he said in the postoffice?

A. I can't put the words together; he had a letter in his hand.

Q. Did he read it to you?

A. He started to read it but I did not stay to listen to it.

Q. Did he go to see you?

A. Yes, sir; I took him over to see the brick, as a good many would be rejected.

Q. Are you personally acquainted with Samuel Coleman?

A. Yes, sir.

Q. Did you get brick checks with H. M. Coleman's name on them?

A. I got checks just like those I always got, as far as I noticed, and after the suit commenced that was brought up, and I looked them over and saw little small letters, H. M., put at the edge of the paper; I had not noticed anything on there before.

Q. When you met Mr. Hoge in the postoffice that was not the time you had the row with him, but that was before Miller's hardware store?

A. I had no row with him in the postoffice.

Q. You did have some trouble with him in front of Miller's hardware store?

A. Yes, sir, we had some pretty warm words.

Q. Samuel E. Coleman never told you these brick were his father's?

A. Not until after the brick were delivered.

Q. When did he tell you?

A. Right there and then; he said for me to pay the money into the Kearney National Bank.

Q. Do you remember the day he told you that?

A. No, sir; but it can be got at; the first time he told me to pay any money into the bank was that Saturday before I was garnished the next Monday.

Q. Did he not tell you then that his father would not want to draw any more on you until all the brick were delivered?

A. No, sir.

Q. Who had garnished you?

A. East's son and Wade.

Q. You have been indemnified in all these cases where you have been garnished?

A. Yes, sir.

It will thus be seen that the defendant had knowledge of all the facts as to the plaintiff's interest in the brick before he filed answers in the garnishment proceedings, and he should have set them up as a defense in those cases. This he evidently did not do. The garnishment proceedings seem to have taken place in justice's court. The attaching creditor had no greater rights against the garnishee than were possessed by the defendant in the action; therefore when a debt has been assigned in good faith for a valuable consideration before the notice to the garnishee, the assignee will be protected; and if after the garnishee has answered and before judgment, he is notified by the assignee of the assignment of the debt to him, before service of the notice, the garnishee should at once bring the matter to the attention of the court by a supplemental answer. (*Copeland v. Manton*, 22 O. S., 404; *Maxw. Justice Pr.*, (5th Ed.), 341-2; *Drake on Attachment*, sec. 527; *Wakefield v. Martin*, 3 Mass., 558; *Dix v. Cobb*, 4 Id., 508; *Warren v. Copelin*, 4 Metc. (Id.), 598; *Littlefield v. Smith*,

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17 Me., 327; *Winch v. Keeley*, 1 T. R., 619; *Walling v. Miller*, 15 Cal., 38; *Smith v. Clark*, 9 Iowa, 241; *Nesmith v. Drum*, 8 W. & S. (Pa.), 9; *Wilson v. Davisson*, 5 Munf. (Va.), 178; *Tazewell v. Barrett*, 4 H. & M. (Va.), 259; *Anderson v. De Soer*, 6 Gratt., 364.)

No question is made as to the *bona fides* of the plaintiff's claim, and as it is clearly established that the defendant had notice of such interest before the notice in the garnishment was served, he is not protected, but as he seems to be fully indemnified he probably will suffer no loss. Where the judgment of the court is against the established controlling facts in the case, it cannot be sustained. It follows that the judgment of the district court must be reversed and a decree will be entered in this court for the amount claimed in the petition, with interest thereon.

DECREE ACCORDINGLY.

THE other Judges concur.

THE STODDARD MANUFACTURING COMPANY V.
KRAUSE ET AL.

[FILED JUNE 27, 1889.]

1. **Partnership.** An ostensible partner retiring from a firm must give notice of his retirement or he will be liable to creditors of the continuing firm or partner, who either carries on the business, or is charged with the duty of liquidating the business of the partnership.
2. ———: **DISSOLUTION.** To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him. (*Johnson v. Totten*, 3 Cal., 343.)

ERROR to the district court for Platte county. Tried below before POST, J.

McAllister & Cornelius, for plaintiff in error, cited: *Pecker v. Hall*, 14 Allen, 532; *Bates*, Law of Partnership; secs. 607, 611, 612, and cases cited; *Warren v. Ball*, 37 Ill., 77; *Bayard v. Johnson*, 2 Peters, 186, and note; *Wade*, Law of Notice, sec. 530; *Abbott's Trial Evidence*, p. 222, par. 40; *Story on Partnership*, sec. 160; *Southern v. Grim*, 67 Ill., 106; *Williams v. Bowers*, 15 Cal., 321.

M. Whitmoyer, for defendant in error.

COBB, J.

This cause was brought to this court on error from the district court of Platte county.

The Stoddard Manufacturing Company, organized as a corporation under the laws of the state of Ohio, and authorized to do business in this state, complains that Gus. R. Krause, Henry Lubker, and W. J. Welch, a copartnership formed and doing business in this state, under the firm name of Krause, Lubker & Welch, on June 24, 1886, bought of the company certain goods, wares, and merchandise, consisting of agricultural implements, which were delivered to the firm, in part payment for which that firm endorsed and transferred to the company a certain promissory note as follows:

"\$100.

No.

"COLUMBUS, NEB., October 1, 1886.

"On or before the first day of July, 1887, for value received, I or we promise to pay to Krause, Lubker & Welch, or order, one hundred dollars at Columbus State Bank, with interest from date until paid at the rate of ten per cent per annum.

"(Signed) G. R. KRAUSE.

Indorsed: "Pay to the order of the Stoddard Mfg Co., protest waived. (Signed) Krause, Lubker & Welch,"

Stoddard Mfg. Co. v. Krause.

which was not paid by either drawer or endorser; also a second promissory note as follows:

"\$26. COLUMBUS, NEB., August 24, 1886.

"On or before the 1st day of June, 1887, for value received, in one hay rake, I, we, or either of us promise to pay the Stoddard Manufacturing Company, Dayton, Ohio, or order, twenty-six dollars at the Columbus State Bank, with interest at the rate of ten per cent per annum from date until paid. (Signed) WM. T. PRICE."

Indorsed: "For value received I or we hereby guarantee the payment of the within note at maturity, or at any time thereafter, or any renewal of the same, and hereby waive protest, demand, and notice of non-payment thereof. (Signed) Krause, Lubker & Welch;" which was not paid by drawer or guarantor, by reason of which the company demand judgment against the firm for \$126, with interest at ten per cent on \$100 from October 1, 1886, and at the same rate on \$26 from August 24, 1886, and costs of suit.

The separate answers of defendants, Lubker and Welch denied each and every allegation of the plaintiff except that it is a duly authorized corporation.

There was a trial to a jury with a finding for the defendants as to the first note of \$100, and for the plaintiff on the second note of \$26, with verdict for plaintiff of \$30.50.

The plaintiff's motion for a new trial was overruled, judgment entered on the verdict, and exceptions taken.

The plaintiff in error assigns the following causes:

1. The verdict is contrary to law.
2. The verdict is not sustained by the evidence.
3. The court erred in giving the instruction to the jury.

It appears from the evidence that the defendants, Krause, Lubker & Welch, were general partners engaged in the sale of agricultural implements at Columbus, in this state,

Stoddard Mfg. Co. v. Krause.

as a firm or partnership of the name and style of Krause, Lubker & Welch. For aught that appears in the case they were all active partners, taking an equal part in the business of the firm. They purchased agricultural implements on credit of the plaintiff, a manufacturing corporation of Dayton, Ohio, under an agreement that plaintiff receive in payment for said goods from time to time the notes of the customers of said firm endorsed or guaranteed by them. The firm was dissolved on the 3d or 4th day of November, 1886, being then indebted to the plaintiff. There was evidence offered which it is assumed tended to prove that a notice of such dissolution was published about that date, but upon objection said evidence was rejected. It does not appear whether the business was continued by any or either of the partners, nor indeed what were the terms of the dissolution or whether any provision was made for winding up or settling the partnership business. But it does appear that on or about the 10th day of said month of November the plaintiff received by mail from the defendants an invoice of indorsed and guaranteed notes to apply on the indebtedness of defendants to the plaintiff, the receipt of which was acknowledged by letter dated the 10th of said month and in the due course of business. In this invoice or remittance of notes were the notes sued on. While the evidence is not very clear, there can be no doubt that the defendants had credit on their account with the plaintiff for the full amount of these notes. It does not appear which one of the defendants performed the clerical work of enclosing and mailing said package of notes to the plaintiffs or of writing the letter of transmittal, nor do I think it at all important. It appears from the testimony of the defendant, G. R. Krause, that at the time of the dissolution he was indebted to the firm for a pulverizer, a rake, and some other goods of the plaintiff's manufacture, amounting in all to one hundred dollars, which he had taken for use on his farm; that he executed his note

to the firm therefor, placed it in the firm's safe and entered it on the books of the firm, after having endorsed it in the name of the firm. This endorsement, he says, he placed on the note after the dissolution of the firm. But it appears from the deposition of William J. Jones, book-keeper and treasurer of the plaintiff, that the two notes sued on were received by the plaintiff, endorsed to it, on the 10th day of December, 1886, as a part of an invoice or remittance of notes as hereinbefore referred to, made on the 4th day of the said month; that the defendant firm had full credit on their indebtedness to the plaintiff for the said invoice or remittance of notes, including the notes sued on, and that no part of the notes sued on had been paid; and that at the date of the receipt of said notes plaintiff had no notice of the dissolution of said firm.

The court instructed the jury as follows:

"In this case the answering defendants, Lubker & Welch, admit their liability for the amount of the note of W. T. Price; you will therefore find for the plaintiff to the amount of said note. The law and the facts are with the defendants so far as the note signed by G. R. Krause is concerned, and you will find for the defendants as to that note."

The plaintiff presented the following instruction, which was refused:

"The court instructs the jury that if they find from the evidence that the goods in controversy were sold and delivered to the defendants and the notes in suit were transferred to the plaintiffs before they were informed of the dissolution of the firm of Krause, Lubker & Welch, the defendants are liable."

While as above stated it does not appear from the bill of exceptions whether after the dissolution of the firm the business was continued by any or either of the partners, or whether any provision was made for winding up or settling the partnership business, yet there is a hint in the

testimony of Henry Lubker, who was sworn and examined as a witness on behalf of the defendants, that Mr. Krause was either by the terms of the dissolution or by the sufferance, permission, and assent of the other partners the *liquidating* partner of the dissolved firm. I copy from the evidence of Henry Lubker:

Q. Take this \$26.00 note marked Exhibit "B." Mr. Lubker, who was the owner and in possession of that note at the time of the dissolution of your firm?

A. Why the firm of Krause, Lubker & Welch held it in trust for the Stoddard Manufacturing Company till we dissolved and then turned it over to Mr. Krause.

Q. Who endorsed that note?

A. I don't know; it looks like Mr. Krause.

Q. Was that endorsed while the partnership was in existence?

A. No, sir.

Q. Did your firm ever endorse that note and transfer it to anybody?

A. No, sir.

The case of *Lloyd v. Thomas*; 79 Pa. St., 68, is a case precisely in point with the case at bar, if Krause was either expressly or impliedly made the liquidating partner upon the dissolution of the firm. I copy the syllabus:

"A firm dissolved in May, giving notice by publication and authorizing one to use the firm name as liquidating partner. In August, without the knowledge of his fellows, he drew notes payable to the firm, endorsed them with the firm name, had them discounted by bankers with whom the firm had never had dealings; the proceeds of the notes passed to the individual credit of the partner making them; there was evidence that the proceeds were applied to the firm debts. *Held*, That if the notes were *bona fide* for liquidation and the proceeds applied to payment of firm debts, the other partners would be liable."

In the case of *Fulton v. Central Bank of Pittsburgh*, 92 Id., 112, the court in the opinion says: "It is well settled that after dissolution a liquidating partner may bind his late copartners in borrowing money to pay the debts of the late firm. He may renew an accommodation endorsement and give notes to liquidate the partnership indebtedness. * * * The authority to act as a liquidating partner does not require an express and specific appointment. When one so acts with the knowledge of his late copartners, their permission may be presumed."

In his late and valuable work on the "Principles of Partnership" Professor Parsons thus states the rule: "If no liquidating partner is appointed, any partner who continues the business can bind his copartners for a liquidation." (Principles of Partnership, sec. 185.)

In the case at bar, although, as above stated, there was an attempt to prove the publication of a notice of the dissolution of the partnership of defendants, yet no evidence of such publication was received or is to be found in the record. It has been often held that where a partnership relation has existed between two or more persons and one or more of them seeks to defend against an obligation incurred in the partnership name by one or more of the partners who continued the business, on the ground that the partnership had been dissolved, they must prove at least constructive notice of such dissolution. (See *Southern v. Grim*, 67 Ill., 106; *Speer v. Bishop*, 24 O. S., 598; *Johnson v. Totten*, 8 Cal., 343; *Williams v. Bowers*, 15 Id., 321, and *Woodruff v. King*, 47 Wis., 261.)

But as there must be a new trial it is deemed not inappropriate to say that the mere publication of a notice of dissolution in a local newspaper at the residence of defendants would probably not be deemed binding upon the plaintiff, a resident of a distant state, with whom defendants had long had important dealings and business relations, but that actual notice should be brought home to him.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other Judges concur.

27	90
36	97

GEORGE REYNOLDS V. THE STATE OF NEBRASKA,

[FILED JUNE 27, 1889.]

1. **Rape: EVIDENCE.** In a prosecution for rape there was a conflict in the testimony as to the resistance of the prosecutrix, and also as to the resort to force by the accused. The latter asked an instruction in substance cautioning the jury against prejudice which was liable to be aroused against the accused because of the heinous nature of the charge, and calling their attention to the difficulty of defending against the accusation, and that if the carnal knowledge, while she had the power to resist, was with the voluntary consent of the woman, no matter how tardily given, or how much force had previously been employed, it was no rape. *Held*, The instruction asked should have been given.
2. —: **EVIDENCE: OBJECTIONS.** Objections were predicated on certain testimony of an expert, but it appeared from the record that the testimony objected to had been first drawn out on cross-examination by the attorneys for the prisoner. *Held*, That the objections could not be considered.

ERROR to the district court for Saunders county. Tried below before MARSHALL, J.

Hamilton & Trevitt, for plaintiff in error, cited: *Clark v. Fisher*, 1 Paige Ch. (N. Y.), 171 [19 Am. Dec., 402]; *Otis v. Thom*, 23 Ala., 469 [58 Am. Dec., 303]; *Smith v. State*, 55 Ala., 1; *Cook v. State*, 4 Zab. (N. J.), 852; *Van Zandt v. Ins. Co.*, 55 N. Y., 179; *Connors v. State*, 47 Wis., 523.

Wm. Leese, Attorney General, for defendant in error.

MAXWELL, J.

An information was filed against the plaintiff in error in the district court of Saunders county charging him with the crime of rape and on the trial he was found guilty and sentenced to imprisonment in the penitentiary for four years. A large number of errors are assigned in this court, most of which it is unnecessary to notice. The evidence of the prosecuting witness was received through the aid of an interpreter, and while it may be true in its principal features the examination was conducted in such a manner as practically to put words in the witness's mouth. No objection seems to have been made to this mode of conducting the examination and it is not ground of error, but as there must be a new trial and it is evident that the witness has a considerable knowledge of the English language, an effort should be made to take her testimony without the intervention of an interpreter and as far as possible require her to narrate the facts.

The plaintiff in error asked the court to give the following instruction, which was refused :

"I. The charge made against the defendant is, in its nature, a most heinous one, and well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty growing out of the nature of the usual circumstances of the crime, in defending against the accusation of rape. So you, the jury, must carefully consider all the evidence in the case, and the law given you by the court in making up your verdict.

"You must find on the part of the woman, not merely a passive policy or equivocal submission to the defendant ; such resistance will not do. Voluntary submission by the woman, while she has power to resist, no matter how reluc-

tantly yielded, removes from the act an essential element of the crime of rape.

"If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is not rape."

In *Connors v. State*, 47 Wis., 523, Judge Lyon, in delivering the opinion of the court, said of an instruction substantially like the one asked in this case :

"The law given by the learned circuit judge to the jury contains a correct statement of the law of the case, as far as it goes, but it does not contain the substance of the rejected instructions. It fails to caution the jury that prejudice was liable to be aroused against the accused because of the heinous nature of the crime charged in the information, or to call their attention to the difficulty growing out of the nature and usual incidents of the crime, of defending against an accusation of rape. It did not press upon their attention the principle or rule that voluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. The jury were not expressly told that if the carnal knowledge was with the consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is no rape. And lastly, the jury were not instructed that proof of the good reputation of the accused as a peaceable and law-abiding citizen (and such proof was given on the trial) was entitled to some weight in his favor, especially if there were circumstances proved on the trial upon which a doubt of his guilt might be predicated. The proposed instructions are not accurately drawn, but they aim to state the above propositions, all of which are well established rules of law."

This, we think, is a correct view of the law. The fact that the charge itself will frequently raise a clamor among ignorant and easily biased persons has been recognized by fair-minded judges and law writers from the time of Chief

Reynolds v. State.

Justice Hale, at least, until the present time. Even that eminent and impartial judge seems to have given but little thought to the care required in trying this class of cases until a case came before him where three witnesses, including the prosecutrix, swore positively to the commission of the act when upon inspection of the accused it appeared that he could not have committed the offense. Other cases are also mentioned. He says: "I only mention these instances that we may be more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance." (Hale, Pl. of the Crown, vol. 1, p. 636.)

In *Oleson v. State*, 11 Neb., 276, it was held that where the prosecutrix was conscious and had possession of her natural, mental, and physical powers and was not terrified by threats or in such a position that resistance would be useless, it must appear that she resisted to the extent of her ability. In *Mathews v. State*, 19 Neb., 330, the authorities of this and other states were reviewed and the doctrine of *Oleson v. State* affirmed.

The case of *State v. Burgdorf*, 53 Mo., 65, resembles in some of its features that under consideration, and it was held that a "passive policy, a mere half-way case, will not do." To the same effect, *People v. Abbott*, 19 Wend., 194; *Whitaker v. State*, 50 Wis., 518; *Don Moran v. People*, 25 Mich., 356; *Whitney v. State*, 35 Ind., 506; *People v. Brown*, 47 Cal., 447; *Taylor v. State*, 50 Ga., 79. The case should be so submitted to the jury as to enable it to consider all the evidence and determine therefrom the question of the guilt or innocence of the accused.

Objection is made to certain questions asked Dr. Mansfelde as an expert. It is sufficient to say that the questions objected to were in the first instance asked by the attorneys for the plaintiff in error, and therefore they cannot predicate error thereon. As there must be a new trial we will not discuss the testimony in the case.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other Judges concur.

P. F. H. SCHARS V. JOHN BARND.

[FILED JUNE 27, 1889.]

27	94
56	78
27	94
62	258

1. **Replevin: DAMAGES.** Where a sheriff levied an execution upon a stock of drugs contained in a drug store, and took them into his possession as the property of A, and they were replevied from the sheriff by B, who claimed to be the owner, and upon a jury trial the drugs were found to be the property of B, the trial jury, in estimating the damages due to B by reason of illegal detention of the property by the sheriff, will not be confined to the net income of the store at or about the time of the levy. They may take into consideration all other elements of damage shown upon the trial, such as the closing of the store, the handling of the goods in making the inventories, etc., and in such case, where about one week of time intervened between the levy by the sheriff and the restoration of the goods to the plaintiff in the action, by the coroner, under the proceeding in replevin, a verdict for one hundred and fifty dollars damages was not excessive.
2. ———: ———. In an action of replevin against the sheriff by a third party, and stranger to the execution, who had the goods in his possession at the time of the levy by the sheriff, and where the sheriff justifies under such execution in order to maintain his possession, he must show by competent proof his authority for such seizure. In case he fails to do so, the plaintiff in the action will be entitled to judgment for the possession of the goods and his damages.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

Marston & Nevius, for plaintiff in error.

REESE, CH. J.

This was an action in replevin instituted by defendant in error against plaintiff in error for a stock of drugs levied upon by plaintiff as sheriff of Buffalo county. A jury trial was had in the district court which resulted in a verdict in favor of defendant in error, sustaining his title to the property involved, and for one hundred and fifty dollars damages.

It appears from the record that Flescher and Henline were in the drug business as copartners on and prior to the 16th day of January, 1886, and that defendant in error, who is the brother-in-law of Flescher, had become liable for the debts of Flescher, and perhaps of Flescher and Henline, to the amount of about \$2,000 by becoming surety therefor. Flescher also owed defendant in error \$2,220, making a total of \$4,221.50. Defendant in error induced Henline to sell his interest in the stock to Flescher and then purchased from Flescher.

The transfer was made on the date above named. The indebtedness assumed by defendant in error, together with the amount owing to him by Flescher, was more than the value of the stock of goods on hand. Defendant in error seems to have taken possession of the stock but retained both Flescher and Henline as clerks.

On the 24th day of January plaintiff in error, as sheriff, levied an execution upon the property, and took it into his possession, when defendant in error replevied it.

The sheriff, as plaintiff in error, brings the case to this court for review, and it will be examined in the order presented by him in his brief.

The first contention of plaintiff in error is that the damages allowed defendant in error by the jury were excessive.

It seems from the record that defendant in error instituted the replevin proceedings immediately after the levy upon the goods by the sheriff, but that it was about one

week from the time of the levy by the sheriff until the defendant in error was reinstated in the possession of the goods. A good portion of this time was occupied in making the necessary inventory by the coroner. Upon the trial considerable attention was paid to the question as to the amount of net income of the store about the time of the levy of the execution by the sheriff. This was shown to be rather small. But it was shown that there was, to say the least, over three thousand dollars' worth of goods in the store levied upon by the sheriff, and also replevied back by the defendant in error. We apprehend that in estimating the damages due the defendant in error, under section 191 of the Civil Code, the jury would be permitted to take into consideration the length of time intervening between the levy by the sheriff and the complete reinstating of defendant in error to his possession. In addition to this, we think it would be entirely proper for them to consider the depreciation in value of the property from handling in making the inventory. It is true, as claimed by plaintiff in error, that nothing but compensatory damages could be allowed. Yet for the purpose of arriving at the just compensation due the defendant in error, or growing out of the levy, or wrong by plaintiff in error, if wrong it were, the jury would be entitled to take into consideration all the elements of damage in the case as shown by the evidence. We do not think the amount of damages found by the jury is so great as to necessarily lead to the conclusion that it is the result of either bias or prejudice on the part of the jury. We cannot, therefore, interfere. It is next contended that "the verdict is contrary to law and should have been for the defendant." We have carefully read the bill of exceptions throughout, and cannot agree with counsel for plaintiff in error in this conclusion. As we have already said, it is sufficiently shown that Flescher was indebted to defendant in error in the sum of \$2,220.50, money which had been borrowed and for which Flescher

had executed his note, and that defendant in error was liable to the creditors of Flescher, and perhaps of Flescher and Henline, for \$2,000 more. It is true, perhaps, that defendant in error was aware at the time of the transaction that Flescher was deeply involved in debt and was perhaps insolvent; but that would not necessarily prevent him from procuring payment of his indebtedness if the same were *bona fide*, and securing himself against the liability which existed by reason of his having become surety for Flescher to the persons named in the bill of exceptions. We can find no evidence of fraud on the part of defendant in error, and from the whole tenor of the testimony it seems to us that it can be safely said that the transaction was simply an effort on the part of defendant in error to secure the amount due him by Flescher, and the amount for which he was liable; and also on the part of Flescher to prefer defendant in error, who was one of his creditors, to the exclusion, probably, of others, although it does not appear in evidence that any of the creditors of Flescher and Henline were defrauded, injured, or delayed in the collection of their debts.

Some objections are made to the instructions given to the jury by the trial court. But it would serve no good purpose to examine these instructions, for the reason that there was no proof presented to the jury showing any right upon the part of plaintiff in error to seize the goods in question. It was shown, no doubt, to the full satisfaction of the jury, that the goods levied upon were originally the property of defendant in error. He replevied them from plaintiff in error, and showed his right thereto. We are unable to find any proof offered on the part of plaintiff in error which would entitle him to the possession of the goods. As stated in *Williams v. Eikenberry*, 25 Neb., 721, recently decided by this court, where property in possession of a third party who claims title thereto, and the right of possession thereof, is levied upon, the sheriff

must show his right to levy by introducing in evidence the process under which he levied, the judgment, etc. It is not necessary to rediscuss this question. We have found nothing in the bill of exceptions to show that plaintiff in error was entitled to the goods, even were they not claimed by defendant in error. This, of course, it was necessary for him to do in order to make his justification complete.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

ELIJAH J. WILLIS V. STATE OF NEBRASKA.

[FILED JUNE 27, 1889.]

Practice in Supreme Court. Where a case is presented upon the transcript alone, without a bill of exceptions, instructions given to the trial jury by the district court will be presumed to be correct, unless they misstate the law and contain propositions which could not be held correct in any possible case made by the proof under the complaint or information upon which the prosecution was founded, all presumptions being in favor of the regularity of the proceedings of the district court.

ERROR to the district court for Lancaster county. Tried below before HAYWARD, J.

Lewis & Lewis, for plaintiff in error.

Atkinson & Doty, for defendant in error.

REESE, CH. J

This prosecution was instituted in the police court of the city of Lincoln upon a complaint which was as follows:

27	98
47	208
47	293
47	397
27	98
50	141
53	149

"THE STATE OF NEBRASKA V. WILLIS (first name unknown).

"In the police court of the city of Lincoln, Lancaster county, Nebraska.

"THE STATE OF NEBRASKA, } ss.
"Lancaster County,

"A complaint and information of Charles Meyer in the county of Lancaster, made before me, A. F. Parsons, judge of the police court, in and for the city of Lincoln, Lancaster county, Nebraska, on this 27th day of April, 1886, who, being duly sworn, on his oath says that one Willis, the first name unknown, of said last named county and city, on or about the — day of March, 1886, in the county last named, and within the corporate limits of the city of Lincoln, then and there being, did unlawfully and willfully place, and suffer to remain, in and upon a gutter, fronting upon the lots owned by him, certain refuse matter and filth, to-wit: stable manure, which did obstruct said gutter or ditch, and did interfere with the drainage of such city, said gutter so filled and obstructed being on the west side of Eighth street between W and X streets, contrary to the form of the ordinance in that behalf provided, and against the peace and dignity of the state of Nebraska.

"(Signed) CHARLES MEYER."

The cause was appealed from the judgment in the police court to the district court, where a jury trial was had.

From a verdict of guilty, and a judgment of conviction, the plaintiff in error brings the case to this court by proceedings in error. There is no bill of exceptions, and it is impossible for us to state what the evidence before the trial court was. We will notice briefly the points relied upon by plaintiff in error in this court.

The first is that the court erred in giving the first instruction asked for on behalf of the state, and in refusing to give the fourth and sixth instructions requested by the plaintiff in error.

The first instruction asked for by the state was as follows :

"1. You are instructed that if you find the city built or caused to be made a ditch along Eighth street for drainage, and that the defendant caused said ditch to be filled, on or about the time alleged in the complaint, up so as to impede the drainage in such ditch, you must find the defendant guilty."

The objection to this instruction is, that it was too vague, general, and uncertain ; that it did not indicate with accuracy, or precision, the kind or amount of proof required to justify a jury in finding a person guilty of a criminal offense ; that it conflicts with the first instruction given at the request of the plaintiff in error, and is calculated to mislead the jury. Being left entirely in the dark as to what evidence was submitted to the jury, the only question presented here to be considered is, whether or not this instruction could have been correct under any conditions or circumstances which might have been proven on the trial, or, under any quality or character of proof. For it is a well established rule that all presumptions are in favor of the regularity of the proceedings of the district court. This being true, the instructions must be examined in the light of such presumptions. In connection with this instruction the court, upon request of plaintiff in error, gave a number of instructions, which we here copy. They are as follows :

"1. The jury are instructed that every material allegation of the complaint must be proven, beyond a reasonable doubt, and that if the evidence submitted by the state leaves any reasonable doubt in the minds of the jury as to the defendant's guilt, he must be acquitted.

"2. The jury are instructed that it is incumbent upon the prosecution to prove that the refuse matter alleged to have been deposited by the defendant in and upon a gutter of the city, obstructed and interfered with the drainage of the city.

"3. The jury are instructed that a gutter, within the meaning of the ordinance of the city of Lincoln under which the complaint in this case is brought, is a ditch or conduit calculated to allow of the passage of water from one point to another in a certain direction, and that a mere excavation without an outlet would not be a gutter within the meaning of said ordinance.

"5. The jury are instructed that if they found the city authorities caused an excavation to be dug along the front of the defendant's premises without any adequate or proper outlet, which was usually or frequently filled with water to such an extent as to interfere with ingress and egress to and from the defendant's land, they may also find that such an excavation constituted a nuisance within the meaning of the law.

"7. The jury are instructed that if this complaint is based upon an ordinance of the city of Lincoln, it is not only necessary for the government to prove beyond a reasonable doubt the acts of the defendant charged in the complaint, but also to prove beyond a reasonable doubt, by competent evidence, said ordinance.

"The city of Lincoln cannot license the erection or commission of a nuisance, and if a nuisance is committed by the civil authorities of said city, a person suffering from said nuisance has the same remedies that he might have against a private individual.

"The jury are instructed that the prosecution must prove that the offense charged was committed on or about the time charged in the complaint, and before you can convict the defendant, you must believe beyond a reasonable doubt, from the evidence, that the defendant did commit the offense charged in the complaint."

It will be apparent upon a comparison of all the instructions that the criticism upon instruction No. 1 cannot be sustained.

It does not misstate any proposition of law. It could

only be considered in connection with the evidence which was submitted to the jury. That not being before us, and the whole scope of the instructions seeming to cover a case which was submitted, we cannot hold the instruction bad.

It is next insisted that the court erred in refusing to give instruction No. 4 asked by defendant in error. This instruction was as follows:

"4. The jury are instructed that if the city authorities, in the construction of the gutter in question, constructed along the front of the defendant's premises, and thence, without permission or license, through, over, or upon the land of private persons, including the defendant, making the portion of the ditch that lies upon the defendant's land the outlet for the portion constructed in front of his land, the city has gained no other or greater right to maintain the portion of the gutter constructed in front of the defendant's land than it would have gained if the portion of the gutter which was made without authority or license upon defendant's land had not been constructed."

It is quite probable that this instruction contains a correct statement of the law as applicable to some cases, or to a case which might be made to a jury. But whether or not the evidence submitted would warrant any such an instruction is beyond our power to say. We do not know that any proof was submitted to the jury, that the ditch referred to had been constructed upon any other land or in any other place than along the border of the street. If it had not, the court did not err in refusing to give the instruction asked, and for the purpose of sustaining the judgment of the court we must presume that there was no such evidence. A number of other instructions were asked by plaintiff in error and refused by the court. The same rule which has been applied to instruction No. 4 must apply to those under consideration. It is impossible for us to say, from the record, that they were not properly refused, and it is not deemed necessary to extend the length of this opinion by a discussion of them.

 Walker v. Turner.

We are unable to detect any error by an inspection of the record before us, and the judgment of the district court must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

MACK WALKER V. JONATHAN TURNER.

[FILED JUNE 27, 1889.]'

27	103
c49	106
c49	251
27	103
57	257

1. **Practice: APPEARANCE.** When a defendant appears specially for the purpose of challenging the jurisdiction of the court over him on the grounds of a defect in the service of summons, if the objection is overruled, an answer to the merits of the case without further objection to the jurisdiction, followed by a trial thereon, will be deemed a general appearance, and the objection waived.
2. **Action Quantum Meruit: EVIDENCE.** In an action upon the *quantum meruit* for compensation for services performed upon the request of the defendant, and which employment was denied by such defendant, it was not error for the trial court to permit the plaintiff to testify that the defendant represented that the services would be worth, and that he would guarantee the payment of that sum, etc.; the offer as to price not having been accepted by the plaintiff. Such evidence would not establish an express contract as to the price to be paid.
3. ———: ———. In such case, when the defendant alleged in his answer that the plaintiff's services were rendered exclusively for the water works company, and that he had been fully paid therefor, it was held not erroneous for the trial court to exclude from the consideration of the jury a receipt for \$1,000, executed by the plaintiff to the water works company, there being no proof that the employment, nor payment, by the water works company was intended to cover the whole time of the plaintiff and his efforts on behalf of the defendant in securing the adoption of his pump.
4. **"Instructions: EXCEPTIONS.** A general exception to instruc-

only be considered in connection with the evidence which was submitted to the jury. That not being before us, and the whole scope of the instructions seeming to cover a case which was submitted, we cannot hold the instruction bad.

It is next insisted that the court erred in refusing to give instruction No. 4 asked by defendant in error. This instruction was as follows:

"4. The jury are instructed that if the city authorities, in the construction of the gutter in question, constructed along the front of the defendant's premises, and thence, without permission or license, through, over, or upon the land of private persons, including the defendant, making the portion of the ditch that lies upon the defendant's land the outlet for the portion constructed in front of his land, the city has gained no other or greater right to maintain the portion of the gutter constructed in front of the defendant's land than it would have gained if the portion of the gutter which was made without authority or license upon defendant's land had not been constructed."

It is quite probable that this instruction contains a correct statement of the law as applicable to some cases, or to a case which might be made to a jury. But whether or not the evidence submitted would warrant any such an instruction is beyond our power to say. We do not know that any proof was submitted to the jury, that the ditch referred to had been constructed upon any other land or in any other place than along the border of the street. If it had not, the court did not err in refusing to give the instruction asked, and for the purpose of sustaining the judgment of the court we must presume that there was no such evidence. A number of other instructions were asked by plaintiff in error and refused by the court. The same rule which has been applied to instruction No. 4 must apply to those under consideration. It is impossible for us to say, from the record, that they were not properly refused, and it is not deemed necessary to extend the length of this opinion by a discussion of them.

 Walker v. Turner.

We are unable to detect any error by an inspection of the record before us, and the judgment of the district court must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

MACK WALKER V. JONATHAN TURNER.

[FILED JUNE 27, 1889.]'

27	103
49	106
49	261
27	103
57	257

1. **Practice: APPEARANCE.** When a defendant appears specially for the purpose of challenging the jurisdiction of the court over him on the grounds of a defect in the service of summons, if the objection is overruled, an answer to the merits of the case without further objection to the jurisdiction, followed by a trial thereon, will be deemed a general appearance, and the objection waived.
2. **Action Quantum Meruit: EVIDENCE.** In an action upon the *quantum meruit* for compensation for services performed upon the request of the defendant, and which employment was denied by such defendant, it was not error for the trial court to permit the plaintiff to testify that the defendant represented that the services would be worth, and that he would guarantee the payment of that sum, etc.; the offer as to price not having been accepted by the plaintiff. Such evidence would not establish an express contract as to the price to be paid.
3. ———: ———. In such case, when the defendant alleged in his answer that the plaintiff's services were rendered exclusively for the water works company, and that he had been fully paid therefor, it was held not erroneous for the trial court to exclude from the consideration of the jury a receipt for \$1,000, executed by the plaintiff to the water works company, there being no proof that the employment, nor payment, by the water works company was intended to cover the whole time of the plaintiff and his efforts on behalf of the defendant in securing the adoption of his pump.
4. **"Instructions: EXCEPTIONS.** A general exception to instruc-

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tions given is insufficient. Each specific instruction which is claimed to be erroneous must be distinctly pointed out and specifically excepted to." (*Brooks v. Dutcher*, 22 Neb., 644.)

5. Evidence examined, and held, sufficient to sustain the verdict.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

Marston & Nevius, for plaintiff in error, cited: *Atkins v. Atkins*, 9 Neb., 191; *McGavock v. Pollack*, 13 Id., 535; *Grebe v. Jones*, 15 Id., 315; *Holmes v. Holmes*, Id., 615; *Potter v. C. & N. W. Ry. Co.*, 1 Id., 14; Bishop on Contracts, secs. 185, 187; *Winchester v. King*, 46 Mich., 102; *Bartling v. Behrends*, 20 Neb., 211.

John M. Stewart, for defendant in error, cited: *Crowell v. Galloway*, 3 Neb., 220; *Kane v. People*, 4 Id., 509; *Burnham v. Doolittle*, 14 Id., 215.

REESE, CH. J.

This action was instituted in the district court of Buffalo county, the purpose of which was to recover from plaintiff in error the sum of \$2,500, alleged to be due defendant in error for certain services rendered on behalf of plaintiff in error in procuring the adoption of a certain pump to be used in the system of water works constructed for the city of Kearney. The allegations of the petition were substantially that at and prior to the time of the contract which is alleged to have been entered into between plaintiff and defendant the city of Kearney was desirous of constructing a system of water works; that plaintiff in error was the manufacturer of a certain pump known as the Walker pump, and that he employed defendant in error to assist him in presenting to the city council of the city of Kearney the merits of said pump and inducing them to cause the same to be adopted in connection with the water works system of the city of Kearney. It was alleged that the contract between plaintiff

iff and defendant was made in the city of Chicago, where defendant in error had gone at the request of the plaintiff, and during an interview held between them; that in pursuance of said contract defendant in error returned to the city of Kearney, and by canvassing the matter of the construction of water works with the citizens and members of the city council he induced them to adopt the system of water works constructed by the corporation known as the American Water Works and Guarantee Company, Limited, with a condition in the contract with such company which required them to adopt the wheel or pump of defendant in error as the pumping power of said system of works. It is unnecessary to notice further the allegations of the petition.

By his answer plaintiff in error admitted the allegations of the petition concerning the purpose of the city of Kearney to construct the system of water works, the adoption by the council of said city of the works as constructed by the American Water Works and Guarantee Company, Limited, the franchise being granted to them, and the adoption of the pump manufactured by plaintiff in error. In connection with the denial on the part of plaintiff in error, that defendant in error was employed by him or assisted him in procuring the adoption of his pump as part of the water works system of the city of Kearney, it is alleged that whatever services were rendered by defendant in error were rendered in favor of the water works company above named and not for him, and that defendant in error had been fully paid by the said water works company for his services. All the allegations of the petition not admitted were denied. The reply amounted to substantially a general denial of all the allegations of the answer. The cause was tried to a jury, which resulted in a verdict in favor of defendant in error for the sum of \$500. Plaintiff in error alleges errors occurring upon the trial and prior thereto, and brings the case to this court by proceedings in error.

Before plaintiff in error answered, he appeared specially and objected to the jurisdiction of the court, for the reason that there was no legal service of summons upon him, either actually or constructively. The challenge to the jurisdiction of the court was overruled, to which plaintiff excepted, and now assigns the ruling of the district court upon this objection as error. The record does not show that completed service was ever made upon plaintiff in error, and it is quite probable that at the time of the filing of the motion, and the ruling thereon, the court did not have jurisdiction of the person of plaintiff in error. But after the ruling of the district court plaintiff in error appeared generally and answered to the full merits of the case, without raising any question as to the jurisdiction. The cause proceeded to trial and was tried upon the merits of the contest between plaintiff and defendant alone. Without stopping to discuss the question here presented, we think it is well settled in this state that a general appearance of the character made by plaintiff in error in this case will waive any defect in the service of summons or want of jurisdiction. (*Crowell v. Galloway*, 3 Neb., 220; *Burnham v. Doolittle*, 14 Id., 215.) The objection now that the district court did not have jurisdiction over the person of plaintiff in error cannot avail him. As we have seen, the plaintiff's cause of action was to recover upon the *quantum meruit* for services alleged to have been performed for plaintiff in error, and that by performing the services rendered upon the request of plaintiff in error there was an implied obligation on the part of plaintiff in error to have paid a reasonable compensation therefor; that is, what it was worth. In the course of the examination of defendant in error, when upon the witness stand, in which he detailed several conversations had between the parties, he stated that plaintiff in error had said in his presence that he, plaintiff in error, would guarantee to defendant in error the sum of \$2,000 to get

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his patent introduced in this state. This was objected to, as immaterial and incompetent, and a motion was made to strike it out, which was overruled. To this the plaintiff in error excepted, and now assigns this ruling of the court for error. This objection is made upon the ground that, as the action was upon the *quantum meruit*, it was not proper to allow the witness to testify to anything which would tend to prove an express contract on the part of plaintiff in error to pay a certain sum for the services. This is no doubt true, and the position taken by counsel for plaintiff in error would be correct were it a fact that by the evidence which was given defendant in error sought to establish a liability on the part of plaintiff in error by virtue of an express contract by which he agreed to pay a certain sum, but this we do not understand to have been the case. There was no evidence offered that an agreement between them was made by which plaintiff in error was to pay and defendant in error was to receive the sum of \$2,000 for his services, but the evidence was received rather for the purpose of tending to corroborate the theory of defendant in error that he had been employed by plaintiff in error to render the services which he claims to have rendered. It was not claimed that defendant in error accepted the proposition and agreed to perform the labor for \$2,000 or any other sum. The offer made by plaintiff in error to give that much, unaccepted by defendant in error, would not be a contract, nor would the fact that defendant in error went on and rendered the service as claimed by him to have been rendered, change the rule. The amount to be paid to compensate him would still be one to be implied from the other circumstances.

It is next claimed that the court erred in excluding a receipt offered by plaintiff in error, to which objection was made by defendant in error. This receipt was as follows:

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"\$1,000. KEARNEY, NEB., October 22, 1886.

"Received of Charles A. Lamb one thousand dollars, in full for any and all services directly or indirectly rendered to the American Water Works and Guarantee Co., or its representatives, and in full for and all claims that I had or held against said company, and in full for all fees for attorneys employed. JONATHAN TURNER."

To this receipt is appended the following memorandum:

Draft order J. P. Hartman.....	\$100.00
" " Jno. Turner.....	474.25
" " Jno. Turner and Ross Gamble.....	425.75
	<u>\$1000.00</u>

It is insisted that, in view of the fact that the defense tendered by plaintiff in error in his answer was that the services of defendant in error were rendered for and on behalf of the American Water Works and Guarantee Company, and that he had been paid for his services in that behalf, this receipt was competent for the purpose of proving that fact. We have examined the bill of exceptions carefully, and are unable to find any proof whatever that this receipt was executed, or that the money mentioned in this receipt as having been paid was intended to cover all the labor or services of defendant in error in and about procuring the adoption of the American Water Works system of water works, and plaintiff's pump. In order to render this receipt admissible, as against defendant in error, it was necessary that it should show that the money paid as therein recited was paid in consideration of and satisfaction for all the services which he rendered in and about the adoption of the system of water works of the American Water Works and Guarantee Company, and also the adoption of the pump of the plaintiff in error, in connection therewith. We find no proof of this kind. That being true, the receipt offered in evidence was properly rejected, as immaterial and as throwing no light upon

the question of the liability of the plaintiff in error to defendant in error for services rendered in his behalf in procuring the adoption of his pump.

It is next contended that the court erred in giving certain instructions to the jury. We find upon an examination of the record that instructions numbers one, two, three, and four were given to the jury upon request of defendant in error. To these instructions an exception was taken in the following form: "To the giving of each and every of such instructions the defendant, by his counsel, then and there excepted, and the exceptions were allowed." Plaintiff in error requested the court to give to the jury a number of instructions. Among those so requested were numbers three and four, which were refused. We again quote the record. "Both of which instructions, numbers three and four, the court refused to give to the jury, to which ruling of the court the defendant, by his counsel, then and there excepted." The court then gave to the jury certain instructions upon its own motion, numbers one and two. We quote from the record again as follows: "To the giving of which instruction marked numbers one and two the defendant, by his counsel, then and there excepted, and the exception was allowed." This exception was insufficient and would not lay a sufficient foundation for a review of the instructions given and refused. In *Brooks v. Dutcher*, 22 Neb., 644, this question was before the court and received as careful consideration as it was possible at that time for us to give it, and it was the unanimous opinion of the court that the rule stated in the cases there cited was correct and should be adhered to. We do not deem it essential that the question should be again discussed, as we are satisfied with the rulings there had.

It is next contended that the verdict is contrary to and not supported by the evidence. This contention is based chiefly upon the evidence of defendant in error himself, who, it is claimed, testified positively that an express con-

tract had been entered into between him and plaintiff in error, by which he was to receive the sum of \$2,000 in case of the adoption of plaintiff's pump, or in case it was not adopted that he was to receive nothing. We have carefully examined the evidence and cannot agree with the contention of plaintiff in error. While it is true that upon the cross-examination, as well as the examination in chief, defendant in error stated that plaintiff in error guaranteed to him \$2,000 for his services in the matter testified to by him, yet he did not claim, either in the pleadings or his testimony, that there was an agreement or contract entered into by which certain services were to be rendered by defendant in error, and in consideration of which plaintiff in error was to pay him \$2,000 ; but rather that the amount which defendant in error might expect to realize from his labors in that behalf would amount to at least that sum. We observe a direct conflict in the evidence between plaintiff and defendant, and had we been acting as a juror in a trial of the case it appears to us that the evidence introduced by plaintiff in error would have been sufficient to raise serious doubt as to the right of defendant in error to recover ; that the circumstances tended to sustain and support his theory rather than that of defendant in error. But of this the jury were the sole judges, and we cannot, as a court of error, sit in review on the evidence or as to the weight to which each witness should be entitled, that being alone for the jury. There being enough to sustain their finding if believed by them, we cannot interfere.

We discover no error in the record calling for a reversal of the judgment of the district court, and it must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

J. B. FORBES ET AL. V. SAMUEL D. HICKS.

[FILED JUNE 27, 1889.]

1. **Fugitives From Justice.** Section 330, *et seq.*, of the Criminal Code contemplates that the charge of the crime against the person to be arrested and delivered up must be made in the state where the offense was committed. The charge must be to some court, magistrate or officer, in the form of an indictment, complaint, or other accusation known to the laws of such state or territory, and be pending; and a complaint made before a magistrate in this state which fails to allege that such charge is pending against the accused in the state where it is alleged the offense was committed, will not confer jurisdiction on such magistrate.
2. **False Imprisonment: EVIDENCE.** In an action for false imprisonment against three defendants, one of whom had procured the issuance, by one of the others, who was a justice of the peace, of a warrant, by virtue of which the other, who was a constable, had arrested and imprisoned the plaintiff, *held*, that the warrant and complaint, on which it was issued, were properly admitted in evidence.
3. ———: ———. In the action described in the second clause of this syllabus a part of the damages sustained by the plaintiff consisted of the fees and expenses of a proceeding in *habeas corpus* in the county court by which he was released from such imprisonment: *Held*, That the docket of the county court, containing the entries of such proceedings, was properly admitted in evidence.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

C. C. Flansburg, for plaintiff in error, cited: *In re Manchester*, 5 Cal., 237; Bishop Crim. Pro., vol. 1, sec. 222; *Poult v. Slocum*, 3 Blackf. (Ind.), 422.

John Dawson, for defendant in error, cited: *People, ex rel. Lawrence, v. Brady*, 56 N. Y., 182; *Ex parte White*, 49

Cal., 433; *Smith v. State*, 21 Neb., 552; Cooley on Torts, 173.

COBB, J.

This case was tried in the district court of Harlan county and brought to this court to review the judgment below, on error.

The plaintiff below alleged that on February 28, 1887, the defendants unlawfully, and with force, assaulted and imprisoned him, and detained him in prison for the space of six days without reasonable or probable cause, to his damage for expenses of defense of \$50 and of \$1,950 for interruption of his business and for bodily and mental suffering.

The defendants, Forbes and Mason, answered, denying all the allegations and averments of the plaintiff.

There was a trial to a jury with findings for the plaintiff and a verdict for \$350 damages.

The defendants' motion for a new trial was overruled, in case the plaintiff should remit \$150 of the amount of the verdict; and the plaintiff having remitted that sum, judgment was entered for \$200 damages and costs.

Exceptions having been taken, the plaintiffs in error assign as errors:

1. That the court erred in admitting the county court record docket.
2. In admitting the justice's docket, p. 62.
3. In orally instructing the jury without the consent of defendants.
4. In permitting the plaintiff to go outside the record in argument to the jury.
5. In overruling the motion for a new trial.

As near as it is possible to arrive at the facts in the case from the very imperfect bill of exceptions, the defendant, William E. Goddard, went before the defendant, Jerome

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B. Forbes, a justice of the peace of Harlan county, and charged the plaintiff, Samuel D. Hicks, with the crime of being a fugitive from justice, by a written complaint upon oath; the justice thereupon issued a warrant for the arrest of Hicks and placed it in the hands of the defendant, Robert Mason, who was a constable of said county. Mason arrested Hicks and brought him before the justice of the peace. Hicks pleaded not guilty. A trial was had and thereupon the justice found Hicks (defendant in said proceeding) guilty in manner and form as charged in said complaint and ordered him to be detained by the said constable for the period of ten days, unless sooner discharged or removed by operation of law, and issued a *mittimus* to said Robert Mason to that effect. Thereupon Hicks continued in the custody of Mason until he was discharged by *habeas corpus* proceedings. For this imprisonment Hicks sued Goddard, Forbes, and Mason.

Upon the trial the plaintiff called the defendant Forbes as a witness, who testified that about two weeks before a previous term of the court he had sent the complaint and warrant in said cause against Hicks "to the attorney," without stating what or whose attorney, and had not seen them since. Upon cross-examination he stated that his docket contained a copy of the complaint. Samuel D. Hicks took the stand and testified that he was the plaintiff in the case; that he resided at Republican City; that he was in the custody of Robert Mason for nine days; that Mason told him that if he would conclude to stay with him and not try to get away from him, that he might stay with him and he would not put him in jail; that he was before Forbes and Forbes turned him over to Mason; that he had to employ an attorney and paid him \$50; that he lost nine days while in custody; that he had to hire his brother to go and see an attorney, for which he paid him \$3, and that Mason kept control of him all the time. In answer to the question by his attorney, "Do you know what you were

arrested for?" he answered, "Goddard claimed he had me arrested for trying to get away with some property;" that he did not owe him anything.

Upon cross-examination he stated that he thought that Forbes was acting as justice of the peace; that Mason was acting as constable; that Mason had a writ in his hand when he arrested him; that the writ was issued by Forbes as a justice of the peace on Goddard's complaint; that he made an agreement with Mason to stay with him; that he went home a couple of times for about fifteen minutes at a time. On re-examination, to the question put by his attorney, "Do you know how you got your liberty?" he answered, "I think you got out some process and got me out." To the question "What was your time worth while you were in custody?" he answered, "Well, more than usual, as I wanted to go to seeding and my wife was sick and I ought to have been right there with her."

Plaintiff offered in evidence certain pages of the docket of the county court containing the entry of proceedings in *habeas corpus*, consisting of an affidavit by E. S. Hicks on behalf of Samuel D. Hicks, to the effect that said Samuel D. Hicks was unlawfully deprived of his liberty by Robert Mason, etc.; the issuance of a writ of *habeas corpus*; the return of said writ by Robert Mason, constable, which return purports to have attached thereto a mittimus issued by Jerome B. Forbes, justice of the peace, etc. But the *mittimus* is not set out in the bill of exceptions, while the proceedings of said county court, under date March 5, 1887, are set out, by which it appears that the county court found that Samuel D. Hicks was unlawfully deprived of his liberty by Robert Mason, and was discharged from custody, etc.

The admission of said docket in evidence was objected to by the defendants, whereupon it was admitted as to the defendant Mason only.

The plaintiff also offered so much of the docket of the

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justice of the peace as purports to be a copy of the complaint against the plaintiff which, over defendant's objection, was received. I here copy the docket entries:

"The State of Nebraska v. R. B. Hicks. February 28, 1887. Complaint in writing and on oath made and filed before me by W. E. Goddard, charging that one Samuel D. Hicks, late of Phillips county, Kansas, and now within the county of Harlan, Nebraska, is a fugitive from justice; that said Samuel D. Hicks is charged with, on the 30th day of January, 1887, in the county of Phillips, and state of Kansas, after having mortgaged one span of mules, one black and one bay horse with a black stripe across the shoulders, eight or nine years old, and bay mare mule nine or ten years old, one standard corn planter, one standard corn plow, one Mast sulky plow, one double harness, one three section sixty-tooth drag, W. E. Goddard being the owner thereof, fraudulently removing and concealing the said mortgaged property with the fraudulent intent to place the same beyond the control of the said W. E. Goddard, now do issue warrant and deliver same to Robert Mason, constable. Warrant returned endorsed as follows, to-wit:

"Received this warrant on the 28th day of February, 1887, and according to the command thereof I arrested the within named S. D. Hicks, and now have his body before this court.

"ROBERT MASON, *Constable.*"

"Defendant arraigned and plead not guilty, where, upon examination, after hearing the evidence, I find the defendant guilty in manner and form as charged in said complaint, and ordered the said Samuel D. Hicks to be detained by the said Robert Mason for the period of ten days, unless sooner discharged or removed by operation of the process of law. Issued mittimus to Robert Mason therefor.

"J. B. FORBES,

"Justice of the Peace."

It appears that counsel for plaintiff during his argument to the jury read said copy of the complaint, when, upon objection by counsel for defendants, the court announced as follows: "The law is this—that where the law of a foreign state comes in question and the law of said state is not introduced in evidence, the presumption is that it is like the law in our state."

By counsel for plaintiff to the jury: "Here is a poor man who had to mortgage his only two cows to obtain his release from this prosecution;" to which remarks the counsel for defendants objected, as improper and not in the record.

By the court: "I sustain the objection and the jury are instructed to pay no attention to it."

By the counsel for the plaintiff to the jury: "Probably this defendant was paid something for manifesting this interest."

The defendants objected to these remarks of counsel for plaintiff. Overruled by the court as to defendant Mason.

The law of this case, arising upon the principal question presented, is sufficiently stated in the opinion in the case of *Smith v. State*, 21 Neb., 552. By reference to the copy of the complaint made by Goddard against Hicks as taken from the docket of the defendant Forbes, it will be seen that the only allegation against Hicks in addition to the general one that he is a fugitive from justice, is that he "is charged with, on the 30th day of January, 1887, in the county of Phillips, and state of Kansas, after having mortgaged one span of mules," etc., "fraudulently removing, and concealing," etc. It is not stated that this charge has been made upon oath, or that it was made to any court or authority, or that such charge was then pending against the said accused. For aught that is stated said charge might have been a mere idle, non-judicial accusation, made through the newspapers, or at the hustings, or if even made judicially, he may have been acquitted of it.

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For these reasons, upon the authority of the case above cited, and which opinion is amply sustained by cases cited from the courts of other states, and of the United States, the warrant issued by the defendant Forbes by the procurement of the defendant Goddard, and upon which the defendant Mason arrested and imprisoned the plaintiff, was simply void. It follows, therefore, that it could afford no protection to the defendants for the imprisonment of the plaintiff.

Had the suit been against Mason alone, there would have been neither necessity for nor propriety in the introduction of evidence showing the pretended authority upon which the arrest and imprisonment of the plaintiff were made, but it was necessary, and hence proper, for the purpose of connecting Forbes with the arrest and imprisonment. The proceedings in the county court upon *habeas corpus*, upon which the plaintiff was discharged from the imprisonment, which constituted his cause of action, were necessary, as the expense of such proceedings was a consideration in his measure of damages, and consequently was admissible in evidence.

There was no error in the court's stating the law applicable to the objection raised by the counsel for defendants to counsel for the plaintiff's reading the copy of the complaint to the jury, when summing up. The provision of the statute which requires the court to reduce his instructions to the jury to writing, and file them with the record, has no reference to the decision of, or ruling by, the court on the points which arise during the progress of a trial, or while counsel are summing up to the jury. Such decisions and rulings, generally accompanied by necessary explanations, while not addressed to, nor intended for, the jury, are necessarily made in their hearing.

Plaintiffs in error objected to two remarks of counsel for the plaintiff in his argument to the jury. As to one, the objection was sustained and the counsel sufficiently re-

buked, and the jury cautioned; but as to the other, the court said that he would overrule the objection as to the defendant Mason. The departure from the line of legitimate discussion by counsel in this instance was not very gross; and while trial courts should not fail to notice and rebuke serious violations of the rules of discussion and argument on the part of counsel in the argument of causes to juries, it is not deemed proper to establish a rule by which trivial departures from correct practice, in this respect, would be held to be a reversible error.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM F. SELLARS ET AL. V. BLANCHE L. FOSTER ET AL.

[FILED JUNE 27, 1889.]

27	118
39	720
27	118
42	346
27	118
45	827
27	118
53	669
27	118
56	608

1. **Trial: EVIDENCE: BOOKS OF SCIENCE.** A table showing the expectancy of life in healthy persons of different ages, printed in a law book of general acceptance and authority in the courts of this state, as the Carlisle tables of expectancy, is admissible in evidence in cases where such evidence is applicable.
2. ———: ———: **ERROR WITHOUT PREJUDICE.** In an action by a widow on behalf of herself and infant child against defendants, saloon keepers and their sureties, the cause of action being the selling of intoxicating liquors to the husband and father of the plaintiff and her said child, by reason of the drinking of which he became and was intoxicated, and that while so intoxicated and endeavoring to board a moving freight train on a railroad he was run over by the cars and killed, on the trial there was introduced in evidence an excerpt in the form of a table of expectation of life, but which contained no intrinsic evidence of authenticity: *Held*, That while said excerpt was erroneously

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admitted in evidence, as it was more favorable to the party excepting than was the Carlisle table of expectation as contained in a law book which was properly admitted in evidence, it was error without prejudice to the plaintiff in error.

3. **Evidence: ERROR.** To entitle a plaintiff in error to a review of the ruling of the court below on the rejection of testimony it is required that the party complaining shall have made an offer of the testimony, clearly indicating what he expects to prove by the witness in response to the question propounded and overruled by the court. (*Fates v. Kinney*, 25 Neb., 120, and cases cited.)
4. **Instructions given and refused examined, and held,** no reversible error in their giving or refusal.
5. **The evidence considered, and held,** to sustain the verdict.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

C. C. Flansburg, and *James McNeny*, for plaintiffs in error, cited: *Abbot's Trial Evidence*, pp. 609, 724.

Judson Ferguson, and *John Dawson*, for defendants, cited: *Donaldson v. M. & M. R. R. Co.*, 18 Ia., 291; *Bowman v. Woods*, 1 G. Greene (Ia.), 441; *McHenry v. Yokum*, 27 Ill., 160; 2 Thompson on Trials, sec. 2407.

COBB, J.

This cause was tried in the district court of Harlan county, and brought to this court for review on error.

The plaintiff below, *Blanche L. Foster*, the widow of *Henry W. Foster*, for herself and as next friend for her minor child, *Edwin Foster*, complained that *William F. Sellers*, *Frederick W. Hildebrandt*, and *Frederick E. Dale*, on August 29, 30, and 31, and September 1, 1887, were engaged in the retail traffic in intoxicating liquors in Alma, Harlan county, and had on said days license to sell malt, spirituous, and vinous liquors, issued by the proper authorities of Alma; and that on said days *Matthew*

Becker, Minna A. Kamminga, John Robner, G. Raisch, Herman Nass, August Dobberstein, Philip Ott, and J. A. Smith were the bondsmen of William F. Sellars.

2. That at the time Sellars, Hildebrandt, and Dale procured license to sell liquor, on May 1, 1887, they severally gave bond in \$5,000 to the state that they would not violate any of the provisions of chapter 50, Compiled Statutes, entitled "Liquors," or any of the ordinances of the corporation of Alma, during the year from May 1, 1887, and ending April 1, 1888, and pay all damages that the community or individuals might sustain by reason of the sale of intoxicating liquors; that the bond of Sellars was signed by the above defendants, that of Hildebrandt by Josiah Zerbe and others, and that of Dale by Charles Hummell and others; and that all of said bondsmen were sureties for their respective principals on August 29, 30, and 31, and September 1, 1887; and true copies of the bonds are exhibited.

3. On said last mentioned days the plaintiff was the wife of Henry W. Foster, and a resident of Alma, and Edwin Foster is their minor child.

4. On the days last mentioned Henry W. Foster became intoxicated and continued in a state of intoxication and drunkenness for four days up to the time of his death; that he spent his time on those days in the saloons and places of business of Sellars, Hildebrandt, and Dale in Alma.

5. That they sold, gave, and furnished to him the liquors which caused his intoxication, and furnished it in sufficient quantities to cause his intoxication, and did cause his intoxication and keep him under the influence of liquor, and continued to sell, furnish, and give liquors and intoxicating drinks to him while so intoxicated.

6. That on September 1, 1887, while so intoxicated and under the influence of liquor so sold, furnished and given to him by said Sellars, Hildebrandt, and Dale, in Alma, Henry W. Foster undertook to board and get on a train

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of cars of the Burlington & Missouri River Railroad, in Alma, and fell under the train of cars and was thereby run over, and had his leg crushed, and was otherwise injured, from which he suffered and died on the last mentioned day; that said accident and death were caused from the effects of the liquors so sold to him by Sellers, Hildebrandt, and Dale.

7. That plaintiff and her minor child were both dependent upon Henry W. Foster for their means of support; that the proceeds of his labor and earnings amounted to \$1,000 per year, which he applied to the plaintiff's support; that he was thirty-five years of age, was healthy, energetic, and industrious.

8. The plaintiff and her minor child constitute one family, and are without means of support, and have sustained damages, in the premises, in the sum of \$15,000; and pray judgment, etc. The defendants, W. F. Sellers, Math. Becker, Minna A. Kamminga, John Rohner, G. Raisch, Herman Nass, Aug. Dobberstein, Philip Ott, and J. A. Smith answered admitting that Sellers is engaged in the retail liquor traffic in Alma, and that they are his bondsmen, but denying each and every other allegation of the plaintiff. Other defendants did not answer. There was a trial to a jury with findings for the plaintiff and damages assessed against the defendants named to the amount of \$2,500.

The motion of defendants for a new trial was overruled and judgment was entered against said defendants on the verdict.

The plaintiffs in error assign for review the following errors of the court below:

1. In admitting in evidence the longevity tables marked A.
2. In excluding the evidence of R. M. Liberty as to the reputation of Huston.
3. In rejecting the evidence of W. Campbell as to the reputation of Huston.

4. In overruling defendants' objection to the question to plaintiff as to how much deceased could have earned and contributed to his family's support during his lifetime.

5. In giving instruction 1 to the jury on the court's own motion.

6. In giving instruction 2 on the court's own motion.

7. In giving instruction 3 on the court's own motion.

8. In giving instruction 1 on the motion of the plaintiff.

9. In giving instruction 3 on the motion of the plaintiff.

10. In refusing instructions 3, 4, 5, and 9, requested by defendants.

11. In refusing and modifying instruction 3, requested by defendants.

12. In overruling the defendants' motion for a new trial.

On the trial the plaintiff offered in evidence a printed excerpt containing tabular rows of figures in the form of longevity tables of the expectancy of life, which was admitted against the objection and motion of defendants: (1), that there was no proper foundation laid for its introduction; (2), that the tables offered do not purport to be the Carlisle table of expectation of life; and (3), because the tables offered have not been proven to be the Carlisle table, or any other table of vitality, or authorized or taken from any text book of authority; and (4), because the same is incompetent, irrelevant, and immaterial. The plaintiff offered the further evidence of so much of page 534 of Maxwell's Pleading and Practice, 3d ed., 1880, as shows the Carlisle table of the expectation of life, to which the defendants objected for the same reasons stated in the last motion. The plaintiffs in error now argue in the brief of counsel that the court erred in the admission of these tables without proof that they were the Carlisle tables or that they purported to be such. While this objection might apply to the printed excerpt, it does not apply to the table set forth in Maxwell's Pleading and Practice. This text book

being an authority of general acceptance in the courts of this state, and the table therein being entitled Carlisle's table of expectation of life, with a brief history of its construction from vital statistics collected by its author, its general use and approval as such relieves it of the technical objections. It was admissible under the authority of most text writers on evidence. The excerpt, in the shape presented, may be admitted as lacking authenticity. It is not a copy of the table in the authority referred to. It sets down the expectancy of a person at thirty-five years of age to be twenty-nine and seven-twelfths years, while in the table from Maxwell's volume, which we hold to be admissible, the expectancy is set down at thirty-one years. The printed slip introduced being, therefore, less unfavorable to the plaintiff in error than the book, the admission of the former was error without prejudice to the party complaining.

The second and third errors relied on are based upon the rejection by the court of certain evidence offered by the plaintiffs in error for the purpose of impeaching one Charles Huston, who had testified as a witness for the plaintiff. It appears from the bill of exceptions that the defendants called as a witness R. M. Liberty, who testified that he had "lived in this town" (Alma) for four years; that he knew Charles Huston, and to the question, "Do you know his general reputation for truth and veracity in the community?" he answered: "As far as I know, it is bad." On motion of the plaintiff this answer was stricken out, as irresponsible and improper; and counsel for defendants put the following question: "State, if you know, this man's general reputation for truth and veracity in this community." The objection of the plaintiff to this form of inquiry was sustained, and the defendants put the following question: "State what you do know about his general reputation for truth and veracity." To which the plaintiff objected, and the objection was sustained; when

the defendant put the following question: "As far as people say anything about him, what is his reputation for truth and veracity?" to which the plaintiff's objection was again sustained; also the question, "State if you have heard of his reputation for truth and veracity in this community," which was overruled; and then was put the question, "Have you ever heard anybody call his general reputation for truth and veracity in this community in question?" to which the plaintiff's objection was also sustained.

The defendants then called Wm. Campbell, a witness on their behalf, who testified that he had lived "in this town" for nine years and that he was acquainted with Charles Huston:

Q. Do you know his general reputation for truth and veracity in this community?

A. I don't know it as general. I have heard a few persons speak of his truth and veracity.

The plaintiff's motion to strike out the answer, as irresponsible and improper, was sustained.

Q. Do you know his general reputation for truth and veracity in this community?

A. I don't think he is generally known.

Q. Do you know his reputation among those who do know him?

The plaintiff's objection to this question, as incompetent and improper, was sustained.

It nowhere appears in the bill of exceptions that the defendants below made any offer to the court to prove any specific facts for the impeaching of the witness Huston by either witness Liberty or Campbell, or by any other witness; and while there was in no event error in the sustaining of objections offered by plaintiff to the testimony of either witness, that need not be discussed anew here, as it has become a settled rule, in this state, that to entitle a plaintiff in error to a review of the ruling of the court below on the rejection of testimony, it is required that the party shall

have made an offer of the testimony, clearly indicating what he expected to prove by the witness in response to the questions propounded and overruled by the court.

The plaintiff being examined as a witness in her own behalf, and having testified to her marriage with Henry W. Foster, and as to his habits of intoxication, his injury while intoxicated, from falling under the moving cars of a railroad train, his subsequent death therefrom, and other circumstances tending to support her action against the defendants, her counsel proposed the question: "State how much he could earn and contribute to the support of his family during his lifetime." To which the defendants objected, as immaterial and improper, and the objection being overruled, she answered: "He could earn \$1,000 a year. I know he made \$1,200 the year before last, and last year he got \$20 a week, and some per cent, from Hutchins." The overruling defendants' objection, and permitting the plaintiff to answer this question, constitutes the fourth error argued in the plaintiff's brief. Counsel seem to understand the question as relating directly to and calling from the witness an opinion or knowledge, through psychological or metaphysical means, of what amount her deceased husband would have been able to earn and contribute to the support of his family during his future lifetime, had he been spared. While it is true that the loss to the plaintiff, for which, under the law, she had a cause of action against the defendants, consisted in the loss of that support, which she had a right to expect from the earnings of her husband, the value of that support could only be estimated by proof of what it had been in the past. The question may have been infelicitously put, but it will still bear the construction evidently placed upon it by the witness in her answer, and by the court, that what he had been able to earn and contribute in the past he might be able to do in the future. Her answer strongly indicates that such was the construction she placed upon it, and whatever

might be said of the question, abstractly, taken in connection with the circumstances of the answer, I think it free from error.

The fifth, sixth, seventh, eighth, and ninth assignments are based upon the court's instructions to the jury, numbers one, two, and three on its own motion, and the eighth and ninth assignments are based upon instructions numbers one and three, given on the motion of the plaintiff below. These instructions are set forth in the transcript.

"I. If you find the principal defendants were licensed to sell malt, spirituous, vinous, and intoxicating liquors or drinks, and that the other defendants were their bondsmen, as averred by plaintiff, and you find the deceased, Henry W. Foster, at the time of his death, was intoxicated, and that such intoxication was the cause of his death, and you find that he was the father and husband of plaintiffs, and they were dependent on him for their support as alleged, and you find all the principal defendants sold or gave to deceased intoxicating drinks, which contributed to such intoxication, and you further find the plaintiffs have lost the means of support which would have been supplied to them by said deceased, you must find for the plaintiffs against all the defendants, assessing your damages at actual value of such loss of support to plaintiffs, estimating his expectancy of life upon the Carlisle tables introduced in evidence before you; if you find the deceased was a strong, robust man, bearing in mind in any event you only can return a verdict (if any) against those principal defendants and their bondsmen, whom you find, by a fair preponderance of evidence, sold or gave to deceased the intoxicating drinks which contributed towards or caused intoxication of deceased, which caused his death; and should you find the deceased was intoxicated at the time of his death, and that his decease was caused by such intoxication, in no, nor in any, event can you return a verdict against any of the principal defendants and their bondsmen unless a fair pre-

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ponderance of the evidence satisfies you such principal defendants sold or gave to deceased intoxicating drinks, which caused or contributed to the intoxication of the deceased.

"In other words, should you find the deceased came to his death by means and reason of being intoxicated, at the time and place the principal defendants as gave or sold intoxicating drinks to deceased, and their bondsmen—and this you must find from the preponderance of evidence; and should you find a part or portion of the principal defendants gave or sold intoxicating drinks to deceased, and a part or portion did not, you will return a verdict against the former and their bondsmen, and in favor of the latter and their bondsmen, bearing in mind your verdict cannot exceed the amount of damages claimed against any principal defendant, and not to exceed the penalty of the bond signed by the respective bondsmen.

"II. This action being brought for loss of means of support which would have been supplied to the plaintiffs by the deceased father and husband had he lived, the extent of such loss is to be considered and measured by you by the kind, character, and value of the services of the deceased to plaintiffs, in his vocation or business when living; and as to the value of the loss of such means of support to the minor child of plaintiff, it will depend in some degree upon the age and ability to support himself, bearing in mind you cannot take into consideration and assess remote, speculative, or exemplary and punitive damages; but you can assess damages (if any) only to the extent of the real and actual value of the loss of means of support to plaintiff occasioned by the death of the father and husband.

"III. In passing on this case, should you find for the plaintiff, in estimating the damages you must take into consideration the situation of the deceased, his estate, if any, the physical condition and health of deceased, his means of earning money and a livelihood, and his habits of industry, his vocation, the daily, monthly, or annual

product or value of same, and whether any of the plaintiffs are of such tender age as to render them entirely dependent upon parents, and especially upon the deceased, for support, taking into consideration his reasonable expectation of life; and should you find he was a strong, robust man, the Carlisle tables of expectancy introduced in evidence before you will be the proper estimate of his, the deceased's, life."

The plaintiff then asked the following instructions, which were given :

"I. The jury are instructed that though they may believe from the evidence that the deceased had bought or taken liquor at places other than the saloons of William F. Sellars and Fred. W. Hildebrandt, still this fact would constitute no defense to this action, provided the jury believe from the evidence that the deceased obtained intoxicating liquors at the saloon of Hildebrandt and Sellars which contributed to his intoxication, and that his death resulted as a consequence of such intoxication."

"III. If you find for the plaintiff, you will find such damages as she and her minor child have suffered in a pecuniary way by the death of said Foster. It is proper in making up your estimate to take into consideration the occupation of the deceased, his annual earnings, his health, his age, habits, and taking all these facts into consideration, give such damages as will compensate her and her minor child for the loss they have sustained of the means of support in the death of said Henry W. Foster. And it is proper for you, in this connection, to take into consideration the probable length of the life of the deceased, Henry W. Foster, if he had not lost his life by the accident."

The first point urged by counsel in the brief, under this head, is that the first instruction authorized the jury to assess the damages for loss of support, basing the assessment solely on the Carlisle tables of expectancy. While the defend-

ants admit that this may be true, granting that the tables were properly admitted, and in case the deceased was shown to have been a strong, robust man, they contend that the charge was erroneous, it being without reference to his previous habits of life, and that it was inapplicable to the issues, in that the deceased was not shown to have been a strong and robust man, as stated in the instruction.

Taking up the examination of the plaintiff, where it was last referred to, when considering a former part of her evidence, it proceeded as follows:

Q. State if he supported you and your child well.

A. I never wanted for anything, until I came here.

Q. State his physical condition.

A. He was as healthy as any one.

The plaintiff was subjected to a long and exhaustive cross-examination in which no reference whatever was made to the physical condition, strength, or health of the deceased. From which, as well as from her direct examination, it appears that he was a photographer, which had been his vocation up to the time of his death, and being "as healthy as any one," as testified to by the plaintiff, there was furnished sufficient evidence to the jury of his being a strong, robust man.

The second point urged in the brief will be again referred to. Counsel complain of the second instruction that it assumes that the plaintiffs in error gave or sold to deceased intoxicating drinks which contributed to his death, and further assumes that the drinks so sold caused the intoxication which produced his death. A careful reading of the instruction impresses me with the belief that this section of the counsel's brief was written through a misapprehension or misapplication of fact, as the sole object and purpose of the instruction was to caution the jury against considering any remote or speculative damages to the plaintiff below, and against assessing exemplary or punitive damages, but only, in any event, to assess damages to the extent

of the real and actual loss occasioned by the loss of means of support from the husband and father. No reference is made in the instruction to defendants' giving or selling intoxicating drinks to the deceased which caused his death.

The objection made to the third instruction is that it tells the jury that, in estimating the damages which they can find the plaintiff entitled to recover, the physical condition and health of deceased, his means of earning money, his habits of industry, his vocation, or the daily, monthly, and annual value of the same, is alone to be taken into consideration, without reference to the part or portion of the product of his labor which went to the support of the defendant in error.

By reference to her testimony it will be seen that she had been married to the deceased three and one-half years; that after their marriage they lived at Ida Grove, Iowa, for one year, during which he was intoxicated twice. They removed to Syracuse, in this state, where they lived a year and a half, during which he was intoxicated but twice; that he never began to drink to excess "until he came here." From Syracuse they removed to Pawnee City, and remained less than a year, where he did not drink at all; they went thence to Republican City, remaining a month or six weeks; before she joined him there he drank some, afterwards he was slightly intoxicated once. About July 20, preceding his death, they came to Alma, where he shortly commenced drinking to excess; that during all the time prior to coming to Alma he devoted his entire earnings to the support of his wife and child; that when she was not with him he sent his earnings to her; that they accumulated about \$400 of household furniture, some of which she was obliged to sell for support after coming to Alma; that after coming, and up to the time of his death, though his earnings were considerable, but a trifling part was devoted to the support of herself and child; the balance and greater part was spent in the saloons of the defendants.

Applying the instruction to this evidence, I think it correct.

Returning to the first instruction, defendants say that it is inconsistent with the third instruction requested by them and modified by the court, and given to the jury, as follows:

"3. If the jury find from the evidence that the deceased was in the habit, prior to his coming to Alma, and afterwards, of drinking to excess, and that for several days prior to that of his decease he was intoxicated, and from the effects of which he became and was suffering from a depressed, unsteady, or excited, nervous condition, and while in such condition undertook to get on the train, and by accident was thrown under the train and killed, still you should find for defendants, unless you should find that the deceased was intoxicated at the time of the accident; that such intoxication caused or contributed to his death, and the liquor which produced this intoxication was sold or given to the deceased by the defendants or some of them, their agents or employés"; which the court refused to give but did give with this modification: "If you find the death of deceased was caused by nervous prostration, or physical disability, occasioned or caused by intoxicating drinks sold or given by defendants or either of them, against such defendants or either of them, or his or their bondsmen, you will be warranted in finding a verdict, even if deceased was not actually drunk or intoxicated when killed, provided his death was caused by such and said intoxicating drinks."

The argument is made that by the first instruction the jury were told that in order to find for the plaintiff they must find that the deceased was intoxicated at the time of his death, which was caused by such intoxication; while in the third instruction asked by defendants, as modified by the court, they are told that if they find that the death of deceased was caused by nervous prostration or physical dis-

bility, occasioned or caused by intoxicating drinks sold or given by defendants or either of them, against such defendants or either of them, or his or their bondsmen, they would be warranted in finding a verdict, even if deceased was not actually drunk or intoxicated when killed, provided his death was *the cause of such and said intoxicating drinks*.

The last clause of the modified instruction is evidently not correctly stated in the bill of exceptions. It never could have been so intended or written by the judge who presided; nor, had it been thus, could it have escaped the notice of the counsel, of either side, who conducted the trial of the case. It will therefore be corrected in this court and made to read "provided his death was caused by such and said intoxicating drinks," and so read there is no inconsistency between it and the first instruction of the court on its own motion. The mental and physical prostration, and inability of self-protection, in the face of danger, from excessive drinking of intoxicating liquors are consubstantial with drunkenness itself, and, with the same conditions, takes the same risks and penalties.

Counsel predicate some part of their argument upon, as they state it, the refusal of the sixth, seventh, and eighth instructions by the court on the motion of defendants. These instructions are not found in the bill of exceptions. There are only found, of those not heretofore set forth, the fourth, fifth, and ninth asked by defendants and refused by the court, as follows:

"4. The court instructs the jury that if the death of a party who receives an injury while intoxicated can be traced as the natural and probable result of any new and intervening cause, such as reckless exposure of himself, the liquor seller will not be responsible to the wife for the death.

"5. The jury are instructed as a matter of law that while a man is answerable for the natural and probable consequences of his own acts, still if his act happens to

concur with something extraordinary, and not reasonably to have been foreseen, and thus produce an injury, he will not be liable therefor; provided, that such extraordinary and unforeseen condition was not produced by, or was not the direct result of, his own wrongful act.

"9. And as a matter of law that the damages to be recovered in an action must always be the natural and proximate consequence of the wrongful act complained of. If a new force or power has intervened, of itself sufficient to stand as the cause of the mischief or injury, the first must be considered too remote."

It is argued that these were erroneously refused. The theory and text of these were those of the seventh, eighth, ninth, and tenth prayers for instructions offered and refused on the trial of the case of *McClay v. Worrall*, 18 Neb., 44; which were, I conceive, sufficiently considered and properly disposed of in the opinion of that reported case, which is referred to here rather than to go over, unnecessarily, the same ground again. There was no error in the refusal to give these instructions.

The evidence in this case sufficiently establishes the facts that the deceased had been for a considerable time drinking to excess of liquors sold and furnished to him by the principal defendant against whom the judgment, in the court below, was rendered; that on Monday, Tuesday, and Wednesday, the 29th, 30th, and 31st days of August, he was deeply intoxicated on liquors sold and furnished by defendant and his employes; that on neither Tuesday nor Wednesday night was he capable, from intoxication, to get his clothes off and go to bed; that he was under the influence of intoxicating liquors continuously up to the time of the accident which caused his death.

There can be no doubt from the evidence that on the morning of September 1 he drank twice, two drinks of spirituous liquor, though not in the saloon of the defendant Sellars, and that shortly before the accident he was

furnished with a bottle of whiskey, part of which was on his person at the time of the accident. This bottle of whiskey, the witness Huston testifies, was furnished to him by the barkeeper of Sellars, through the agency of the witness.

J. D. Whitelock, at whose house the deceased and his family were boarding, and who was called as a witness by defendants, testified that, on the day of the accident, at dinner time, he saw him, and in reply to defendants' counsel and the question, "Was he drunk or sober?" answered, "He had been drinking, but I would say that he was nearer sober than drunk; I said to his wife, he was sobering up; she said she wished he would."

On this day, September 1, in a condition between drunk and sober, but suffering from the depressed, nervous and enfeebled condition of mind and body, caused by long, continuous intoxication, from which he had in no degree recovered, in endeavoring to board a moving freight train of cars on the railroad track he was run over and killed.

While this case, in many of the features of the trial, and especially in the preparation of the bill of exceptions, is not entirely satisfactory to a reviewing court, there is in it no sufficient cause for reversing the judgment, and it is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

CLARA B. BARKER, APPELLEE, V. A. W. BARKER ET
AL., APPELLANTS.

[FILED JUNE 27, 1889.]

1. **Husband and Wife: DEED BY WIFE: FALSE REPRESENTATIONS.** A husband and wife being in possession of a homestead which was heavily mortgaged, and the husband, being sick and about to die, executed a quit-claim deed of said homestead to his brother for the purpose of enabling him to settle up the estate without expense. The wife at first refused to sign the deed, alleging that it would deprive her of her rights in the estate, but upon the assurance of persons employed by the grantee to procure the deed, in effect that she would lose none of her rights thereby, she was induced to sign and acknowledge the deed. *Held*, That the grantee was bound by the representations of the persons obtaining the deed for him.
2. **Jurisdiction.** The district court and not the county court has jurisdiction to set aside a deed obtained by false representations.

APPEAL from the district court of Greeley county. Heard below before TIFFANY, J.

H. G. Bell, and *G. C. Wright*, for appellants.

T. J. Doyle, and *M. Randall*, for appellee.

MAXWELL, J.

This is an action brought by the plaintiff against the defendant to require a reconveyance of certain premises. On the trial of the cause the court rendered a decree as follows.

"Now on this the 18th day of April, 1888, being the third day of the term hereof, this cause came up for hearing, and after hearing the evidence and argument of counsel the court finds that the signature of the plaintiff, Clara B. Barker, was obtained by undue influence and that the same

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was not signed by her own voluntary act. It is therefore ordered and decreed by the court that said deed as to plaintiff be set aside and held for nought, and that all rights and privileges of the plaintiff attach to the following described premises, to-wit: The south half of the southwest quarter of section twelve, township eighteen, range twelve west, in Greeley county, Nebraska, and that the defendants pay the costs of their action, taxed at \$. And the court further finds that the signature of deceased was genuine and voluntary, with leave to plaintiff to apply for further order herein at next term."

The testimony tends to show that the plaintiff is the widow of Bradley B. Barker, a brother of A. W. Barker, defendant; that on or about the 26th day of January, 1887, said Bradley B. Barker died; that less than two days before his death he made a will, under the provisions of which the plaintiff was to receive \$100; that on the next day after the will was signed it was submitted to an attorney of the defendant, who then suggested that the defendant procure a deed from Bradley and wife. The defendant was present in the law office of the attorney referred to and understood the purpose of such attorney to procure for him a deed for the premises in question from the plaintiff and her husband, but seems, if the testimony is to be believed, to have taken no part in the discussion of the matter. The estate was heavily encumbered, all the personal property being covered with chattel mortgages and the real estate by mortgages to a considerable amount. The land in question was the homestead. Bradley B. Barker had three children by a former marriage, the oldest, at the time of his death, being about sixteen years of age and the youngest about nine years. The plaintiff and said Bradley at the time of his death had been married about thirteen months, and had one child then about three months old. A considerable portion of the debts owing by the estate seem to have been due to defendant, A. W. Barker.

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On the night preceding the death of Bradley the deed in question was presented to him to sign, and he signed the same, apparently to prevent expense in settling the estate. The plaintiff then refused to sign the same, but after considerable delay, and it being represented to her that the object was to avoid settling the estate in the probate court and thereby save expense, and that she would lose none of her rights, she was induced to sign the deed. It is true that the testimony fails to show that A. W. Barker made any such representations, but they were made by persons employed by him to procure the deed, and so far as the legal effect is concerned are the same as if made by him. The finding of the trial court, therefore, is correct. It is evident, too, that defendant, A. W. Barker, is not the owner of this in fee, free from the trust. He took the title as trustee for the creditors of the estate, the surplus to go to the persons entitled to distribution; and no doubt he is accountable for the proper application of the property.

Some objection is made to the jurisdiction of the court it being claimed that the county court had jurisdiction, but such is not the case. The district court alone has jurisdiction in such matters. Upon the whole case it is apparent that the judgment is right and it is affirmed.

JUDGMENT AFFIRMED.

The other Judges concur.

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44	42
44	117

GEORGE E. BANKS, ADMINISTRATOR, ETC., v. D. M.
STEELE ET AL.

[FILED JUNE 27, 1889.]

Partnership: CLAIMS OF CREDITORS. The creditors of an insolvent firm, one of whose members is deceased, have a primary claim upon the partnership assets, their right being superior to that of an administrator of the deceased partner.

ERROR to the district court for Hitchcock county.
Tried below before GASLIN, J.

George E. Banks, for plaintiff in error, cited: Schouler, Executors and Administrators, sections 325, 326, 339; Lindley on Partnership (Ewell), p. 1044-1047; *Hoyt v. Sprague*, 12 Chicago Legal News, 25; *Sage v. Woodin*, 66 N. Y., 578.

R. B. Likes, and *J. Byron Jennings*, for defendant in error, cited: Maxwell's Pl. & Pr., 32; *Trowbridge v. Cross*, 7 N. E. Rep., 347.

MAXWELL, J.

In September, 1887, the defendant in error brought an action against Ollie M. Pearson, surviving partner of Smith & Pearson, and alleged in their petition that "between the 30th day of April, 1886, and the 11th day of August, 1886, the said defendant and one Jesse Smith were partners, carrying on the business of general merchants in the town of Trenton, Hitchcock county, Nebraska. That on the 11th day of August, 1886, said partnership was dissolved by the death of the said Jesse Smith, the defendant, Ollie M. Pearson, retaining the partnership goods and assuming the payment of the partnership debts, the said Pearson being the sole surviving partner of the firm of Smith & Pearson-

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That after the dissolution of said partnership the said Ollie M. Pearson sold a considerable portion of said partnership goods for cash and converted the same to his own use, and has refused to apply the same to the payment of the partnership debts. That between the 30th day of April, 1886, and the 11th day of August, 1886, the plaintiff sold and delivered to the firm of Smith & Pearson, at their request, goods and merchandise to the amount of \$742.83, and that between the 11th day of August, 1886, and the 18th day of September, 1886, plaintiff sold and delivered to this defendant, at his request, goods and merchandise to the amount of \$56.05; no part thereof has been paid except the sum of \$309.¹⁷/₁₀₀, and there is now due from the defendant to the plaintiff upon said account the sum of \$489.71 and interest thereon from the 3d day of December, 1886."

To this petition the plaintiff in error filed an answer as follows:

"That on or about the 14th day of December, 1886, the county judge of Hitchcock county, Nebraska, appointed the said George E. Banks administrator of the estate of the said Jesse Smith, deceased; that he duly qualified and is now acting in said office.

"2d. Said Jesse Smith, at his decease, was the owner and in possession of one-half interest in said stock of general merchandise of Smith & Pearson, at Trenton, Nebraska. The whole of said stock was of the value of \$2,820.82.

"3d. On or about the 13th day of August, 1886, T. J. Floyd was appointed special administrator of the estate of said Jesse Smith, by the county judge of Hitchcock county, Nebraska, and the said T. J. Floyd, on the 24th day of August, 1886, returned to said county judge an inventory and appraisement of the interest of said estate on said stock of goods, amounting to \$1,410.41.

"Said special administrator permitted and allowed said Ollie M. Pearson to retain possession of said stock of

goods, and to continue the business of the said late firm of Smith & Pearson, said Pearson agreeing to keep a true and correct account of all sales, and to deliver to said special administrator, on demand, all moneys, credits, goods and chattels belonging to said estate.

"Said Ollie M. Pearson sold a considerable portion of said goods between August 11, 1886, and December 3, 1886, and applied the proceeds to his own use as his part and interest in said stock of goods.

"On or about the 3d day of Dec., 1886, the said Ollie M. Pearson absconded from the state of Nebraska, and abandoned the remaining portion of said stock of goods to said special administrator, leaving the same in the care of a clerk.

"Before said special administrator knew of the actions of the said Ollie M. Pearson, the sheriff attached said stock of goods at the suit of these plaintiffs against the said late firm of Smith & Pearson. Although said suit was dismissed the sheriff refused to deliver said goods to the present administrator, but at the request of R. B. Likes, plaintiff's attorney, retained the same until the writ in this case was issued and the goods taken thereunder.

"Said defendant and cross-petitioner, George E. Banks, administrator, claims said goods attached in this case to belong to said estate of Jesse Smith, and prays judgment for the same or for their value in the sum of \$1,410.41, and interest and costs.

"As to the indebtedness of said late firm of Smith & Pearson to plaintiff, your interpleader is unable to say."

On the trial of the cause the court found in favor of the defendants in error and "That the debt upon which this action was brought is and was a partnership debt of the said firm of Smith & Pearson, of which Ollie M. Pearson is the sole surviving partner; that upon the death of said Jesse Smith, of the said firm of Smith & Pearson, Ollie M. Pearson, as the sole surviving partner, was en-

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titled to the possession of said goods for the purpose of paying the partnership indebtedness.

"That the amount of the partnership property is insufficient to pay the partnership debts, and that said copartnership is wholly insolvent, and that there is due the plaintiff from the defendant Ollie M. Pearson, as the sole surviving partner of Smith & Pearson, the sum of \$484.71, and its costs herein expended, taxed at \$..... And it appearing to the court that the property taken by the sheriff under said order of attachment has been sold by order of the court under the provisions of section 218, Civil Code of Nebraska, and that the proceeds thereof are now in the hands of the sheriff:

"It is, therefore, ordered that the sheriff pay over to the plaintiff so much of the same as will satisfy the aforesaid judgment and costs."

Banks, the administrator, appeals. There is a lengthy stipulation of facts, which under the pleadings seems to have been unnecessary. The question presented is the right of the administrator of a deceased partner, the firm being insolvent, to the possession of the partnership property as against a creditor of the firm. In *Bowen v. Billings*, 13 Neb., 443, this court held that where a partnership is insolvent the creditors of the firm have the primary claim on the partnership property, and the partnership debts are to be paid before any portion of such funds can be applied to other purposes. (*Murrill v. Neill*, 8 How. U. S., 414; *Converse v. McKee*, 14 Tex., 20; 3 Kent's Com., 65; Lindley on Part., 323*, and cases cited.) This rule has been constantly applied by this court and is decisive of this case. (*Roop v. Herron*, 15 Neb., 73; *Caldwell v. Bloomington Mfg. Co.*, 17 Id., 489; *Smith v. Jones*, 18 Id., 481.)

The rights of the creditors, therefore, will prevail over the claim of the administrator and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

EDWARD PHILLEO V. McDONALD & McMURRY.

[FILED JUNE 27, 1889.]

Replevin: BOND: JUDGMENT. Where, in an action in replevin, there is a failure to give a replevin undertaking, and the action proceeds under section 193 of the Civil Code, it becomes in substance an action in *trover* for the value of the property involved in the suit; and when in favor of the plaintiff the judgment should be for the amount of damages found due the plaintiff by the verdict of the jury, and not for the return of the property to him.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

J. B. Cessna, for plaintiff in error.

Dikworth, Smith & Dikworth, for defendant in error.

REESE, CH. J.

This was an action of replevin instituted by defendant, in error against plaintiff in error for the possession of a stock of hardware and for damages in the sum of twenty-five dollars (\$25.00).

The case was commenced in the county court, and appealed to the district court. The return of the constable to the summons was as follows:

"Received this writ, and on the same day I took the goods and chattels within described and have caused them to be valued by the oath of A. Bigelow and M. N. Cress, two responsible persons, whose valuation in writing and signed by them is herewith returned; and the plaintiff having failed to give the undertaking required by law, within twenty-four hours from the taking of the property, I redelivered said property to the said defendants. I also

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delivered to Edward Philleo a true and certified copy of this order."

A jury trial was had in the district court, which resulted in a verdict in favor of the plaintiff in the action, assessing his damages at three hundred and fifty-one dollars and ninety cents.

After the return of the verdict plaintiff in error moved the court for an alternative judgment, providing that in case the defendants in the action fail for twenty days to return the property, the plaintiff then have judgment for the amount of the verdict. This motion was overruled. A motion for a new trial was then made and overruled, but it need not be here noticed in detail. Plaintiff in error, who was defendant below, presents the case to this court by proceedings in error. There is but one controlling question involved in the case, and that is whether or not where a replevin suit is instituted, but no replevin undertaking is given, an alternative judgment can be rendered, or whether the action should be for money only. Section 193 of the Civil Code is as follows: "When the property claimed has not been taken, or has been returned to the defendant by the sheriff for want of the undertaking required by section one hundred and eighty-six, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper; but if the property be returned for want of the undertaking required by section one hundred and eighty-six, the plaintiff shall pay all costs made by taking the same."

It is contended by counsel for plaintiff in error that in replevin cases, if the property is delivered to the plaintiff in the action, and final judgment is subsequently rendered against him, then there must be judgment for the return of the property, and if return cannot be had, then the payment of the value thereof, with damages for detention; that the same rule must be applied to cases which are

prosecuted under section 193 above quoted; that the object of an action in replevin is to recover specific personal property, and the liability for the value of the property accrues only when a return of the property cannot be had; citing *Lee v. Hastings*, 13 Neb., 508; *Frey v. Drahos*, 10 Id., 594; *Reavis v. Horner*, 11 Id., 479.

It is not believed that these cases are in point, for the reason that replevin undertakings were given, and they do not fall under section 193. We cannot agree with the learned counsel for plaintiff in error in the construction to be given to the section above referred to. In *Meredith v. Kennard*, 1 Neb., 312, which was an action in replevin, but in which no undertaking was given and the property not taken, the verdict was as follows: "We, the jury in the above entitled cause, find for the defendant."

Chief Justice MASON in writing the opinion of the court copies the section above referred to, and says:

"Cases may occur when a general verdict alone will be a substantial response to the issues taken by special matters set up in the answer when all the facts set up in the answer are negatived by the general verdict. Is not this the precise case at bar? The defendants deny the property of Meredith in the notes and plead property in themselves. This general verdict responds to and finds all the issues made between the parties in favor of the defendant, and is such a finding as the statute contemplates when the property has not been taken on the writ of replevin. We think the verdict in form sufficient and responsive to the issues."

This ruling we think has been substantially followed in *Hainer v. Lee*, 12 Neb., 452, and in *Romberg v. Hughes*, 18 Id., 579. See also *Smith v. McGregor*, 10 Ohio State, 461; *Brewster v. Carmichael*, 39 Wis., 456; *Bigelow v. Doolittle*, 36 Id., 115.

By the plain language of the statute, and by the construction given thereto by the cases above cited, we are

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convinced that where there is a failure to give a replevin undertaking, and the action proceeds under section 193 of the Civil Code, it becomes in substance an action *in trover*, and is only for the value of the goods detained by the defendant in the action.

The judgment of the district court must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM V. MORSE ET AL., APPELLANTS V. JOHN
RABEN ET AL., APPELLEES.

[FILED JUNE 27, 1889.]

Creditor's Bill: HUSBAND AND WIFE. In an action in the nature of a creditor's bill, to set aside a deed made to the wife of a judgment debtor, by the vendor of real estate, in order that the real estate might be applied to the payment of the plaintiffs' judgment, there was sufficient evidence presented to the trial court to sustain the finding that the husband, while in a prosperous financial condition, caused to be conveyed to his wife one hundred and sixty acres of land in the county of B., which conveyance was made in the year 1883. In the year 1886 it appears that the wife sold the real estate, realizing by such sale a large increase upon the amount invested at the time of the purchase; that she permitted the husband to take the money received from the sale and apply it to the payment of the indebtedness of a partnership of which the husband was a member; that soon after the partnership failed and became insolvent, when the husband repaid to his wife out of the partnership assets the money which he had received from her, and which had been devoted to the use of the partnership; that with this money, by direction of the wife, the husband purchased the real estate in controversy, and that they had borrowed a large sum of money upon the real estate, which, together with the money received from the husband, was applied to the construction of the house thereon, rendering the

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property valuable; that the money expended in purchasing the property and in constructing the building thereon was equal to the amount borrowed upon the credit of the property added to the amount formerly loaned by the husband to the wife. In such case the decree of the district court dismissing the creditor's bill was affirmed.

APPEAL from the district court of Hall county. Heard below before TIFFANY, J.

C. B. Kellar, W. R. Bacon, and A. C. Wakely, for appellants, cited: *Schouler on Husband and Wife*, sec. 149; *Shaeffer v. Shepard*, 54 Ala., 244; *Reynolds v. Robinson*, 64 (N. Y.), 589; *Coleman v. Burr*, 25 Hun. (N. Y.), 239; *Bond v. Bunting*, 78 Pa. St., 210; *Payne v. Powell*, 5 Bush (Ky.), 248; *Parsons on Contracts*, 34-5.

J. H. Smith, for appellee, cited: *Arndt v. Harshaw*, 10 N. W. Rep., 390; *Feller v. Alden*, 23 Wis., 301; *Dayton v. Walsh*, 47 Id., 113.

REESE, CH. J.

This action was instituted in the district court of Hall county for the purpose of subjecting the middle $\frac{1}{3}$ of lot 3 in block 80, in the city of Grand Island, to the payment of a judgment held by plaintiff against defendant, John Raben, and one F. J. Engle. A trial was had in the district court which resulted in a general finding and decree in favor of defendant. Plaintiff appeals to this court. The question presented is one of fact alone. It is shown by the record, substantially, that in the early part of 1885, and prior thereto, defendant John Raben was in a good financial condition, worth in real estate and personal property from twenty to thirty thousand dollars. That year, from some cause not fully explained, but attributed to a shrinkage in values of such goods as are usually kept in a general store, and in which business he was engaged at that time, he be-

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came embarrassed, and finally insolvent. F. J. Engle was in partnership with him at the time that plaintiff's debts were contracted. On the 5th day of January, 1886, plaintiff recovered a judgment in the county court of Hamilton county against Raben & Engle for the sum of five hundred and fifty-two dollars and ninety-four cents damages, and three dollars and seventy-five cents costs of suit. A transcript thereof was soon thereafter filed with the clerk of the district court of said county and entered upon the judgment record of the district court. On the 19th day of July, 1887, a transcript of the judgment of the district court was filed in the office of the clerk of the district court of Hall county. Upon the same day execution was issued thereon to the sheriff of Hall county, and on the 20th the sheriff returned the execution unsatisfied, stating in such return that after diligent search he had been unable to find any goods or chattels, land or tenements, whereon to levy, and had returned said execution after levying it upon the property involved in this action.

It was alleged in the petition that during the year 1886 the defendant, John Raben, purchased the lots in controversy from John Wallichs, and being insolvent and there being judgments against him unsatisfied to the amount of about eight thousand dollars, in Hamilton county, at the time of the purchase, he caused the legal title to be taken in the name of his wife, Alvina Raben; that the property was purchased by John Raben, one of the firm of Engle & Co., and of which he was a member at the time of the contracting of the debt, and that the title to the property was taken in the name of defendant Alvina for the purpose of defrauding the creditors of the said John Raben, and of Engle & Co.

All allegations of fraud were denied in the answer, and it was alleged that the real estate in question was the individual property of Alvina Raben, the same having been purchased with money which belonged to her separate estate.

On the 19th day of January, 1883, and while John Raben was financially solvent and prosperous, he purchased of William Graves the southwest quarter of section twenty-four, township fifteen, range three, for the consideration of \$250, subject to a mortgage, the amount of which does not clearly appear from the record. This land is in Butler county, and is situated but a short distance east of David City; and it is claimed by defendant that the purchase was made with the money of Raben's wife which he, prior to that time, had given her. On the 29th day of March, 1886, Alvina Raben sold the land to one Ansen Virgl for the consideration of \$1,300, subject to the mortgage referred to. It is claimed that the proceeds of the land belonging to Mrs. Raben were given to defendant, John Raben, or rather loaned to him, and by him used in the payment of a part of the debts of the firm of Engle & Co. prior to the purchase of the lots involved in this action. On the 6th day of June, 1886, John Raben, accompanied by his wife, perhaps, went to the city of Grand Island and purchased of Wallichs the lots in question, taking a contract of purchase therefor in his own name. The purchase price was \$1,400. He commenced the construction of a brick business house upon the ground about the 6th day of December, 1886. Being unable to finish the building, he applied to Wallichs for a loan to enable him to pay up the balance due upon the lots and to apply the residue to the completion of the building. The sum of \$2,600 was loaned and for it Raben and his wife executed their promissory note and secured its payment by a mortgage on the premises. The money loaned belonged to defendant, Anna Egge, for whom Wallichs was acting as agent. From this twenty-six hundred dollars so loaned the purchase price of the lot was deducted and Wallichs executed his deed to Mrs. Raben. It is shown by the testimony of John Raben that the total cost of the house and lot was thirty-nine hundred and thirty-one dollars and

twenty-five cents. If this be true, the cost of the house and lot would be about equal the amount of money borrowed from Mrs. Egge and the thirteen hundred dollars realized from the sale of the real estate in Butler county, and from the reasoning presented by counsel for defendant there would seem to be no fraud in the transaction. But it is claimed that the evidence shows that a large amount of the material used in the construction of the house was purchased by defendant with means which properly belonged to the firm of Engle & Co., and that plaintiff, as a creditor of that firm, can follow it into this building and apply it to the payment of their judgment.

It is shown that about 6,800 bricks were purchased of Mr. Neihardt, of Aurora, and about eighty dollars' worth of iron from another party, and about three hundred and ten dollars' worth of lumber from Adam Hogue, a lumber dealer in Grand Island, which appears to have been paid for out of the partnership fund of Engle & Co., that is, out of funds which should have been placed to the credit of that firm. It is claimed, therefore, that the court erred in rendering its decree in favor of the defendant. It is a well established principle of equity that the partnership assets should be used first in payment of partnership debts, and that therefore partnership creditors have the right to look to such assets for the payment of their claims. But this rule is to be invoked by creditors generally, and cannot be claimed as the special right of plaintiff in this case to the exclusion of other creditors.

If, then, an amount of money, equal to or greater than the partnership assets applied to the construction of the house, had been taken from the money of Mrs. Raben upon a loan to her husband and applied to the payment of the partnership debts as testified to by him, it would of course not be inequitable to repay her out of the same fund, and of this creditors generally could not complain.

It therefore becomes necessary to enquire whether or not

the means of Mrs. Raben were applied to the construction of the house and to the purchase of the lot. If so, the decree of the district court was right, and should be affirmed.

Since Mrs. Raben became the owner of the real estate in Butler county, at a time when the solvency of her husband could not be questioned, and perhaps for value actually paid by her, although we do not think this a material matter, there is no doubt but that she could retain the money arising from the sale of that real estate; this would be thirteen hundred dollars. Raben testified that he borrowed this money from his wife, and that after he had used it he allowed her interest at the same rate which the indebtedness which was paid with her money was drawing.

Now, suppose this agreement was made between them, or suppose this course was pursued with her money, and that he afterwards repaid it out of the partnership funds, and with the same funds purchased the lot in question and constructed the house, we do not see that it could be questioned but that she would be entitled to the property, and that the creditors could not interfere. The same rule as to the finding of the district court, upon the evidence where it is conflicting, must be applied to this case as to any other.

By the finding of the district court, there being evidence to support it, we must assume that the course designated has been pursued by Mr. Raben in his transactions with his wife as with his other creditors. This being true, we cannot see but that the decree of the district court must be affirmed, as being sustained by sufficient evidence, and in accordance with the theory of the case presented by defendant.

We confess that to us this holding is not in entire accordance with the way in which we view the evidence which was submitted to the trial court. But the rule is a salutary one, that where the trial court sees the witnesses, hears them testify, observes their manner and demeanor upon the

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witness stand, becomes more familiar with the surrounding circumstances than is possible for an appellate court to do by inspecting the record, its finding will not be molested unless clearly wrong. The rule to be applied is generally in furtherance of justice and one that should be observed. The decree of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

PHILIP LIKES ET AL. V. GEORGE WILDISH ET AL.

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[FILED JUNE 27, 1889.]

1. **Mortgage: REAL ESTATE: FORECLOSURE: REDEMPTION.** A mortgage on real estate was given in 1876 to secure one promissory note for \$125 due October 1, 1876, and one promissory note for \$200 due March 1, 1877. Soon after the first note was due an action in equity was instituted thereon to foreclose the mortgage, the petition stating the facts as to both notes but asking for a foreclosure as to the first alone. After both notes became due, no further pleadings having been filed, a decree for the amount due on both notes was taken by default, and the premises sold under the decree, the sale confirmed, and a deed made to the purchaser. Nearly ten years afterwards an assignee of the mortgagor filed a bill to redeem upon the sole ground that the decree for the amount of both notes was unauthorized and void. *Held, First*—That a demurrer to the petition was properly sustained. *Second*—That a sale under such a decree is voidable, not void. *Third*—That the procedure in the case is contrary to equity and liable to abuse, and if by reason thereof a mortgagor has been defrauded of his property, a court of equity in a proper case will grant him relief.
2. **Default.** The failure to enter a formal default against a defendant who has been duly served with process and failed to answer when so required is not error.

ERROR to the district court for Hamilton county. Tried below before NORVAL, J.

Philip Likes, and *J. H. Smith*, for plaintiff in error, cited: *Schultz v. McLean*, 18 Pac. Rep. (Cal.), 775; *Gage v. Mayer*, 7 N. E. Rep. (Ill.), 97; *Jones v. Null*, 9 Neb., 254; *Smith v. Buse et al.*, 28 N. W. Rep. (Minn.), 220; *Meskimen v. Day*, 10 Pac. Rep. (Kan.), 14; *Brown v. Swift*, 1 S. W. Rep. (Ky.), 474; *Gale v. Shillock*, 29 N. W. Rep. (Dak.), 661; *Taylor v. Courtney*, 15 Neb., 190.

Agee & Stevenson, for defendant in error, cited: *Freeman* on Judgments, secs. 126-135; *Hardy v. Miller*, 11 Neb., 397; *McPherson v. Bank*, 12 Id., 205; *McKeighan v. Hopkins*, 14 Id., 361.

MAXWELL, J.

This is an action to redeem certain real estate from the foreclosure of a mortgage. A demurrer to the petition was sustained in the court below and the action dismissed. The first part of the petition is as follows: "That on the 27th day of June, 1877, the United States issued a patent to one Charles C. Pierce, and thereby conveyed to said Pierce in fee-simple the following described land situated in Hamilton county, Neb., to-wit: The southeast quarter of section 6, in township 10, of range 6 west. That while said Charles C. Pierce was the owner of said land, to-wit, on the 21st day of January, 1886, he and his wife, Ruth T. W. Pierce, conveyed said land to the plaintiffs for value received and the plaintiffs are now, and have been, the owner in fee-simple since the said 21st day of January, 1886, of said land. That on the 21st day of March, 1876, said Charles C. Pierce made, executed, and delivered to one C. B. Ragan two certain promissory notes, one for the sum of \$125, due October 1, 1876, with interest at 10 per cent, and one for

\$200, due March 1, 1877, with interest at 10 per cent." These notes were secured by a mortgage on real estate, which mortgage was duly recorded. In November, 1876, an action to foreclose the mortgage to secure the payment of the \$125 note was brought and a summons duly issued and served, and in June, 1877, a decree was taken by default for the sum of \$364.83, the second note for \$200 having become due in the meantime. It is alleged that no default was taken against the defendants before entering the decree. This, however, does not affect the decree. The defendants in that action were in default, the time to answer having expired long before the decree was rendered, there was a default in fact and the failure to make a formal entry to that effect is not in such cases ground of error.

The allegations and prayer of the petition for the foreclosure of the mortgage were as follows: "And said plaintiff further avers that the said Charles C. Pierce did not pay or cause to be paid the said C. B. Ragan the said sum of \$125 with interest when the same became due according to the tenor and effect of the first mentioned promissory note of said Charles C. Pierce, nor any part thereof; nor has the said Charles C. Pierce yet paid or caused to be paid the same to the plaintiff or any part thereof, whereby the said deed has become absolute. And said plaintiff says that no proceedings at law have ever been commenced or had to recover the debt secured thereby or any part thereof, and that no part of said debt has ever been collected or paid. The plaintiff, C. B. Ragan, therefore prays that an account be had of the amount due on the said promissory notes before mentioned; that the court decree a sale of the mortgaged premises, or so much thereof as shall be sufficient to satisfy the claim of the said plaintiff, unless within a short time, to be fixed by the court, the said defendant pay to the said plaintiff the sum of \$125, with interest at the rate of 10 per cent from March 21, 1876, and costs and such other and further relief as equity may require."

In June, 1877, without amending his petition or prayer or filing a supplemental petition, a decree was rendered in favor of the plaintiff in that action as follows:

"C. B. RAGAN
v.
CHARLES C. PIERCE AND
R. T. W. PIERCE.

"On this 13th day of June, 1877, came C. B. Ragan by A. W. Agee, his attorney, and the said Charles C. Pierce and R. T. W. Pierce, his wife, defendants, still failing to answer or demur to said plaintiff's petition, it is considered by the court that the said plaintiff is entitled to an account of an amount due him in the premises, and the court do find that the said Charles C. Pierce and R. T. W. Pierce are justly indebted to said plaintiff on the note and mortgage in said plaintiff's petition described, in the sum of \$364.83, and his costs, to be taxed in the sum of \$——. It is therefore ordered, adjudged, and decreed that in case the said Charles C. Pierce fail for 20 days from the rising of this court to pay to the said plaintiff the sum of \$364.83 found due as aforesaid, with costs of suit, that an order issue to D. A. Scoville, who is hereby appointed a special master commissioner for that purpose, commanding him to cause the said lands and tenements in said plaintiff's petition described, lands and tenements situated in the county of Hamilton, state of Nebraska, to-wit, the southeast $\frac{1}{4}$ of section No. six, township No. ten north, range six west, of the 6th principal meridian, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, to be appraised, advertised, and sold according to law to satisfy said sum of money so as aforesaid found due with costs and increase costs."

No appeal was taken, but it is claimed by the plaintiffs that the decree is void for want of jurisdiction as to the excess over \$125. No stay seems to have been taken, and in November, 1877, an order of sale was duly issued and

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the mortgaged premises were duly appraised and sold to George Wildish for the sum of \$333. This sale, in June, 1878, was duly confirmed and a deed thereafter made to the purchaser. Wildish has conveyed a portion of the land to other parties. The question presented is, Is the decree of foreclosure void? We think not. As to the sum of \$125, and interest thereon, it was a valid decree, and a sale thereunder would convey a valid title. There is no allegation in the petition that more land was sold than would have been necessary to satisfy the amount due on the \$125 note; and while it is reasonable to suppose that such was the case, yet in the absence of an allegation to that effect, we cannot presume that to be the fact, as the land may have been so situated that it was necessary to sell it all. That the judgment was erroneous there is no doubt (*Lipp v. Horbach*, 12 Neb., 371); and whether as to the excess of \$125 and interest we need not determine, as there is nothing to show that the result of the sale would have been different had the decree been for \$125 and interest thereon. A court of equity will not permit the mode of procedure followed in this case, and if the effect has been to work injustice to the mortgagor whereby an undue advantage has been taken of him and his property sacrificed, relief in a proper case will be granted in some form, but so far as the facts stated in the petition show the mortgagor suffered no damages in consequence of the irregular proceedings, and the plaintiffs are not entitled to relief.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

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PETER BURKE V. LEWIS D. MAGEE ET AL.

[FILED JUNE 27, 1889.]

1. **Trial Before Justice of Peace.** A justice of the peace has no authority to charge a jury as to the law of a case tried before him.
2. ———: **VERDICT.** An instruction that "If the jury wished to compromise the amount of damage, they could each one write his amount of damage separately on paper and then add them together and divide them by five, the number of jurymen, and let that be their verdict," is erroneous, as it substitutes chance or hazard for the deliberate judgment of the jury as a whole.

ERROR to the district court for Frontier county. Tried below before COCHRAN, J.

W. S. Morlan, W. H. Latham, and B. H. Vaughn, for plaintiff in error.

W. H. Snelling, for defendants in error.

MAXWELL, J.

The defendants in error brought an action for trespass against the plaintiff in error before a justice of the peace. The case was tried before a jury of five. The jury, after the case had been submitted to them, seemed to be unable to agree, whereupon the justice, at the request of the attorney for defendants in error, instructed them as follows:

"If the jury wished to compromise the amount of damage, they could each one write his amount of damage separately on paper and then add them together and divide them by five, the number of jurymen, and let that be their verdict."

This instruction was duly excepted to by the plaintiff in error. The jury returned a verdict in favor of the defendants in error, on which judgment was rendered. The case

was taken on error to the district court, where the judgment of the justice was affirmed.

In at least two cases this court has held that under our statute a justice of the peace has no authority to give instructions to a jury. (*Ives v. Norris*, 13 Neb., 252; *Wilson v. Young*, 15 Id., 628.) But even if the justice had the power to charge the jury, the instruction is clearly erroneous. A verdict is, or should be, the result of an agreement—of deliberate judgment—not of chance or hazard, therefore, where the jury agree in advance to be bound by an uncertain amount as directed in the instruction in question, the verdict is not the deliberate judgment of the jury. The sum thus agreed upon may be an approximation to what is just and right in the case, and each juror, seeing this, after the amount has been ascertained, may adopt it as his verdict; but if he do so it is because in his opinion, under the solemnity of an oath, the verdict will be right. No juror, however, can conscientiously bind himself in advance to agree to a verdict which had not then been formulated, and the amount of which must be a matter of conjecture. In many cases persons are called as jurors who have a particular friendship or dislike for one of the parties, and this feeling, being stronger than their sense of justice, controls, or at least has great influence on their minds in shaping the verdict. Hence such jurors in many cases will fix upon the amount of the verdict at too high or low an amount as may for the time being suit their fancy. And even where all the jurors make an earnest effort to be governed by the evidence, there is danger of mistakes by giving undue weight to immaterial points or overlooking material facts. A verdict, therefore, should be the deliberate judgment of each member of the jury, to be arrived at after a careful consideration of all the testimony in the case. A verdict in each case on the trial is desirable, because, if just, it will probably put an end to that litigation. If, however, it was not arrived at by a

careful consideration of the evidence, it cannot be said to be the judgment of each member of the jury, and does not in fact, as its name imports, speak the truth. The direction as to the mode of arriving at a verdict is clearly erroneous. (*Dana v. Tucker*, 4 Johns. (N. Y.), 497; *Guard v. Risk*, 11 Ind., 156; *Johnson v. Perry*, 2 Humph. (Tenn.), 569; *Barton v. Holmes*, 16 Iowa, 252; Maxw. Pl. and Pr., 4th Ed., 489.)

The judgment of the district court is reversed, and also that of the justice, and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

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29	733
27	158
151	866
52	9

WILLIAM GILLEN ET AL. V. ANDREW RILEY ET AL.

[FILED JULY 11, 1889.]

1. **Account Stated: SALE OF LIQUORS: EVIDENCE.** In an action by R. and D. against G. and J., on an account stated, which account consisted of five bills of goods sold and delivered, amounting in the aggregate to \$564.40, the defendants answered, first, by a general denial, and second, "for a counter-claim that the amount claimed to be due of the account set out by plaintiffs is for intoxicating liquors sold by plaintiffs to defendants between the 20th of October, 1883, and July 13, 1885; that on and between said dates plaintiffs sold to defendants intoxicating liquors to the amount of \$2,453.58, and that all the other goods sold during said period by plaintiffs to defendants amounted to only \$150; and said defendants have, on and between December 19, 1883, and March 13, 1886, paid to plaintiffs various sums of money, amounting in all to \$1,710.63, which was paid for intoxicating liquors, except \$150, and that all the time between and including the said dates plaintiffs were engaged in the business of wholesale dealers in malt, spirituous, and vinous liquors, in the city of Omaha, Nebraska, without having taken out a license for such sales," etc. *Held*, that such answer amounted

to a plea of confession and avoidance, and rendered proof of their account or of the statement thereof by the plaintiffs unnecessary; and upon proof by the defendants of the matter pleaded in avoidance would amount to a full defense.

2. **Liquors: SALE.** A liquor dealer must have a license from the city or county in which his store is kept. With such license he may send out agents and take orders in any part of the state, for goods to be selected and forwarded from the stock kept in such store, and is not required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agent. (*Haug v. Gillett*, 14 Kan., 140.)
3. ———: **EVIDENCE.** The defendants having pleaded in avoidance of the action that the intoxicating liquors, for which in part the action was brought, were sold by the plaintiffs without first having obtained license therefor, it was incumbent upon them to prove *prima facie* that, at the time of such sales *pro tanto*, the plaintiffs were without such license; an instruction to that effect, *held*, properly given.
4. ———: **INSTRUCTIONS.** The third paragraph of instructions, given by the court on its own motion, and the first and third instructions asked by the defendants, and refused by the court, examined and *held*, properly given and refused.
5. **Instructions.** An instruction or a series of instructions headed "Instructions given by the court on its own motion," and so placed in the record as to be clearly separate and distinguishable from the instructions presented by the parties, *held*, a sufficient compliance with the terms of the act of February 25, 1875.

ERROR to the district court for Dixon county. Tried below before POWERS, J.

W. E. Gantt, for plaintiff in error, cited: *Auzerais v. Naglee*, 15 Pac. Rep., 371, 372; *Volkening v. DeGraaf*, 81 N. Y., 268, 270; *Webber v. Howe*, 24 Am. Rep., 590; *Dillon v. Allen*, 26 Id., 145; *Woods v. Armstrong*, 25 Id., 671; *Delahaye v. Heitkemper*, 16 Neb., 476; *Schermerhorn v. Talman*, 14 N. Y., 93; *Bateman v. Robinson*, 12 Neb., 508.

Barnes Brothers, for defendant in error, cited: *Greenleaf on Evidence*, vol. 1, secs. 74, 80, 81; *State v. Cooper*,

28 Cent. Law Journal, p. 94; 1 Benjamin on Sales, p. 321, and cases cited; *Haug v. Gillett*, 14 Kan., 140; *Gill v. Kauffman*, 16 Id., 35; *Boothby v. Plaisted*, 51 N. H., 436.

COBB, J.

This cause comes to this court on error from the judgment of the district court of Dixon county.

The plaintiffs below allege that an account was stated with the defendants on May 10, 1886, on which there was due \$2,084.95, which the defendants agreed to pay; and that there was paid on the account \$1,516.55, and there is still due \$568.40, with interest at seven per cent from May 1, 1886, which the defendants have failed to pay though requested; and prayer for judgment.

The defendants below answered: denied that an account was stated, or that they are indebted to plaintiffs as alleged; and for a counter-claim set up that the amount due on the plaintiffs' account is for intoxicating liquors sold by plaintiffs to defendants between October 20, 1883, and July 13, 1885; that between said dates plaintiffs sold to defendants intoxicating liquors, amounting to \$2,458.51; that all other goods, for the same period, sold by plaintiffs to defendants amounted only to \$150; that defendants have, between December 19, 1883, and March 13, 1886, paid to plaintiffs various sums, on account, amounting to \$1,710.63, for intoxicating liquors only, excepting \$150, for other goods. That for the whole time, including said dates, plaintiffs were engaged in the business of wholesale dealers in malt, spirituous, and vinous liquors, in Omaha, without being licensed as required by the provisions of chapter fifty, Compiled Statutes of Nebraska, relating to the sale of liquor; and all of such sales by plaintiffs to defendants were in violation of law, of which, at the times of purchase, defendants had no knowledge; with prayer

for judgment that the account be declared void, the action dismissed, and the defendants recover for the sum of \$1,560.63, the amount paid for the intoxicating liquors as stated.

The plaintiffs replied denying each and every allegation, except that as to the accounts being for the sale of intoxicating liquors, and specifically denying that such sale was without license, as set up.

There was a trial to a jury with findings and verdict for the plaintiffs. The defendants' motion for a new trial was overruled and judgment entered on the verdict for \$568.40.

The plaintiffs in error present the following grounds for review :

1. The verdict is not maintained by sufficient evidence.
2. The verdict is contrary to law.
3. For errors at law occurring at the trial.
4. In refusing to give the first, second, and third instructions asked by the defendants.
5. In giving, on its own motion, instructions Nos. 1, 2, 3, 4, 5, and 6.
6. In reading to the jury the instructions given, when the same were not marked given.

Under the first error assigned the counsel argue that there was not sufficient evidence of an account stated. In his deposition the plaintiff below, Thomas A. Dillon, replying to the seventeenth interrogatory, to state when any statement of this account had been presented to the defendants, answered, that there had been several statements; at one time they claimed that they got their books mixed up, and he rendered them an itemized statement, in order to help them out, and get their books straightened up.

Q. State whether or not they have made any objections to the account.

A. Not to my knowledge.

Q. [The account was here shown to the witness.] State whether that is a correct statement of the account, and

whether the amount there is the true amount which is due and owing?

A. That is a correct statement of the amount due us at the present time.

The witness here refers to Exhibit A, attached to his deposition, as follows:

OMAHA, September 29, 1887.

Messrs. JONES & GILLEN, Ponca, Neb.,

In account with RILEY & DILLON.,

Wholesale Liquors and Cigars, 1309 Douglas Street.

1885.

Dr.

April 4. To balance.....	\$ 34 60
May 11. To merchandise.....	74 75
May 15. To merchandise.....	405 30
July 11. To merchandise.....	47 75
July 13. To merchandise.....	10 00
	<u>\$568 40</u>

If the case depended upon this evidence alone, I should doubt that there was sufficient proof of an account stated. The witness does not state that this identical account was stated or rendered to the defendants, and, as rendered and as here set out, was acquiesced in by them, as a true statement of accounts between them; but by reference to the answer of defendants it will be seen that the claim of plaintiffs is substantially confessed by defendants, and an attempt made to avoid it by the plea that the account consists in great part of charges for spirituous liquors, and that the plaintiffs, at the time of selling such liquors to defendants, were not licensed to sell intoxicating liquors. So much of the answer as is necessary to show the defense is here inserted.

"Defendants, for a counter-claim, allege that the amount claimed to be due, of the account set out by plaintiffs, is for intoxicating liquors sold by plaintiffs to defendants between the 20th of October, 1883, and the 13th of July 1885; that on and between said dates plaintiffs sold to defendants intoxicating liquors to the amount of \$2,458.58,

Gillen v. Riley.

and that all the other goods sold during said period by plaintiffs to defendants amounted to only \$150; and said defendants have, on and between the 19th of December, 1883, and the 13th of March, 1886, paid to plaintiffs various sums of money, amounting in all to \$1,710.63, which was paid for intoxicating liquors, except \$150, as will appear from a statement of said sales and credits attached to and made a part of this answer.

"That all the time between and including said dates plaintiffs were engaged in the business of wholesale dealers in malt, spirituous, and vinous liquors, in the city of Omaha, Nebraska, without having taken out a license for such sales, as required by chapter 50, Compiled Statutes, relating to Liquor. And all of the sales made by plaintiffs to defendants were in violation of law, and at the time of purchasing said liquors these defendants had no knowledge that said plaintiffs were acting in violation of law."

From this plea it appears that within the times therein stated the plaintiffs sold to defendants intoxicating liquors amounting to \$2,458.58, and of other articles of merchandise \$150, and that upon the whole amount of goods so sold the defendants paid them the sum of \$1,710.63, leaving a balance due to the plaintiffs of \$897.95. This plea is substantially, if not technically, the ancient plea of confession and avoidance, and amounts to a complete defense, if the matter pleaded in avoidance constitutes a defense in law, and is satisfactorily proven.

Here it may be proper to state that the defendant F. H. Jones, when on the stand as a witness for defendants, in his examination in chief was by the counsel for defendants asked: Was there ever a stated account made between you and them, and answered, "that there was, that they sent up a statement."

It appears from the evidence, is admitted by both parties and not denied by either, as a matter of fact, that, during the time involved in the controversy, the plaintiffs were

engaged in the business of wholesale dealers in liquors and cigars in Omaha, and that the defendants were engaged as retail dealers in intoxicating liquors and cigars in Ponca, Dixon county.

Defendants, in the brief, make two contentions : *First*—That the liquors being in part, if not altogether, sold to them by sample, at their place of business in Ponca, through the plaintiffs' traveling agent, where the plaintiffs confessedly had no license to sell intoxicating liquors, they cannot recover therefor. *Second*—That even if the liquors were, in point of law, sold at the wholesale storehouse of plaintiffs in Omaha, they had no license to sell intoxicating liquors there, and, under the law, cannot recover therefor.

The evidence of plaintiffs, in addition to that already given, consisted in the statement that the witness, the deponent, T. A. Dillon, was a resident of Omaha ; that he was a member of the firm of Riley & Dillon, plaintiffs ; that he knew the defendants Jones & Gillen, of Ponca, Nebraska ; that plaintiffs were engaged, at Omaha, in the business of wholesale dealers in liquor and cigars ; that they had dealings with defendants in the fall of 1883, and up to the spring and summer of 1885 ; that they sold the liquor and cigars during the years 1884 and 1885 ; that on April 4, 1885, there was a balance due plaintiffs from defendants on account of such dealings, the sum of \$34.60, which was still due and a part of the bill sued upon ; that on May 11, 1885, the plaintiffs sold to defendants certain merchandise, amounting to the sum of \$70.75 ; and on May 15, 1885, merchandise to the amount of \$405.30 ; and on July 11, 1885, \$47.75 ; and July 13, 1885, \$10.00 ; that said goods were all delivered to and received by them ; that the prices charged were the reasonable market prices for such articles, and were the prices agreed upon between them and the salesman of the plaintiffs ; that the amount due and unpaid for the goods at the date of the deposition was \$568.40, and interest ; that said sales were made upon a

credit of four months, and, according to the terms of sale, plaintiffs were entitled to interest after four months.

On cross-examination the witness stated that the balance due April 4, 1885, was for cigars and mineral waters solely ; that the invoice of May 11, 1885, was for cigars \$20, and liquors \$50.75 ; that the invoice of May 15, 1885, was for liquors, \$405.30 ; and that of July 11 and 13, 1885, was for liquors, \$57.75 ; making a total amount for liquors, \$513.80 ; and for cigars and mineral waters, \$54.60.

On the part of defendants, F. H. Jones testified that he was the leading member of the firm of defendants ; that they had dealings with the plaintiffs in liquors and cigars ; that their business with them was generally conducted here at Ponca ; that there were two bills bought from Mr. Riley here in town—that it was all bought here in town ; that in making these purchases they dealt either with Riley & Dillon, or their agent.

On cross-examination he testified as follows :

Question by plaintiffs' attorney: I suppose these parties came here and, either by themselves, or their agents, solicited orders, didn't they, as all wholesale houses do ?

A. They did.

Q. And you gave them orders for the goods, and they were shipped to you from the city of Omaha, here ?

A. Yes, sir.

Counsel for the plaintiffs here admitted that the plaintiffs had no license to wholesale liquors in the county of Dixon, but that their license was to sell in the city of Omaha.

On the trial the defendants asked the court to charge the jury as follows : " That if they are satisfied from the evidence that the sales of liquor, on which this action was based, were made in Dixon county, then, under the admissions of plaintiffs, that they had no license for the sale of liquors in said county, their verdict should be in favor of defendants for the liquors so sold," which was refused.

The question raised by the plaintiffs in error came before

the supreme court of Kansas under the liquor law of that state, existing before the law prohibiting the manufacture and sale of intoxicating liquors there, the provisions of which were substantially the same as that of this state; and, first, in the case of *Haug v. Gillett*, 14 Kan., 140, cited by counsel for defendants in error.

In the opinion, by Mr. Justice Brewer, the court, with clearness and perspicacity, construes the law as condensed in the syllabus from which I quote: "A liquor dealer must have a license from the city or county in which his store is kept. With such license he may send out agents and take orders in any part of the state for goods to be selected and forwarded from the stock kept in such store, and is not required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agents."

This case was followed in the same court by those of *Williams v. Feinman*, Id., 288, and *Gill v. Kaufman*, 16 Id., 571. The same question was taken to the supreme court of New Hampshire and decided in the same way, in the case of *Boothby v. Plaisted*, 51 N. H., 436, also cited by the defendants in error.

The instruction requested and not given was therefore inapplicable to the law and evidence of this case, and was rightfully refused.

Under the head of "Error in refusing to give instructions asked by defendants," counsel raise the question of the legality of the plaintiffs' license, as shown by the depositions of John Rush and J. B. Southard. In these depositions Rush testified that he was city treasurer of Omaha, and custodian of the records of the city and treasurer's office; that he had examined the record with reference to the payment of license of the firm of Riley & Dillon, for 1885; that the records show that the firm paid to the city treasury for liquor license for the year 1885, January 12, 1885, \$250; April 1, 1885, \$1,000; that the last sum was

in one payment. On cross-examination the witness testified, in reply, as follows:

Q. State whether the money for liquor license has been paid to you by the party receiving it, and if so, whether they paid the full amount at the time of or before issuing the same, or in installments.

A. There is no question as to the party actually paying the money, but we note in a book the name of the payor and the amount, and date. It is customary to pay only *one-fourth* of the year's license, but the party has the option of paying the whole \$1,000 at the time if he chooses.

J. B. Southard testified that he resided in Omaha and was city clerk, and had been such since April 20, 1885; that he had custody of the city records; that he knew the plaintiffs; that the firm of Riley & Dillon, during 1885, procured from the city of Omaha license to sell liquors; that the bond and application bears no filing date, the date of the treasurer's receipt for \$1,000 being March 28, 1885, the bond itself being approved on April 11, 1885; that the license took effect April 11, 1885, and would be in operation up to April 10, 1886, at midnight. That under the provisions of the city ordinance, No. 483, of Omaha, adopted in 1881, it is optional with all liquor dealers to pay by installments, either quarterly or yearly, in advance, as they may elect. They cannot pay less than one-fourth, \$250. The plaintiffs, however, on March 28, 1885, paid the full amount, \$1,000.

There was also introduced in evidence and attached to the bill of particulars a copy of ordinance 483, by defendants, entitled "An ordinance to regulate the license and sale of malt, spirituous, and vinous liquors in the city of Omaha, approved October 10, 1881"; of which ordinance section eight provides: "That the applicant for such license shall, upon filing his application, petition, and bond, pay to the city treasurer the amount required for such license tax at the rate of one thousand dollars (\$1,000) per

annum, taking the receipt of the city treasurer therefor, which receipt shall be filed with the city clerk, where it shall remain if such license shall be finally issued; if license to the applicant be refused, then such receipt shall be returned to the applicant, and the money by him paid to the city treasurer shall be refunded upon the surrender of such receipt." The defendants also introduced in evidence a calendar of the days of the week and months for the years 1885 and 1886. Section three of said ordinance provides "that no license shall be issued for any time beyond the municipal year, being the first Monday after the first Tuesday in April following the date of the license." According to the calendar introduced, the first Tuesday of April, 1885, was the 7th and the Monday following was the 13th of the month.

The second instruction by the court, on its own motion, is as follows:

"If you find from the evidence that the goods for which the indebtedness was incurred were intoxicating liquors sold to defendants by plaintiffs in the state of Nebraska, then plaintiffs could not recover for the same unless at the time of making such sales they had a license therefor; and under the issues in this case it devolves upon the defendants to affirmatively show that plaintiffs did not hold such license at the time."

The evidence quoted was introduced on the part of the defendants for the purpose of bringing their case, at the trial, within the rule of the court's instruction; and at the same time they make the point that the instruction itself was error.

We must hold that the evidence fails to show affirmatively that the plaintiffs were not licensed to sell intoxicating liquors during the municipal year of 1885; and without elaborating the argument, I am of the opinion that the want of license by plaintiffs having been pleaded affirmatively by defendants, not only as a defense to the action,

but also in support of their counter-claim, it was incumbent on them to prove, at least *prima facie*, that the plaintiffs sold the liquors sued for without first having obtained license as dealers therein.

Plaintiffs in error also complain of the giving by the court of the third paragraph of instructions, on its own motion, as follows:

"If you find that said sales of liquor were made in the city of Omaha, and at the time the plaintiffs had paid into the city treasury the sum of \$1,000, and had their bond therefor on file and approved with the clerk of said city, and a license thereupon issued to them by the authorities of said city for the year 1885, then your verdict should be for the plaintiffs, although such license may have been dated April 11, 1885, and two days before the commencement of the municipal year of 1885."

Were this a direct proceeding on the part of the proper authority against the plaintiffs for the purpose of setting aside and annulling their license, I should be of the opinion that this instruction was erroneous; but upon a collateral issue by a party who has purchased of the licensees, who have sold in good faith, and especially as there is no evidence tending to prove that the plaintiffs were without a license issued within the municipal year in which the liquors were sold, I am of the opinion that there is no reversible error in the charge.

Plaintiffs in error also complain of the refusal of the court to give the first and third instructions presented by them, as follows:

"1. The jury are instructed that under the evidence it has been shown that all of the amount except \$54.60 is for intoxicating liquors furnished by the plaintiffs to the defendants; that under the evidence it has been shown that plaintiffs were carrying on the business of dealers in liquors in Omaha without first having obtained a license in the manner required by law therefor, and this being

the case, they cannot recover from defendants for liquors so sold.

"3. That a person who has purchased and paid for liquors sold him in violation of law can, in an action brought against him for a balance due, set up as a counter-claim and recover in said action any moneys paid by him to the person who has made said sales."

There was clearly no error in refusing to give the first instruction. It asks the court to charge the jury "that under the evidence it has been shown that plaintiffs were carrying on the business of dealers in liquors without first having obtained a license in the manner provided by law, while, as before stated, the evidence did not even tend to show such fact. My only objection to the third instruction is, that it is inapplicable to the facts as shown by the evidence, which, as before stated, do not tend to prove that the liquors were sold by the plaintiffs to defendants in violation of law.

The sixth exception assigned, and argued by counsel, is that the court erred in reading to the jury the instructions given, on its own motion, when the same were not marked "*given*," as required by law. Next preceding these instructions in the record is the following: "Gentlemen of the jury: You are instructed by the court as follows:" and on the margin is stated, "Instructions of the court; defendants except, for the reason the same was not marked and signed by the court before the same was read to the jury."

At common law it was the practice, after a cause had been argued by counsel on both sides, for the judge to charge the jury orally, explaining the nature of the action, and of the defense, and the issues to be decided between the parties, recapitulating the evidence which had been produced in support of either party, remarking upon it when deemed judicious, or desirable, and instructing the jury on all questions of law arising upon the evidence before them (Sackett's Instructions to Juries, p. 8.)

The legislature of this state, in 1873, enacted: "It shall be the duty of the judges of the several district courts, in all cases, both civil and criminal, to reduce their charge or instructions to the jury to writing, before giving the same to the jury, unless the so giving of the same is waived by the counsel in the case in open court, and so entered in the record of said case; and any charge or portions of a charge or instructions given to the jury by the court and not reduced to writing as aforesaid shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein." Approved February 18, 1883.

This became section 58 of chapter 14 of the General Statutes of 1873. The legislature of 1875 amended the section by an act for that purpose, entitled "An act to amend section 58," etc, approved February 25, 1875, the third section of which provides: "The court must read over all the instructions which it intends to give, and none others, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the words 'given' or 'refused,' as the case may be, on the margin of each instruction."

This first act modifying the common law practice, and adding to the considerable labor of the judges of *nisi prius* courts, was by no means considered as popular with them; and in some districts of this state there were complaints that written instructions, requested by counsel of either party to the cause, sometimes found their way into the record without the proper remarks to show whether they were given by the court or refused. This mischief was sought to be remedied by the amendatory act of February 25, 1875; and for that purpose the last named act was necessary so far as the instructions presented by counsel to the court were affected, but was not necessary if applied to instructions which show upon their face that they are given by the court on its own motion, it being the sole and only

object of the amendatory section, quoted, that the record should show whether a given instruction set forth had been given to the jury as an instruction, or had been withheld from them by the court. A construction of its language which fully answered that end and purpose, and which upholds the due and orderly proceedings of such courts, is what, in my judgment, is required at the hands of a court of review, and answers all the purposes of the statute.

I am, therefore, of the opinion that the introductory words of the instruction given by the court on its own motion, as set forth, answer all the requirements of the statute, and that a construction of the law which would vitiate such instruction for the want of the word "given" written on the margin, would be unnecessarily technical and hypercritical.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

THOMAS W. CARTER V. PHEBE ANN MUNSON.

[FILED JULY 11, 1889.]

Practice. No question of law is involved in the case. The judgment of the district court is found to be sustained, in part, by the evidence in support of some of the items charged in the petition of defendant in error. As to other items charged, the judgment of the district court is not sustained by sufficient evidence and is reversed unless defendant in error remits \$332 therefrom within sixty days, in which case the judgment of the district court is affirmed for \$678, with legal interest from its date. The costs in this court, in case such remittitur is filed, will be equally divided between the parties.

Carter v. Munson.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

Dilworth, Smith & Dilworth, for plaintiff in error, cited : Bishop on Contracts, sec. 679, note 10 ; *Kellogg v. Turpie*, 93 Ill., 265 ; *Bishop v. Stewart*, 13 Nev., 25.

J. B. Cessna, for defendant in error, cited : *Boucher v. Pia*, 14 Abb. Pr., 1, 238 ; *Demarest v. Darg*, 32 N. Y., 291 ; *Bank of U. S. v. Beverly*, 1 How. (U. S.), 134 ; *Herman on Estoppel*, sec. 3 ; *Hall v. Finch*, 29 Wis., 278 ; *Allen v. Allen*, 27 N. W. Rep. (Mich.), 702.

REESE, CH. J.

Defendant in error instituted her action in the district court of Adams county against plaintiff in error, by which it was sought to recover the sum of \$1,500, as damages claimed by her, by reason of the alleged conversion by plaintiff in error of certain personal property named in her petition. This pleading was in the usual form and need not be further noticed at this time.

To the petition plaintiff in error filed his answer, consisting of a general denial of each and every allegation contained therein, and alleging that in the year 1873 defendant in error and her then husband, being in feeble health and advanced age, desiring to make some arrangement for their support in their declining years, entered into contract with plaintiff in error, by virtue of which it was then agreed between the parties that plaintiff in error should support defendant in error and her husband for and during the remainder of their lives, and that in consideration thereof defendant in error "conveyed the sum of \$1,500 for the purchase of the S. W. $\frac{1}{4}$ of Sec. 30, Tp. 5 north, R. 11 west, of the 6th P. M., and which said real estate was purchased and deeded to this plaintiff"; that

defendant in error then agreed with plaintiff in error that for the consideration of plaintiff in error furnishing the support of defendant in error and her husband, the land and all the property which the defendant in error then had should become the property of plaintiff in error; that in pursuance of the contract thus made plaintiff in error entered upon and took possession of the real estate and has continued to occupy it from that time until about the year 1883; that plaintiff in error kept and performed all the conditions of the contract upon his part to be kept and performed until the 19th day of July, 1882, when the husband of defendant in error died; and that he was ready and willing to continue in the performance of the conditions of said contract, but that he was prevented from so doing by reason of defendant in error's subsequent marriage with her present husband, B. F. Munson; that during said time he occupied all his time and spent his money in improving the land, having support of defendant in error and her husband, and that he had made lasting and valuable improvements on said property to the amount of \$1,200; that plaintiff in error paid off, besides the mortgage, an incumbrance on the real estate to the amount of \$400; that he had paid out and expended for defendant in error and her husband, for their support and expenses in pursuance of the conditions of the contract, a large sum of money amounting to \$1,600; that all his earnings and labor for these eight years had been expended in supporting defendant in error and her husband, his mother and father, and in making lasting and valuable improvements upon the real estate mentioned. It was alleged that the personal property mentioned in the petition of defendant in error was the property of plaintiff in error purchased by him out of his own labor, property, and money. It was further alleged that on the 23d day of May, 1883, the plaintiff and defendant had a full settlement of all differences between them, whereby it was agreed that the prop-

erty in controversy should be the property of plaintiff in error.

To this answer defendant in error replied, denying each and every allegation therein contained as her first defense, and second, alleging that the defense set up in the answer of plaintiff in error was the same identical answer or plea made by him in the suit brought and tried in the district court of Adams county, wherein defendant in error was plaintiff and he was the defendant. A portion of the answer in the other suit was copied in the reply, and it was alleged that after the issues had been formed a trial was had before the district court which resulted in favor of defendant in error, and which, upon appeal, was affirmed in the supreme court. (Referring to *Munson v. Carter*, 19 Neb., 293; S. C., 27 N. W. Rep., 208.) It was also alleged that a bill of sale for the mules mentioned in the petition was given on the 23d day of June, 1885, at the same time and place, and by reason of the same fraud, force, duress, and other influence, by which the deed for the land, mentioned in the former suit, was obtained; that defendant in error never made any agreement with plaintiff in error as to the purchase of them except the bill of sale, which was obtained without consideration and by fraud, force, intimidation, etc., on the part of plaintiff in error, and was, therefore, not the free, voluntary act of defendant in error.

While the action above referred to was pending in the district court, plaintiff in error instituted his action against defendant in error for the sum of \$5,410 damages alleged to be due him from defendant in error for the items named in the petition. It is not deemed necessary to copy this petition in full, nor indeed to set out at any great length its contents. It may be sufficient to say that it consisted of alleged demands in favor of plaintiff in error, and against defendant in error, growing out of the occupation, cultivation, and management of the farm during the life-time of the husband of defendant in error, and, after his death, at

the request of defendant in error, and of money paid out and expended by plaintiff in error for the defendant in error at her special institution and request, an itemized account of which is given; also for goods and merchandise furnished defendant in error by plaintiff in error, and for hay, grain, and produce sold and delivered to her between the 15th day of March, 1875, and the 15th day of the same month, in the year 1883, consisting of corn, wheat, oats, rye, barley, potatoes, hay, etc. To this petition defendant in error answered by way of *first*, a general denial; *second*, pleading the statute of limitations, and *third*, alleging that plaintiff in error was indebted to her in the sum of \$4,000 for grain, hay, produce, corn, rent, issues, and products of the farm of plaintiff in error, occupied, received, and used by him from the 23d day of April, 1875, to the 23d day of May, 1883, and in the further sum of \$1,000 for money loaned by her to plaintiff in error at his request during the month of July, 1874, and at other times since said date. A judgment of \$4,000 with interest and costs was demanded.

These two causes were consolidated and tried to the court without a jury, as one case. The trial resulted in a finding in favor of defendant in error and the assessment of damages due her from plaintiff in error in the sum of \$1,000, for which judgment was rendered against him. A motion for a new trial was filed, consisting of three grounds, to-wit:

"*First*—That the finding and judgment were contrary to the evidence.

"*Second*—The finding is not sustained by sufficient evidence.

"*Third*—The finding is contrary to law."

This motion was overruled. From this finding and judgment plaintiff in error prosecutes error to this court, the only contention being that the finding of the district court is not supported by sufficient evidence. It is insisted by defendant in error that as the facts stated and averments made in plaintiff's answer to her petition in the suit

instituted by her, and his petition in the suit instituted by him, are substantially the same as were contained in his answer in the case decided by this court and referred to in the answer, the issues presented by plaintiff in error are *res adjudicata*, and plaintiff is estopped to litigate these issues a second time. Upon an examination of the case we conclude that the only question necessary to be decided is the one presented by plaintiff in error; the others will not, therefore, be considered. Upon reading the bill of exceptions we find the evidence conflicting upon almost every material point in the case, and had the witnesses been before the district court we should not hesitate to affirm the judgment without further inquiry; but as it appears that the evidence was taken by a referee, and none of the witnesses were before the trial court, we have endeavored to give the evidence as careful an analysis as the time at our command would permit.

The contest is over a long series of transactions between the father and mother upon one side, and the son upon the other. The father having deceased, the suit is between the mother and son. The dealings referred to began in another state prior to the year 1874, and include money alleged to have been advanced to the son, who is plaintiff in error, at or about the time of his removal to this state in that year, followed soon after by his parents, when a farm was opened in Adams county, on which the three resided together; although plaintiff in error, in connection with his care of the farm, took and improved a homestead some miles distant. From perhaps some degree of contention between the father and son, prior to the death of the father, which was produced by a lingering and painful illness, the differences culminated in an unfortunate and rather unnatural estrangement between the mother and son, resulting in this suit over the personal property on the farm at the time of the marriage of the son and his removal therefrom. A portion of the property in dispute

is a span of mules, harness, and wagon, which were shown to be worth \$400. While there is some evidence tending to show that defendant in error gave, or proposed to give, this property to plaintiff in error, yet we are quite well satisfied with the finding of the district court, that the title thereto was vested in defendant in error at the time of its conversion by plaintiff in error; and by such conversion plaintiff became indebted to defendant in error in the sum of \$400.

In addition to this we find that plaintiff in error should be charged with the value of one corn sheller, worth \$10, two cows with their calves, worth \$40 each, and two hundred bushels of corn, worth twenty cents a bushel, making a total of \$580, to which should be added interest at the rate of seven per cent per annum for four years, making a total of \$678, for which defendant in error was entitled to judgment. Considering all the circumstances of the case, as shown by the evidence, we are impressed with the belief that the other items charged in the petition of defendant in error, and which need not be enumerated here, are not sustained by the proof, and should not be allowed against plaintiff in error. Many of them, while apparently purchased with the money of defendant in error, were doubtless accumulated in a great degree by the labor of plaintiff in error upon the farm, and had he obtained them under other circumstances, no difficulty would likely have resulted therefrom. The finding against plaintiff in error, upon the claim as set up in his petition, was right and need not be discussed here. The judgment of the district court will therefore be reversed, and the cause remanded for further proceedings unless defendant in error files with the clerk of this court a remittitur of the sum of \$332. In case such remittitur is filed within sixty days of the filing of this opinion, the judgment of the district court will be affirmed for the sum of \$678, the same to draw lawful interest from the date of its rendition in the district court,

and in such case the costs in this court will be equally divided between the parties.

JUDGMENT ACCORDINGLY.

The other Judges concur.

27	179
34	50
27	179
51	419

S. W. LITTLE ET AL., APPELLEES, V. EZEKIEL GILES ET AL., APPELLANTS.

[FILED JULY 11, 1889.]

1. **Parties.** Where an action was instituted in behalf of a large number of plaintiffs, by name, for the purpose of enjoining a common defendant from prosecuting actions involving their title to real estate, and a portion of the persons whose names were used as plaintiffs gave to the defendant an instrument in writing, that the suit had been instituted without their knowledge or consent, that they repudiated the action of the attorneys who instituted it, and did not desire it further prosecuted, but upon further inquiry became satisfied with the action of the attorneys, ratified it, and employed them to proceed with the case in their names, in connection with the names of those who did not disaffirm, appeared upon the trial as plaintiffs, and participated therein as litigants and witnesses, explaining that the writing was given under a misapprehension on their part, and a decree or judgment was rendered upon the merits of the case; such judgment will not be held void nor erroneous as to those never having been dismissed nor stricken from the record as plaintiffs by the trial court.
2. —: **DISCLAIMER.** But when such disclaimer is made and filed in the case, and no further action is taken by the party as a plaintiff, such statement and disclaimer, being his last expression concerning the action or its prosecution, it will be treated as a final repudiation of the suit by such party, and a decree of the district court affecting his rights or those of the defendant as to him will be set aside.

FURTHER consideration of case reported in 25 Neb., 313.

REESE, CH. J.

This case was decided at the January, 1889, term of this court, and is reported in 25 Neb., 313. The legal questions involved in the case were disposed of by that decision; but it appearing on the record that a portion of the plaintiffs named in the petition had signed papers, affidavits, and statements in writing inconsistent with their position or attitude as plaintiffs in the action, "the decree of the district court as to all the plaintiffs who did not disclaim" was affirmed. The question as to who had and who had not disclaimed was left open for future consideration. In accordance with the request of the court, the parties have prepared briefs and appeared at the bar and have presented their views upon this subject. The papers referred to were signed by the parties soon after the commencement of the action and they will be noticed in detail hereafter.

It is contended by counsel for appellant that, as the suit was instituted without the consent or knowledge of the plaintiffs named, the whole of the proceedings during the subsequent progress of the action were void, and that, therefore, the decree in their favor cannot be sustained. We apprehend that no legal proposition is better settled than that an attorney cannot appear in court representing an individual or person without authority from such person to act in his behalf and thus bind the party for whom he appears; that any action taken by an attorney without authority therefor is void, whether such action be questioned during the pendency of the action or after judgment.

As to whether the action of an attorney in voluntarily appearing for a person without authority can be ratified after judgment, as any other agency might be ratified, it is not necessary for us to discuss at this time. There is no doubt but that this action was originally instituted without the consent or knowledge of a portion of the persons

named as plaintiffs; that soon thereafter they made statements in writing, either under oath or without that formality, in which this fact clearly appears.

While the same rules must be applied to this as to any other case coming under the general head of principal and agent, as to the invalidity of an unauthorized act of a person improperly representing himself as the agent or representative of another, and that the unauthorized acts of a person so representing himself are void and without legal force, yet we apprehend that where an attorney appears for another person in a court of justice without authority, and during the pendency of the action thus instituted the principal for whom the appearance was made appears and ratifies, either by word or act, the conduct of the person claiming to represent him, then the whole proceedings will be so far legalized as to make it binding both upon the person thus represented and upon those interested upon the opposite side. This must be the rule. (Weeks on Attorneys, sec. 247.) Any other would open a door to fraud which courts could not effectually close, however anxious they might be to do so. If, therefore, any of the plaintiffs have appeared in the district court during the course of the proceedings, prior to any action having been taken by the defendants, by which the person so appearing would be estopped, and have ratified the action of the attorneys, paid them for their services, participated in the trial, furnished evidence in their own behalf, aided in the efforts being made to defeat their adversary, and have thus placed themselves in a position by which they would be bound by any adjudication against them, they cannot be treated as having disclaimed or disaffirmed the action of the attorneys appearing for them, and would be entitled to the benefits of a decree in their favor.

Believing this to be the law of the case, we will inquire as to the attitude of the persons who, it is claimed, have filed disclaimers, and are not entitled to the benefits of the

decree. As the suit was originally instituted, the following names appeared upon the petition as plaintiffs:

S. W. Little, Samuel Arbuckle, D. B. Alexander, A. J. Sawyer, S. G. Owen, Lorenzo Assmesson, R. H. Oakley, Sarah J. Purcell, A. P. S. Stewart, Thomas R. Clark, Mary A. McElhinney, D. C. Kinsell, Hannah Selwood, Alexander C. Heustis, W. J. Van Dorn, G. W. Lashus, Charles D. C. Heustis, Allen W. Hawley, A. F. Lewis, Samuel Arthur, G. F. Thornton, Sarah Cummings, William R. Rundell, Jacob Freedman, O. P. Austin, J. A. Buckstaff, Mary T. McNair, George D. Camp, Wilber F. Kellogg, Elizabeth N. Chase, Sarah A. Gable, Samuel Aughey, Clarinda A. Bumstead, Elizabeth Paden, Martha E. Snowden, Thomas Woods, Joseph S. Hoagland, Eliza W. Pillsbury, Henry V. Hoagland, W. S. Garrison, C. L. Hooper, S. E. Story, V. E. Farmer, Josephine St. Louis, Frank J. Wassika, Ella N. Miller, John H. Schwabold, Helen Weber, Samuel Henderson, Christine Bohlman, Joseph Richardson, Patrick Lyons, W. Sanford Gee, Allen Cogswell, M. B. Cheney, Mary E. Maloney, Emma A. Beach, Barrett F. Looth, Francis D. Howell, L. S. Howell, Samuel D. Bacon, Henry S. Gordon, executor of estate of E. H. Tuttle, deceased, Alice Clark, *nee* Tuttle, Jacob Freedman, Samuel T. English, Guy C. Barnum, H. O. Snow, George Warder, D. D. Muir, George W. Severance, Rhody A. Prindle, Mina W. Brown, W. J. Van Dorn, and G. W. Lashus.

During the progress of the trial, a portion of those named as plaintiffs were dropped out of the case. We quote the following from the record:

"HARWOOD: We will dismiss all these people who have made settlements.

THE COURT: Parties who have no interest, you can drop them out on the trial.

MARQUETT: If they want to take another course, let them.

BURR: We want them out of the case and judgment for costs.

THE COURT: They cannot recover costs if you are successful.

BURR: We will leave it there at present then.

WOOLWORTH: Let us have the reporter take the names of those who are dropped out.

Joseph L. Hoagland, Henry W. Hoagland, C. L. Hooper, Patrick A. Lyon, Samuel Henderson, Margaret Meyers, Guy C. Barnum, Joseph Richardson, Samuel Arbuckle, D. C. Kinsel, Sarah A. Gabriel, Eliza A. Miller, Eliza N. Pillsbury, Christian Bohlman, Allen Coggsell, Mary E. Maloney, Francis D. Howell, Lavender S. Howell, Samuel D. Bacon, D. D. Muir, George W. Severance, Rhoda A. Prindle, Mina W. Brown, V. J. Van Dorn (to be dismissed according to stipulation on file, and judgment according to stipulation), G. W. Lashus, A. F. Lewis, Sarah Cummings, Mary T. McNair, George D. Camp, Wilber F. Kellogg, Samuel Aughey, W. S. Garrison, W. Sanford Gee, Emma A. Beach, and Samuel T. English.

The persons above named are now dismissed out of this action under the prayer of the answer in this action, except as to Van Dorn, who is to be dismissed according to stipulation on file, and judgment according to stipulation."

We also make the following extract from the brief of appellee:

"The parties themselves make a record, and ask to have dismissed, under the prayer of their answer, certain parties which are dismissed. Under the issue which they plead — that there are certain other parties which were improperly made plaintiffs without their consent — there are, as we view it, six, put in the record either by mistake or, which the evidence clearly goes to show, were never parties and never really litigated this matter with the defendants, and of course the decree ought to be modified so as to exclude them from it, to-wit, M. B. Cheney, Jesse P. Chip-

man, Mary A. McSweeney, Samuel Arbuckle, Francis Wassika, and Josephine St. Louis, or Lancto."

This leaves the following named persons remaining upon the record as plaintiffs :

S. W. Little, D. B. Alexander, A. J. Sawyer, S. G. Owen, Lorenzo Assmesson, R. H. Oakley, Sarah J. Purcell, A. P. S. Stewart, Thomas R. Clark, Mary A. McIlhenney, Hannah Selwood, Alexander C. Heustis, W. J. Van Dorn, G. W. Lashus, Chas. D. C. Heustis, A. W. Hawley, Samuel Arthur, G. F. Thornton, William H. Rundell, Jacob Freedman, O. P. Austin, J. A. Buckstaff, Elizabeth M. Chase, Clarinda A. Bumstead, Elizabeth Paden, Martha E. Snowden, Thomas Woods, S. E. Story, V. E. Farmer, Josephine St. Louis, Francis Wassika, Ella N. Miller, John H. Schwabold, Helen Weber, M. B. Cheney, Barrett F. Looth, Henry S. Gordon, Alice Clark (*nee* Tuttle), Jacob Freedman, H. O. Snow, George War-der.

Of these it is claimed by appellants that the following should be stricken out, as having filed disclaimers in the action, to-wit:

J. A. Buckstaff, V. E. Farmer, A. W. Hawley, Henry Childer, A. J. Sawyer, Lorenzo Assmesson, Hannah Selwood, W. H. Rundell, Helen Weber, J. P. Chipman, F. J. Wassika, M. B. Cheney, T. R. Clark, J. St. Louis, or Lancto.

These names are taken from the bill of exceptions and the briefs, and are given as there found. It is quite probable that by mistake in copying, the discrepancies which we notice have occurred. It may be also observed that names occur among the "dismissed" which are not found among the plaintiffs.

The petition was filed on the 27th day of January, 1882. On the 30th day of February, of the same year, J. A. Buckstaff made an affidavit, which we here copy :

"STATE OF NEBRASKA, }
"Lancaster County. } ss.

"I, J. A. Buckstaff, of said county, on oath say that I never authorized T. M. Marquett, S. B. Galey, N. C. Abbott, N. S. Harwood, nor John Ames, nor any of them, nor any person whomsoever, to *commence* or prosecute any action for me, or on my behalf, or in my name, either severally or jointly with others, against Ezekiel Giles, Hiland H. Wheeler, Lionel C. Burr, William A. J. Gordin, and the heirs and representatives of Jacob Dawson, late of Lancaster county, deceased, or any or either of them, and if any such action has been commenced in my name it was done without my knowledge or consent, and I do not wish it to proceed, or be prosecuted any farther, and I repudiate the action of said attorneys and plaintiffs.

"(Signed) J. A. BUCKSTAFF.

"Subscribed in my presence, and sworn to before me, this 30th day of January, 1882.

"(Signed) L. MEYER, *Notary Public.*"

The questions presented will be examined in the order in which they occur in appellants' brief. This affidavit of J. A. Buckstaff was made on the 30th day of January, 1882. It was sworn to before a notary public and filed on the 20th of the following February. In it, referring to the suit, he says: "It was done without my knowledge or consent, and I do not wish it to proceed or be prosecuted further, and I repudiate the action of said attorneys and plaintiffs." This act of disaffirmance could not be more direct, and positive, and considered alone would have been sufficient to have justified the court in striking his name from the case; but it seems that no such action was taken. On the 6th day of July, 1887, the defendants filed their answer, in which it is alleged that the suit had been instituted in the names of a number of the plaintiffs (naming them) without their knowledge or consent, and that the suit had been repudiated by them, evidently referring to

the affidavits mentioned, but no reference is made to Buckstaff. The prayer of the answer is as follows:

"That it be declared that by the true construction of the last will and testament of said Jacob Dawson, deceased, in the petition set forth, that said Editha J. Dawson took an estate for life in the premises in the said petition described, determinable upon her marriage, and that upon her marriage with the said Pickering her said estate was determined, and the children of the said testator thereunder became seized in fee of said premises and entitled to the possession thereof, and that their interest and estate have come to and become vested in the said Giles, and that he is entitled to the possession of the said premises as against the said plaintiffs and each and every of them.

"*Second*—That it be adjudged that plaintiffs, by instrument in form to be approved by the court, release their claims in said premises, and surrender the possession thereof to the said Giles, and that he be forever quieted as against all claims of said plaintiffs.

"*Third*—That an account be taken of the rents and profits of the said premises and of the amount thereof, which has come into the hands of the plaintiffs respectively, and that each of them be adjudged to pay to the said Giles which each shall be found to have so received.

"*Fourth*—That a receiver of the rents heretofore collected, and also of those which may accrue pending this suit, be appointed, with the usual powers of receivers in such cases.

"*Fifth*—That the said plaintiff be adjudged to pay the costs of this suit, and that the defendant have all such other and further relief as the circumstances may require, and is just and equitable."

So far as we are able to discover, the attention of the court was not called to the disclaimer filed, by motion or otherwise, which would call for any affirmative action on the part of the court looking toward the striking of the

name of Buckstaff from the petition, but rather it seems to have been somewhat of an issue made upon the trial. We quote the following from the evidence of Mr. Buckstaff:

Q. No. 1723. How soon after that affidavit was made, did you manifest your intentions to remain in the case? [BURR: We object, as incompetent and for the further reason that the party cannot repudiate a repudiation. Overruled. Exception.]

A. I presume it was a year or more after that. I often asked Mr. Burr to fix up that title with me. He kept telling me he would, and I presume it was a year after that I told Mr. Montgomery I wanted him to look after my interests, and I wanted to be retained in this case if I could.

Q. Were you ever dismissed in this case? [BURR: Object, as calling for a conclusion, and incompetent. Overruled. Exception.]

A. Not that I know of.

Q. Did you ever authorize anyone to dismiss that suit?

A. No.

Cross-examination by Burr:

Q. Is this [paper produced] your signature?

A. I think it is.

Q. Who filed this statement in this case?

A. I think you did.

Q. I did?

A. I never saw it. I guess so.

Q. That is filed March 30, 1879. Do you say I had anything to do with it?

A. I don't know I ever saw it before. O! This was * * * that I think was filed by Harwood, Ames & Kelly.

Q. After you filed the first affidavit, this is the first step you ever took?

A. I talked to my attorney, Mr. Montgomery, a year ago—some years ago.

Q. You say you were sued in the federal court? Who was your counsel in that case?

A. I don't know what * * *

Q. You say you were sued?

A. I don't know what you mean by the federal court.

Q. The court at Omaha.

A. Yes, sir. He was my attorney there.

Q. Had you any other counsel?

A. I think Mr. Marquett and Harwood.

Q. You did nothing after filing the first disclaimer in this case or repudiation, till this paper I hold in my hand here.

A. I don't know.

Q. That is the first you know of?

A. I don't know.

Witness excused.

BURR: We offer in evidence this statement together with the filing marks on it.

No objection was made, and the paper was admitted, of which the following is a copy:

"In the district court of Lancaster county, Nebraska.

"SAMUEL W. LITTLE ET AL., PLAINTIFFS, VS. EZEKIEL GILES ET AL., DEFENDANTS.

"Now comes J. A. Buckstaff, one of the plaintiffs in the above case, and asks leave to withdraw his affidavit and application for the dismissal of said suit so far as respects this plaintiff, and hereby affirms and ratifies all that his attorneys, Harwood & Ames and T. M. Marquett, have heretofore done or assumed to do as the attorneys of this plaintiff in said action.

"(Signed) J. A. BUCKSTAFF."

Endorsed: "In district court; Little v. Giles; motion; 3174. Filed March 30, 1887, E. R. Sizer, clerk d. c., Harwood & Ames, attorneys for plaintiffs."

We make the following additional extract from his testimony upon cross-examination tending to throw light

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upon this particular inquiry. In seeking to fix upon the date of a conversation with Mr. Burr he was asked :

Q. Was the conversation about these lots?

A. No ; it was about the affidavit that I gave him.

Q. Then it was after this litigation begun, and was with respect to the affidavit that you gave him ?

A. It was about the time I gave him that affidavit he told me he had to put the property in Giles' name to get it out of the state court. That is the time he told me.

Q. That is the time that you made the affidavit that you had no knowledge of the bringing of this suit?

A. Yes, sir.

Q. Which affidavit was true as a matter of fact ?

A. I think it was at that time.

Q. It was true at that time, and is true now—the affidavit?

A. I think he bull-dozed me a little on that.

Q. I am not asking you that, but if the affidavit was true ?

A. I presume it was at that time.

Q. Is it true now ?

A. Well, I don't know about that.

Q. Truth don't change—it was true when you made it ?

A. Well, yes, it was true ; I did not know that I was a party to the suit at that time.

Q. Now you are a party if it wins, and not a party if it loses, ain't that it ?

A. I think I am a party all around—win or lose—heads or tails.

Q. It is pay if you hit, and miss, do nothing ?

A. No.

Q. You are in with the fight ?

A. Bet I am. I am on the war path.

By this it appears that after the signing of the affidavit given to Mr. Burr, which was filed in the case, and before any action of the court was had upon the disclaimer,

Mr. Buckstaff concluded to proceed with the case, and counseled with his attorneys, and participated in the trial as one of the plaintiffs. As said by him the case had never been dismissed, although at one time he had repudiated the action of the attorneys who had instituted it, so far as his name was concerned.

While it would have been the duty of the court, had its attention been called to the fact, to inquire into the matter of the institution of the suit, and to have dismissed the case so far as Buckstaff was concerned, had he so desired, or rather had he not desired the suit to be prosecuted in his name, yet the affidavit filed could be treated as nothing more than a written statement made by him, in which he disaffirmed the action of those who had assumed to act for him. No notice of its filing seems to have been given to the attorneys who so acted, and so far as they are concerned, there is no proof that their action was not ratified by him. From the reputation and standing of the attorneys involved in the prosecution of the case, we doubt not that, if it was thought that he did not desire to prosecute, they would have moved in the matter themselves to the extent of having his name stricken from the list of plaintiffs, such at least would have been their duty; but no such action seems to have been taken. It is but justice to them to say that the action being brought to quiet title, and the interest of all the plaintiffs being adverse to Giles, and said attorneys being employed by a large number of such owners, the suit was brought in the names of all such owners, there being insufficient time to confer with all before filing the petition.

We doubt not that, after having taken the part in the trial which was taken by him, he would have been bound by the judgment had it been adverse to him; and he could not then have been permitted to question the authority of his attorneys who appeared in his behalf during the long trial before the district court. We have no doubt but that

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he would have been bound by the judgment. We are equally clear that he is properly retained in the case as it now stands.

The affidavit made by V. E. Farmer was as follows :

"STATE OF NEBRASKA, }
"Lancaster County, } ss.

"I, V. E. Farmer, in said county, on oath do say that I have never authorized T. M. Marquett, S. B. Gale, N. C. Abbott, N. S. Harwood, nor John H. Ames, nor any one of them, nor any person whomsoever, to commence or prosecute any action for me, or in my behalf, or in my name, either severally or jointly with others, against Ezekiel Giles, Hiland H. Wheeler, Lionel C. Burr, William A. J. Goodwin, and the heirs and representatives of Jacob Dawson, late of Lancaster county, Nebraska, deceased, or any or either of them, and if any such action has been commenced in my name, it was done without my knowledge or consent, and I do not wish it to proceed or to be prosecuted further, and I repudiate the action of said attorneys and plaintiffs so far as I am concerned.

"V. E. FARMER."

"Subscribed in my presence and sworn to before me this 30th day of January, 1882.

J. H. MCMURTRY,

"Notary Public."

So far as we are able to ascertain in the voluminous record before us, this is the only reference to Mr. Farmer, except the allegation in the petition that he held title under Mrs. Dawson to lot 12, block 32, Dawson's addition to South Lincoln. The disclaimer having been made after the petition was filed, and allowed to remain as his last expression upon the subject, we think the decree, whatever it may be, can have no force as to him, and therefore the decree as entered by the district court cannot stand, and as to him it will be reversed and the case dismissed.

The bill of exceptions shows no disclaimer by A. W.

Hawley. A copy of an affidavit which is said to have been made by him is attached to the transcript. But under a well established rule of law in this state (*Tessier v. Crowley*, 16 Neb., 369), it cannot be considered, and as to him the decree will have to stand.

The affidavit of Henry Childer, which was similar to that made by Farmer, need not be set out here at length. It was made on the 20th day of February, 1882, and filed on the same day. We are unable to find that any subsequent action was taken by him. The same rule must be applied to him as to Farmer.

The affidavit made by A. J. Sawyer was in the same form, and need not be here copied. It was dated the 31st day of January, 1882, and filed on the 16th day of February following. Mr. Sawyer appeared in the trial as one of the plaintiffs, and took part as an attorney, for perhaps himself and others. In his testimony upon the witness stand he explained the giving of the affidavit. We make the following extract therefrom, elicited on the cross-examination:

Q. At the time this suit was brought the petition alleges the title to these lots to be in Samuel Arbuckle?

A. Yes, sir.

Q. Is that the fact?

A. No, it is not the fact.

Q. This Samuel Arbuckle wa'nt a plaintiff?

A. I don't know how he came to be.

Q. What is the fact?

A. I don't know anything about that. I did not read that petition.

Q. Are you a plaintiff?

A. Yes, I am a plaintiff.

Q. A party to the record?

A. My name is used there—a party to the record I am supposed to be in that case.

Q. Why was Samuel Arbuckle's name used in reference to these two lots?

A. I cannot tell.

Q. Those four lots?

A. I cannot tell anything about it. I was not there when that was drawn, nor did I take any part in the drawing of it.

Q. Nor have anything to do with it?

A. Not anything.

Q. Hence you would not be bound by litigation with Arbuckle in that petition?

A. I am not responsible for what some one else may have said. I discovered that very recently.

Q. You are counsel in this case as well as attorney for yourself?

A. Yes, for certain parties.

Q. And have been for some considerable time?

A. Some little time; yes, sir.

Q. You take quite a deep interest in this Dawson will litigation?

A. Well, I am somewhat interested personally, and interested on behalf of others.

Q. As a citizen?

A. Personally as a victim or a litigant.

Q. You have considerable feeling with respect to some of the parties?

A. Not very much. I have not manifested much feeling. Mr. Burr and I have been good friends so far as I know. So has Mr. Wheeler.

Q. I see by the petition Arbuckle is owner of these four lots: 9, 10, 11, and 12, in block 33, and lot 10 in block 45; do you own 10 in 45?

A. No, sir; not that I know of.

Q. But you did own, at the commencement of this suit, these four lots alleged to be in the name of Arbuckle?

A. That is what my deeds say.

Q. At the time of the commencement of this suit Arbuckle had no interest in these four lots?

A. I think he had not. I don't know how he comes to be made a party, nor anything about it. I have never spoken to him on the subject, and did not discover it till the other day when I came into court; I looked over the record and found they had got my lots misdescribed.

Q. Instead of your lots being misdescribed, they had got your lots in the name of Arbuckle?

A. Yes, sir.

Q. Arbuckle's lots described your lots?

A. Yes; they should have put these as being owned by me instead of Arbuckle.

Q. You, I think, testified that you never reconveyed the lots to Mr. Arbuckle?

A. No, nor anyone else. I have held them since I took them.

Q. Stood right by them?

A. Yes, sir; and intend to till the last moment. If I have to surrender them, I will gracefully. When Mr. Burr asked me for an affidavit, I did not know of the commencement of the suit, and I promised to give him one to the effect that I had not authorized the commencement of this suit. I did not know of it at the time.

We also quote the following from the examination-in-chief when recalled:

Q. Mr. Burr put in your affidavit. Have you seen that?

A. Yes, sir.

Q. State the circumstances under which it was given

A. On the 31st day of January, 1882, he came to my office and asked me if I had sued him. I told him I had not. Well, he said, are you willing to make an affidavit to that effect? I thought for a moment—I did not know what he was driving at—and I finally said, Yes, I will make a statement under oath, if you wish me to, that I have not sued you. He then pulled out an affidavit, or told me he would procure one, I would not say which it was. Any-

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way it is 31st there, and it might have been a day or two before that, but on the 31st I signed an affidavit to that effect. He talked to me to some extent about it, and then he told me the nature of the suit. He said that I was one of the plaintiffs against him and Wheeler. I said I never authorized anyone to sue him nor Wheeler for me; and very shortly after, as it appears from the affidavit—I don't remember just where I signed it, but it seems that Mr. Guy A. Brown was the notary—I have no recollection of signing it before Mr. Brown, but it seems he was the notary—it is more than likely I did. Possibly I was up at the library, and it was brought to me while there, and I signed it. It simply stated at that time a fact: I had not sued Mr. Burr nor Wheeler, nor had I authorized anyone at that time to bring suit for me, and it was somewhat of a mystery to me just how it came about. A few days after I investigated the matter a little further, and found that a great number of plaintiffs had united in an equity suit, to quiet title to property, and I was made a party to it without my consent. I found out the circumstances, how the suit came to be brought, and all about it, which I did not know at the time I signed the affidavit. I never authorized Mr. L. C. Burr to file any affidavit for me, nor did he say that he wanted to file it, nor was Mr. Burr authorized to act for me as an attorney that I know of in this suit. I know that he never was, and after I found out the nature of this case, and that it was important for all to sue in one, I said that it was all right, that it might go on.

Q. Was there ever any step taken to dismiss you from the case?

A. No, sir; I have never been dismissed from the case. I am still in it as it appears both here and at Omaha.

Q. If there is anything else you may state.

A. I may state this—[BURR: I object, unless he asks some question that we may know what it is.]

Q. By SAWYER: State if Burr, in speaking of this matter—what he said about bringing an action against these parties in Dawson's addition to South Lincoln.

A. He stated to me—[BURR: Object, as incompetent, irrelevant, and immaterial. Objection overruled.]—A. continued.—a number of times that he had no intention whatever to prosecute those people who were located in South Lincoln, or Dawson's addition to South Lincoln. It was not his intention to molest them out there, though he did not make me any promises. I did not ask for any. I simply stated that it was a fact, gave it after. I will state, three days after the suit commenced I knew nothing except what Burr told me, and I signed the affidavit. The suit was commenced the 27th day of January, and the affidavit shows I signed it on the 31st day of January.

There is no doubt but that the decree retaining Mr. Sawyer as a party was right, and it will not be molested.

Although Lorenzo Assmesson's name does not appear in the petition as the owner of any of the property described therein, yet it appears that on the 30th day of January, 1882, he made an affidavit similar to the one above copied, which was filed on the 20th day of the following February. We are unable to find anything in the bill of exceptions which could be construed into a subsequent ratification of the institution of the suit. Neither are we able to find any proof of title in him to any of the property described in the petition. The same rule must be applied to his case as to Farmer, and the decree reversed and the action dismissed as to him. The same is true as to Hannah Selwood.

W. H. Rundell appeared on the trial as plaintiff and testified in his own behalf upon the merits of the case; and upon rebuttal as to the signing of the affidavit as follows:

Q. Do you know anything about a paper Mr. Burr presented to you?

A. Yes, I signed a paper.

Q. Did you know what the paper contained at that time?

A. No, sir.

Q. Do you know the circumstances under which you signed it, and where you signed it?

A. He came to my house and wanted to know if I had lawed him. I said no, not that I know. He took a paper out of his pocket * * * no, he said my name was on the list with the rest. I said * * * I don't know nothing about it. Then he took a paper out of his pocket and asked me whether I would sign it or not. I thought it was all right, and signed it.

Q. Do you know whether that authorized the dismissal of the suit or not? [Burr objected, as leading and incompetent. Overruled and exception.]

A. No, sir; dismiss nothing.

Q. Did he say anything about its effect on your property? [Burr objected, as leading. Overruled and exception.]

A. He said now he would not trouble us at all. He asked what the property was. I told him. We then talked it over. He said, "I will never trouble you at all; it is not this property I am after, it is the town. We shall never trouble this property out there."

He clearly ratified the institution of the suit, and the decree as to him must stand.

An affidavit purporting to have been made by Helen Weber was filed, but which, it is said by her husband in his testimony, was not sworn to. This, however, is not deemed important, as, in our view, the jurat adds little if anything to the statements contained in the writing. It is amply shown that after the paper was signed the husband, as agent of Mrs. Weber saw, and retained counsel to prosecute the case, and took an active part himself throughout its pendency, taking the witness stand, and testifying to material facts upon the merits of the case, as well as the

fact of the execution of the paper referred to. So far as this feature of the case is concerned, the decree of the district court was correct.

J. P. Chipman, referred to in appellants' brief, is doubtless the same person referred to in appellees' brief as Jesse P. Chapman, who, it is conceded, is not a proper plaintiff, and will be so treated. The same disposition will be made of M. B. Cheney, and J. St. Louis (Lancto).

The petition was filed January 22, 1882, in which it was alleged that Thomas R. Clark was the owner of lot 2, block 33, Dawson's addition to South Lincoln, and in which he also appears as plaintiff. On the 25th day of February, 1887, he, with his wife, Annie Clark, conveyed the property to defendant, Ezekiel Giles, for the consideration of \$325. It was alleged in the answer filed July 6, 1887, that defendant and Clark had compromised, and settled their differences and that he, Clark, had conveyed the property in dispute to Giles. We are unable to find any evidence that Clark took any part in the trial, or had any interest therein. As the deed was introduced in evidence, its validity not being questioned, we must presume that the whole matter between him and defendant had been adjusted to his satisfaction. The decree as to him will therefore be set aside.

The decree of the district court in favor of V. E. Farmer, Henry Childer, Lorenzo Assmesson, J. P. Chipman, M. B. Cheney, J. St. Louis (Lancto), and Thos. R. Clark is set aside and the cause as to them is dismissed. As to the remaining plaintiffs, the order of this court made on the former hearing affirming the decree of the district court will stand as then made.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

C. AULTMAN & Co. v. HENRY TROUT.

[FILED JULY 11, 1889.]

1. **Verdict.** The evidence examined, and *held*, to sustain the verdict.
- 2 **Instructions** given and refused, the giving and refusal of which are complained of, examined, and *held*, properly given, and refused.

ERROR to the district court for Hamilton county. Tried below before NORVAL J.

Agee & Stevenson, for plaintiff in error, cited: *Nichols v. Knowles*, 18 N. W. Rep., 413; *Furneaux v. Esterly et al.*, 36 Kan., 539; *Bomberger v. Griener*, 18 Iowa, 477; *Davis v. Robinson*, 25 N. W. Rep., 280; *Nichols v. Hall*, 4 Neb., 210; *Acker v. Kimmie*, 37 Kan., 276.

R. G. Brown, for defendant in error, cited: *Sandwich Mfg. Co., v. Feary*, 22 Neb., 53; *Cobbey v. Knapp*, 23 Id., 579; *McBride v. Ins. Co.*, 30 Wis., 568; *Shafer v. Phoenix Ins. Co.*, 53 Id., 361; *First National Bank v. Erickson*, 20 Neb., 580-586.

COBB, J.

This cause is brought to this court on error from the district court of Hamilton county. The plaintiff, below, alleges that it is a corporation duly organized under the laws of the state of Ohio; that on August 5, 1887, it sold and delivered to defendant at Aurora, Nebraska, one No. 9 New Model thresher, with trucks and stacker, also, one flax riddle, and one timothy sieve, for which the defendant agreed to pay \$450, and the freight and charges on the machinery from Canton, Ohio, to Aurora, Nebraska, which amounted to \$51 at the time of delivery,

to-wit: \$51, cash for freight; \$125 in one Minnesota Chief separator, to be delivered to A. L. Bishop, plaintiff's agent, and the remainder in three promisory notes, one for \$110, with interest from date, payable October 1, 1887; the second for the same amount, with like interest, payable October 1, 1888, and the third for \$105, with like interest, payable October 1, 1889; that after receiving said machinery from the plaintiff the defendant refused to pay said freight, and refused to deliver said separator to the plaintiff, or to his agent, and refused, and still refuses, to give his notes for the purchase of the machinery, or for any part thereof; and refuses to make any settlement for the same, to the damage of the plaintiff \$503.30.

The defendant answered, denying that he owed the plaintiff said sum, or any part thereof; and denied buying the property described, in the way and manner alleged; but set up that on August 5, 1887, he obtained the property, on trial, with the understanding and agreement that if the machinery failed to do good and satisfactory work, it was to be returned to the plaintiff's agent; and that the same was by the plaintiff warranted to be of good material, and, with proper use and management, to do good work in threshing all kinds of grain and flaxseed, and that upon a careful, competent trial the machinery was found to be so imperfect and defective in its construction and operation that with proper care and management it could not be made to clean grain and flaxseed in a fair and proper manner, and was entirely unfit for the purpose for which it was constructed, and delivered to defendant; that on August 6, 1887, the plaintiff was duly notified of the defective and worthless condition of the machinery, and requested to replace it with good machinery, or to correct, repair, and operate the machinery obtained from him, which request he failed and neglected to comply with; and that on September 1, 1887, being unable to use and operate the machinery on account of its defective condition, and the

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plaintiff failing and neglecting to repair the same, as it had agreed to do, defendant returned the same to the plaintiff's agent in Aurora. The defendant further sets up, that the plaintiff is justly indebted to him in \$200 for loss of time, and for labor and expense incurred in and about the defective and worthless machinery so obtained from the plaintiff; and prays judgment, etc.

The plaintiff's reply admits that the defendant took the said machine to Aurora, Nebraska, September 1, 1887, and offered to return the same to the plaintiff's agent, who refused to accept the same, and that said machinery, or any part thereof, has never been returned to the plaintiff; and the plaintiff denies every allegation in the second and third defense of defendant not hereinbefore expressly admitted.

There was a trial to a jury with findings and verdict for the defendant; and the plaintiff's motion for a new trial having been heard and overruled, judgment was entered on the verdict for the defendant's costs taxed at \$77.68.

The plaintiff assigns the following errors in the record and proceedings of the court below for review in this court:

1. The verdict is contrary to the weight of evidence.
2. It is contrary to law.
3. The court erred in giving instructions Nos. 3 and 4.
4. In refusing to give instruction No. 2 asked by plaintiff.
5. In admitting testimony objected to by plaintiff, and in excluding testimony offered by plaintiff, and duly excepted to.
6. Errors of law at the trial, and duly excepted to.
7. In overruling the motion for a new trial.
8. The verdict and judgment were for the wrong party.

Upon the trial the plaintiff called A. L. Bishop, who testified that he was engaged in machinery business at Aurora as local agent for C. Aultman & Co., plaintiffs; that the defendant called on him at his place of business,

and was looking for a machine, and wanted to know how witness would sell it, and whether witness would trade it for an old machine. Witness told him that he would, and that he would go down in a few days and see what he had; witness went to defendant's place, and saw him, but they could not make any terms. In two, three, or four days thereafter defendant came back, and they made a bargain for a thresher; this was about the 25th day of July, 1887. Witness took his order for the thresher. The duplicate of this order, signed by witness as agent for the plaintiff, and by the defendant, the witness presented and identified, which was received in evidence, and which I here copy:

"WARRANTY.—The above machinery to be warranted to be of good material, and, with proper use and management, to do as good work as any other of its size, made for the same purpose, in the United States. If, inside of five days from the day of its first use, the said machinery shall fail to fill said warranty, written notice shall be given to C. Aultman & Co., and also to the local agent from whom the same was purchased, stating wherein it fails to fill the warranty, and a reasonable time allowed them to get to the machine and remedy the defect, if any there be (if it be of such nature that a remedy cannot be suggested by letter), the undersigned rendering necessary and friendly assistance. If the machinery cannot be made to fill the warranty, that part which fails shall be returned by the undersigned to the place where received, and another furnished which shall perform the work, or the money and notes which shall have been given for same to be returned, and no further claim to be made on C. Aultman & Co. It is further mutually understood and agreed that the use of said machinery after the expiration of the time named in the above warranty shall be evidence of the fulfillment of the warranty, and full satisfaction of the undersigned, who agrees thereafter to make no other

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claim on C. Aultman & Co. And further, that if the above machinery, or any part thereof, is delivered to the undersigned before settlement is made for same as herein agreed, or any alteration or erasures are made in the above warranty or in this special understanding or agreement, the undersigned waives all claims under this warranty. It is expressly understood that all agreements appertaining to this order are included in the above."

The witness proceeds to state that the defendant took the duplicate, and witness sent the original to the company at Council Bluffs, to forward the machine; that witness was to take the old machine as part payment at the price of \$125; that the machine came and was delivered to defendant on August 3, 1887; that defendant came up and took the machine home with him, and witness sent out two men, Preston and Pike, to set it up; that Pike was the expert to start it; that the defendant has never paid for the machine, nor any portion of the price, and has never delivered the old machine in part payment; that witness has called upon him to deliver the old one, and settle up the balance for the new machine, which he has never done. On cross-examination the witness said that he went down there to attempt to fix the machine on or about the 23d or 24th days of August. In answer to defendant's counsel, as to whether the notes were given at the time the machine came, he said they were not.

Q. What was the reason?

A. The defendant wanted to take the machine out and try it the next day and see how it run.

Q. You consented for him to take the machine, and have a trial in that way?

A. In that way, yes, sir.

Q. When did he return the machine? [Objected to by plaintiff, as not proper, and objection sustained by the court.]

The case on the part of plaintiff being closed, the de-

defendant was sworn as a witness in his own behalf, and stated that the signature to the plaintiff's "Exhibit A," set forth, was his; that it was given to him by A. L. Bishop; that he took a threshing machine from Bishop; that the price was \$325; that the plaintiff, as represented by Bishop, was to take an old threshing machine in part payment. In answer to the question, "How much was you allowed for the old threshing machine?" he answered: "Well, it was nothing said, but just as we make the bargain with him, he tell me when I can get \$40 for that machine, to let him have it up here."

By counsel:

Q. At the time you gave this contract did you read it over?

A. No; I cannot English read at all; I cannot much talk English.

Q. You could not read the contract?

A. No.

Q. Did Mr. Bishop read it over to you?

A. Well, he read it. I don't know what he read; I can't *verstehen*, I can't read any English. I don't know what he read.

Q. You don't know then whether he read this contract over to you or not, do you?

A. No, sir; I don't know that.

Defendant further testified that the machine was set up on his place, on the 4th of August, by two men, agents of the plaintiff, whose names he does not state; that when he set it up he said there was something broken in the machine, and he had to go home the next day.

As near as I can understand, from the broken and imperfect English of the witness, which seems to have been taken down verbatim by the reporter, he states that there was something broken in the machine at the time he got it, or was broken on the way from Aurora to his farm, which the agent had to go back to Aurora to have supplied, and

returned again on the 5th of August; that on his return they fixed something in the machine, when they undertook to run it; that he then stated to the agent that it looked like the machine would not run, whereupon the agent said that he would come back in about three days, that he could not tell then whether the machine was all right or not, but when he got back, and got all that belonged to the machine, that it would then go, and then defendant might pay for it; that defendant told the agent he didn't like to pay until the machine would do better than it then did; that if it did do better he would keep it; that they threshed all that afternoon and succeeded in only threshing out eight bushels of flax; that the agent never came back at all. The witness proceeded to explain, in his way and language, the respects in which the machine would not run, and to give reasons therefor, which were doubtless understood by the jury, at the trial, but are deemed unnecessary to repeat here. The conclusions of it were that the machine would not elevate; that after trying to run it for some time, probably to the 6th of August, defendant and his wife went to Aurora, and to Bishop, the agent, and notified him that the machine did not run well; that the elevator stopped; that he would have to fix it and make it run better, and that Bishop replied, in words that I understand to mean, that they must have a man from the factory to put it in order; that he told Bishop he was to have five days to write, and that the five days were pretty soon up; that Bishop replied to the effect that five days would expire too soon; that a man would be out from the factory, and that it would take more than five days to put the machine in order and properly test it; that he returned home that day and continued his efforts to run the machine, but without satisfaction or success.

On Thursday, but whether the next Thursday after the last interview between defendant and Bishop, which was on Monday morning, does not appear, but probably it was, the defendant undertook to do threshing for one Rich, who

being dissatisfied with the work of the machine, compelled him to stop, after which the defendant drove immediately to Aurora, called on Bishop, informed him that the elevator stopped, and would not clean the grain and the flax any better, demanded of him to go and fix the machine, and if not, that he would not pay for it; that Bishop replied either that he had sent or would send—it is not easy to understand the exact meaning of the witness—by telegraph, “so that there comes a fellow out of the factory for to fix the machine;” that Rich having refused to let him thresh his grain, defendant had taken the machine back to his own place, and the company’s agent, doubtless the same “fellow out of the factory,” came, four or five days afterwards, for the purpose of fixing the machine; that the agent tightened the belts, and broke one of the castings, telling defendant that the casting wasn’t of much account, and he would send him another one—“he tightened the belts awful tight, and the elevator he stopped, and break some laths off,” are the expressions of the defendant: that the agent stayed a couple of hours; that after the agent went away defendant tried for four or five days to run the machine, but without better success than before the agent attended to it. At the expiration of four or five days, instead of that agent continuing, Bishop came out there, “and another fellow, yet,” and tried to fix the machine, bringing a casting to replace the one that the other agent broke, and bringing along some laths for the elevator, and, for about two hours “they made the machine thresh middling good,” but after an hour and a half, or two hours, they broke five laths, or slats, out of the elevator; they tried to run it, that day, till night, when they stopped, and took the machine to the house, and took the elevator out.

On Friday, defendant went to Aurora, “and take him along here,” whether the whole machine, the elevator alone, or otherwise, is not expressed, and told Bishop that he did not like the way the machine worked, as he himself knew

that it was not good, and he wouldn't pay for it; that Bishop told him he would come over next Monday and try the machine; also told him "you try the machine one way, and another, and you not get the machine to run, then you not have to keep it; and if you make him run you have to take him;" witness "told him all right;" then Monday, Bishop did not come; defendant waited a week, and on the next Saturday went again to Bishop, and asked him, "How is this, Mr. Bishop, with that elevator, you not have him? Well, he tell me he take the elevator out Monday, and he take him out by another fellow, if he could. I ask him if he fix the elevator, and he tell me, yes, he fix him; I tell him if you not come any more, that is more than I stand, I bring your machine over here; he tell me, you wait a week, you wait a little, I come over next Monday and fill out my contract better."

The witness further stated that Bishop did not come out on Monday, but on Wednesday, following, when he was absent, and brought the elevator, put it on the machine, put in some slats, and went away and left it. The defendant then took the machine to Aurora and delivered it to Bishop. This he says was on the 17th or 18th of August, and he testified further that he did not notify the plaintiffs directly of the failure of the machine to work within five days after he first attempted to run it; and that the reason why he did not, was, that Bishop the agent, told him, as before stated, during the five days, that he would telegraph for him, and do everything in that respect which was necessary for him to do; that he would telegraph to the factory, which the defendant understood to be all that he was required to do.

Defendant was cross-examined at length by counsel for the plaintiff without material difference in the substance of his testimony. His testimony in regard to the manner of the running and insufficiency of the threshing machine, and the quality of the work it did, was in great part corrob-

orated by that of six other witnesses; that portion in regard to calling on the agent, Bishop, the first time, and the communications which passed between them, by the testimony of his wife, Elizabeth Trout; and in respect to the return of the machine to the agency, by that of his son, Henry Trout, jr.

The plaintiff recalled Bishop in rebuttal, who contradicted most of the evidence of the defendant, and also called, and examined, six additional witnesses, whose testimony corroborated that of Bishop in the most important particulars. But in respect to the running of the machine and the quality of the work which it did, there is presented a clear case of conflicting testimony, and whichever way and for whichever party the jury may have found the facts, there would be found sufficient evidence to sustain their verdict.

There was a departure from the terms of the order, warranty, or contract, whichever it may be called, at the inception of the transaction; and it appears to me, from the examination of both parties, that it was not a sale within the terms of the contract. By its terms, the delivery of the threshing machine to the defendant, before a settlement was made, is declared to be a waiver of all claims under the warranty, and yet, by his own testimony, the agent of plaintiff, through whom the contract was made, consented that defendant should take the machine out and try it, and see how it would run, without having executed the notes, or paying the freight, or delivering the *old thresher*, which was to be taken in part payment.

I do not think that any court, considering the lack of defendant's ability to understand the English language, and to read the contract itself, and considering the superior intelligence and business capacity of the agent, would hold the defendant to the strict letter of the contract, under these circumstances. And even had the defendant been capable to read and understand it, the contract nowhere gave the

residence, or postal address, of the plaintiff, by which notice might be sent him.

It appears from the evidence, that the general agents of the plaintiff, to whom the local agent, Bishop, was no doubt primarily responsible, resided and kept their business office at Council Bluffs, Iowa, something more than 100 miles distant from the defendant, while, as is claimed, the plaintiff resides and carries on his business at Canton, Ohio, nearly a thousand miles away. There can be no doubt, from the testimony which was accepted by the jury, that within less than five days from the commencement of the defendant's effort to run the threshing machine he applied to the local agent and notified him that the machine did not operate satisfactorily, and required him to put it in order, to make it run in accordance with the terms of the warranty; that the local agent then promised him to write to the general agency at Council Bluffs, and have an expert, in the plaintiff's employment, sent on to remedy the defects complained of. It should have been stated that when Bishop, the local agent, allowed the defendant to take away the machine and try it, outside of the terms of the written contract, he also, outside of those terms, sent a local expert machinist with him to set it up, complete for running, but, as it appears, without much success. It will be observed that upon Bishop, the local agent, telegraphing the general agent at Council Bluffs, in accordance with his promise to defendant, the expert machinist in the employment of the plaintiff was absent on similar business in a distant county of the state, so that considerably more than five days had elapsed before it was possible for him to reach Hamilton county, or the place of residence of the defendant; but this expert, F. E. English, finally did appear, and worked on the machine, endeavoring to put it in order and make it run satisfactorily in accordance with the terms of the warranty.

Upon the evidence of these facts the court gave to the

jury the instructions complained of, Nos. 3 and 4, as follows:

"3. You are instructed that, by its terms, the warranty provides that if inside of five days from the day of the first use of said machine it shall fail to fill the warranty, the defendant shall give written notice to the plaintiff and to the local agent from whom the machine was purchased, stating wherein it fails to fill the warranty. If you find that the defendant within five days after starting said machine gave the local agent verbal notice stating wherein he claimed the machine failed to fill the warranty, and that such local agent notified the general agent of plaintiff to send an expert to fix or adjust said machine and that said general agents then sent an expert to said machine to fix and adjust it, and said expert did attempt to adjust the same and failed, this would be a waiver of the written notice required by the warranty.

"4. If you find from the evidence that the machine, with proper use and management, would not and did not do as good work as any other machine of the same size, and you further find from the evidence that the defendant within five days after starting said machine gave the local agent verbal notice stating wherein he claimed the machine failed to fill the warranty, and that such local agent notified the general agents of the plaintiff to send an expert to fix said machine and that said general agents then sent an expert to said machine to fix and adjust it, and that said expert attempted to adjust the same, and you further find that said expert failed to adjust the same so as to, with proper use and management, do as good work as any other machine of the same size in the same kind and condition of grain, and that the defendant thereafter within a reasonable time returned said machine to the plaintiff's local agent, then your verdict should be for the defendant."

And the court refused to give instruction No. 2, asked by the plaintiff, as follows:

"If you find that the defendant did not give written notice to the plaintiff of the alleged defects in the machine, within five days from the time of the first use of the machine, then you must find for the plaintiff and assess its damages at the contract price of the machine with seven per cent interest thereon from August 5, 1887."

It sufficiently appears from the testimony of Bishop and English on the part of plaintiff that it had a general agency at Council Bluffs for the management of its business in this state, and that a duty of said agency consisted in the employment of one or more expert machinists, experienced in the running, repairing, and adjusting of its machines, and that it was the special business of the expert, upon the agency being called on for that purpose, to attend upon the local agency in order to remedy defects complained of in its machines, sold at the local agencies, and in effect to make good the terms of its warranty.

It is obvious that had the defendant written to the plaintiff at Canton, Ohio, giving notice that the machine bought of local agent Bishop, at Aurora, would not work, the only thing the plaintiff would have done would have been to write or telegraph to its general agency at Council Bluffs to send English, or other expert, to Aurora, Neb., to see what was the difficulty with the defendant's machine, and to remedy any defect found in it. Exactly this was done, through the correspondence of the local agent, and such being the case, to now hold that the defendant had forfeited his rights under the warranty, by failing to do the formal and supererogatory act of writing a letter to the plaintiff, to an address probably unknown, to request something already being done, or attempted to be done, through the same means, to be provided by the plaintiff for the same purpose, would be but a substitution of formalities for practical execution, and of technicalities for business sense.

I think the trial court took the correct view of the case, and that the instructions given were proper, and were ap-

plicable to the evidence and the law of the case. The plaintiff's instruction, being but the negative proposition of those given, was properly refused by the court. The errors assigned as to the admission of testimony for the defendant, and the exclusion of that offered for the plaintiff, and as to errors of law, excepted to on the trial, not being argued by the plaintiff in error, will not be further considered here.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

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DAVID L. BARLASS V. JOHN BRAASH.

[FILED JULY 11, 1889.]

1. **Affidavits** used in the district court will not be considered in this court in error proceedings, unless made part of the record, which can ordinarily be done only by means of a bill of exceptions. (*Walker v. Lutz*, 14 Neb., 274.)
2. **Conversion : DAMAGES.** In an action for the wrongful taking and conversion of goods, the fair market value of the goods at the time and place of the taking is, ordinarily, the true measure of damages. This is so where the defendant is a sheriff and seeks to justify the taking under an execution; and where the good faith of such officer is undoubted.
3. **An Instruction** asked for by defendant, *held*, properly refused, as not applicable to, nor based upon, the evidence in the case.
4. **Evidence.** The reception in evidence of the replevin bond in another action, and the overruling of defendant's objection to "any evidence regarding such replevin bond," *held*, no error.
5. ———. The rejection of the schedule of appraisement of the property replevied in the former case, as well as of oral testimony of the value of said goods as fixed by the appraisers, when offered in evidence, *held*, no error.
6. The damages given by the verdict are not excessive.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

W. L. Marshall, and *Capps & McCreary*, for plaintiff in error, cited: *Blakeslee v. Rossmann*, 43 Wis., 116-128; Wells on Replevin, secs. 474-478, and cases cited; *Wellton v. Beltezore*, 17 Neb., 399; *Blue Valley Bank v. Bane*, 20 Id., 294; *Cruts v. Wray*, 19 Id., 582; *Jennings v. Johnson*, 17 O., 154; *Battis v. Hamlin*, 22 Wis., 669; Sutherland on Damages, vol. 3, 527, 528; *Freeman v. Rawson*, 5 O. St., 1; 1 Smith's Leading Cases, 49, 50.

Bowen & Hoepfner, for defendant in error, cited: Wells on Replevin, secs. 476-479; *Hagan v. Lucas*, 10 Peters, 401; *Peckinbaugh v. Quillin*, 12 Neb., 588, 589; Jones on Chattel Mortgages, sec. 556.

COBB, J.

This cause was brought to this court on error from the district court of Adams county.

The plaintiff below alleged that, on February 2, 1888, he was the owner in possession of certain goods and chattels, comprising his stock of merchandise and hardware, enumerated in the petition, of the value of \$1,500, and that on said day the defendant below wrongfully obtained possession of the same and converted the goods to his own use, to the damage of the plaintiff \$1,500, and prays judgment, etc.

The defendant answered, denying each and every allegation, and set up that plaintiff's purported ownership of the goods, wares, and merchandise mentioned was derived through a certain purported chattel mortgage made by plaintiff's brother, one Henry F. Braash, to plaintiff, April 12, 1887, purporting to convey to plaintiff his stock of hardware, and store fixtures, situate on lots 10 and 12,

in block 23, of Hastings, Nebraska; and that the said mortgage was given for the purpose of hindering, delaying, and defrauding the creditors of Henry F. Braash and is therefore void. The defendant also set up that the mortgagor kept possession, and had the exclusive control and management of the mortgaged goods, and continued to sell the same, in the usual course of trade, from the date of the mortgage to January 18, 1888, with the permission and consent of the plaintiff, and applied the proceeds to his own use, viz., paying to the plaintiff \$155.80 in satisfaction of a debt not secured by the mortgage; applying the proceeds of sales to the payment of the running expenses of the store in which the goods were kept and sold; and to the living expenses of himself and family and to the payment of other debts, and other needless expenses; the purchase of large quantities of liquors for his own and others' uses, and expenses of sickness of himself, in the fall of 1887, from the excessive drinking of liquors, so purchased with the proceeds of the sales of the mortgaged goods.

The defendant further set up that there never was any consideration passed from plaintiff to Henry F. Braash for the execution of said mortgage; and states the fact that he is sheriff of said county, and obtained possession of said goods as such officer by virtue of an order of execution from the county court of said county, dated February 2, 1888, commanding him to collect the amount of a judgment in favor of The Peninsular Stove Company, of Chicago, Illinois, rendered in said county court January 23, 1888, against said Henry F. Braash, for \$505.68, with interest and costs, out of the goods and chattels of said mortgagor; and that the taking of the goods, and all proceedings therein, were had and done under and by virtue of said execution, and in accordance with law.

The defendant alleges that on January 18, 1888, the plaintiff claimed to take possession of the goods under the chattel

mortgage, when demand was made for the same under the execution, and that he voluntarily surrendered possession without claiming to have any interest or right to the possession thereof; that he, neither at the time of the taking of the goods by defendant, nor at any time thereafter, made any demand of defendant for the return of the goods, or claimed to have any interest in or right to the possession thereof, other than by the bringing of this suit; and whatever interest or right plaintiff may have had in and to said goods, has been waived and surrendered by voluntarily delivering the same to defendant to have the same sold under the same execution to pay the said judgment debt of \$505.68, and costs, and the plaintiff is now estopped from claiming any interest in or right to the same; with prayer for judgment, etc.

The plaintiff's reply denies each and every allegation of the new matter set up by defendant.

There was a trial to a jury with finding and verdict for the plaintiff for \$1,026.33, and judgment for that amount, and \$59.73 costs. The defendant's motion for a new trial was overruled and the cause brought up on the following assignments of error.

1. The court erred in allowing plaintiff below to base his title to the goods on a replevin bond given to Burger Bros. and Alexander & Co.

2. In admitting in evidence the replevin bond mentioned.

3. In admitting any evidence regarding the replevin bond.

4. In excluding the evidence of the appraisal of the goods replevied.

5. In giving oral instructions to the jury by reading to the jury from a law book, after the giving of oral instructions had been objected to.

6. In not reducing said instructions to writing, as required by law.

7. In not having the instructions reduced to writing by

the reporter, and filed with the clerk before giving them to the jury.

8. In not filing with the clerk any of the instructions to the jury before giving the same.

9. In giving oral instructions to the jury.

10. In giving oral explanations of instructions to the jury.

11. In giving oral instructions to the jury without the request of the attorney in the case.

12. Excessive damages given under the influence of passion or prejudice.

13. The verdict is not sustained by sufficient evidence.

14. It is contrary to law.

15. In refusing to give instructions 1 and 2 asked for defendant.

16. The court erred in overruling the motion for a new trial.

It appears from the bill of exceptions that one Henry F. Braash, of Hastings, was the owner of a stock of hardware, etc., and that he mortgaged the same to the defendant in error in this case (John Braash, of Minnesota), to secure the payment of \$2,034 and interest. This mortgage was duly filed in the clerk's office of Adams county, April 14, 1887.

On January 19, 1888, as claimed by the defendant in error, there remained due and unpaid of said sum, for which the mortgage was given, \$544.21, whereupon the defendant in error seized the mortgaged property for the purpose of foreclosing the mortgage; that on the evening of said 19th of January, Burger Bros. and Alexander & Co., creditors of Henry F. Braash, the mortgagor, commenced an action in the county court of Adams county by attachment against Henry F. Braash, and levied upon and attached said stock of goods, and took them out of the possession of the mortgagee, the defendant in error herein. On the next day, January 20, 1888, John Braash, the mortgagee,

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brought an action of replevin in the district court of said county against the sheriff (the plaintiff in error herein), which writ was placed in the hands of the coroner of said county, who served the same and replevied the mortgaged goods out of his hands, and caused the same to be appraised according to law, and valued at \$801.60; that thereupon the plaintiff in said action (defendant in error herein), caused an undertaking to be executed, by two approved sureties, to the sheriff (defendant therein) in \$1,605, which undertaking, after setting forth that John Braash had caused an order of delivery of a certain stock of hardware, etc., to be issued out of the district court of said county, in a case then pending, wherein John Braash is plaintiff and David L. Barlass is defendant, and also reciting the delivery of said order to F. L. Brown, coroner, and the taking by the coroner of the goods and chattels, and the valuation of the same, by two responsible persons under oath, at \$801.60; the signers thereof undertook, in the penal sum stated, that said John Braash, plaintiff, should duly prosecute his action and pay all damages and costs which might be awarded against him, and should return said property to the defendant in case judgment for the return thereof should be rendered against the plaintiff therein, which undertaking was duly approved and accepted by the coroner, and by him returned and filed in the clerk's office of said county; whereupon the coroner delivered the said goods and chattels to the plaintiff in said action of replevin. So far as appears, the action is still pending and undetermined in the district court of Adams county; but on February 2d following, the Peninsular Stove Company, also a creditor of the said Henry F. Braash, the mortgagor, having a judgment against the mortgagor in some court of said county, but in which one does not appear, caused an execution to be issued and levied upon said goods, took them into possession, and subsequently sold them to satisfy said execution, for which

transaction, and for the value of the goods, this suit is brought.

There is no dispute as to these facts. The evidence is somewhat conflicting as to the value of the goods, but so far as that can be material to this review, it is settled by the verdict in the court below.

The 5th, 6th, 7th, 8th, 9th, 10th, and 11th errors assigned in the petition in error relate to the manner of giving instructions to the jury by the trial court. Attached to the record in the case is an affidavit of one of the attorneys of plaintiff in error, setting out that in giving the instructions to the jury in the case, and after affiant had objected to the giving of oral instructions, and against the objections of affiant, the court gave to the jury oral instructions by reading from a law book to the jury, and did not reduce the same to writing, as required by law, and that the same were not taken down by a stenographer and reduced to writing, as required by law, and that none of the instructions given by the court were filed with the clerk, as required by law, before the same were given to the jury, and that the court gave oral explanations of the same to the jury. The defendant in error moved to strike this from the files of the case, for the reason that the same was not properly authenticated and preserved by bill of exceptions, which motion was submitted with the issues in the case.

It has been so often held in this court, that the necessity for repeating it seems superfluous, that affidavits taken for the purpose of procuring a new trial will not be considered by the court unless duly authenticated and preserved by bill of exceptions. The affidavit therefore cannot be considered. As applicable to what has been said, I will call attention to the fact that in the journal entry of the proceedings of the court on the day of the trial, and immediately following the giving of the statement of the charge of the court to the jury, is the following entry: "And

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after the instructions had been read to said jury, the counsel for both parties consented that the presiding judge should read to the jury the case of *Davis v. Scott*, from 22d vol. Neb. Reports, p. 154."

It also appears from the record that the two instructions given by the court on its own motion were filed by the clerk on the 20th of June, 1888, which was the day of the trial; that the 3d and 4th instructions following the above without any title showing whether they were given by the court on its own motion or at the request of one of the parties are both marked *given* on the margin, and at the bottom of the 4th is a copy of the endorsement, with the title of the case, the word *instructions*, and the docket number marked filed June 20, 1888, attested by the signature of the clerk.

The first instruction asked by the plaintiff appears to have been endorsed: "To the giving of this instruction the defendant excepts (signed by counsel). Refused and excepted to by plaintiff. Instructions of court, filed June 20, 1888 (signed by the clerk)." The second instruction asked for by defendant, and No. 1 without expressed authority, but taken to be the plaintiff's, were both refused, and were sufficiently endorsed to that effect.

Even had the affidavit been presented by bill of exceptions, the record, imperfect as it is in some respects, would have to control those points of difference between it and the affidavit.

I think it may be stated as authoritative, that as to those facts which occur in the face of a trial court, and which enter into the journal of the proceedings, the record must be the sole evidence of such facts in this court. I need not say that these records are sometimes imperfect and faulty, and that there are well-known methods by which in such cases they may be rectified and made to show the facts as they occurred; but these proceedings must be direct and not collateral. When parties bring a

record to this court, and make no suggestion of its diminution, or ask any orders against the officers of the court below, who are responsible for it, they should understand that the cause must be considered here upon the record as it is, and not what it possibly might be.

The 15th assignment is based upon the refusal of the court to give the first and second instruction asked by the defendant, as follows:

"I. If you find that at the time of the seizure of the goods on execution by the defendant, the plaintiff was in possession of the goods, and that he voluntarily surrendered the possession of the same to the defendant without claiming to have any interest in or right to the possession thereof, and that said plaintiff never made any demand of defendant for the same other than by the bringing of this suit, you will find for the defendant.

"II. If you find from the evidence that the plaintiff was the owner and entitled to the possession of the goods mentioned in his petition, and that they were wrongfully taken by the defendant, and you also find that the stock of goods sold for all they could be sold for at public auction, you will find for the plaintiff, and assess his damages at the amount for which the goods sold at the execution sale, deducting therefrom the necessary expenses of such sale."

The second instruction was properly refused. The proposition that where goods are wrongfully taken, even by a sheriff, and sold at public vendue, upon a writ, the owner of the goods, from whom they have been wrongfully taken, is entitled only to the amount for which they may have been sold, as the measure of his damages, is one which cannot be approved. On the contrary, it is the fair market value of the goods at the time and place of the wrongful taking and conversion, which constitutes the true measure of his damages.

The first instruction was rightfully refused, for the rea-

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son that it is not applicable to the facts in evidence in the case. It would probably have been applicable, and proper to have been given, had there been evidence tending to prove that the plaintiff consented to, or acquiesced in, the taking of the goods by the sheriff, and no evidence given of a demand by the plaintiff, or his agent, for the goods previous to their sale by the sheriff. But there is an entire absence of the consent or acquiescence of the plaintiff in the taking of the goods, and there is evidence in the testimony of Christopher Hoepfner, that he was the regularly appointed agent of the plaintiff, and as such transacted his business at Hastings, and that after the goods were taken by the sheriff, before the sale, he made a demand of him, on the part of the plaintiff, for the goods, and that the defendant replied that he had a sufficient indemnity bond, and that he would hold the goods under it. The truth of this testimony was not denied by the defendant, although he was afterwards on the stand, recalled as a witness in his own behalf, and examined by his counsel.

The first, second, and third errors will be considered together. As to the first, I will only observe that I know of no means by which the court could have prevented the plaintiff basing his title to the goods on a replevin bond. Indeed, I suppose that this assignment was only intended by counsel as introductory to the second and third assignments. The objection to admitting in evidence the replevin bond, and "admitting any evidence regarding the replevin bond," are substantial objections and will be further considered. These goods, as appears from the weight of testimony, and as found by the verdict, were rightfully in the possession of the plaintiff for the purpose of foreclosing the mortgage, which he held thereon. They were levied on and taken from his possession by the sheriff under an execution in favor of Burger Bros. and Alexander & Co. In order to protect his lien the plaintiff replevied them from the possession of the sheriff. To do

this he was obliged to, and did, give the replevin bond referred to. By the terms of this bond his sureties were bound to redeliver the goods to defendant in the replevin action in the contingency of judgment being rendered for the defendant in said action. Pending the determination of the action, and before the decision thereof, the goods were in the custody of the law. Had such bond not been given by the plaintiff within twenty-four hours from the taking of the property under the order of replevin, it would have become the duty of the coroner to have returned the property to the defendant, which the law presumes he would have promptly done. (Sec. 188, Code of Neb.) In that case it would have been competent for the sheriff to have levied the execution of the Peninsular Stove Company upon the same, subject, of course, to his levy thereon already made. It was therefore not only proper, but necessary for the plaintiff, in the case at bar, to plead, and to prove, the giving of the replevin bond in the case referred to. Errors 1, 2, and 3 must therefore be overruled.

The fourth ground of error assigned, "in excluding the appraisal of the goods replevied," is doubtless mainly based upon the following clause at the close of the bill of exceptions: "Defendant's counsel offer in evidence the appraisal in the replevin case" (defendant's exhibit 2), objected to by plaintiff, and the objection sustained; but probably also, in part, upon the refusal of the court to allow F. C. Ashhall, a witness on the part of defendant, and one of the appraisers in the replevin suit, to answer the following question: What was that estimate or invoice; what in your opinion was the value of the goods at that time? The plaintiff's objection to this evidence was sustained by the court and the question overruled.

Sections 181, 182, 183, 184, and 185 of the Code provide for the manner of commencing actions of replevin; section 186 provides that "the sheriff or other officer shall not deliver to the plaintiff, his agent, or attorney, the

property so taken, until there has been executed by one or more sufficient sureties of the plaintiff a written undertaking to the defendant in at least double the value of the property taken, to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him, and return the property to the defendant in case judgment for a return of such property is rendered against him. The undertaking shall be returned with the order." Section 187 provides "that for the purpose of fixing the amount of the undertaking, the value of the property shall be ascertained by the oaths of two or more responsible persons whom the sheriff or other officer shall swear truly to assess the value thereof." This section expresses the sole purpose for which the value of the property shall be ascertained. It does not even provide that a schedule or appraisalment of it shall be made out, but good practice requires that such should be done, especially when the articles of property levied upon are numerous. But it need scarcely be said that this value, assessed by the persons appointed as appraisers, is not made evidence to be used in court. While I will not say that cases may not arise in which such evidence may be admissible for some purposes, yet no occasion existed in this case for its introduction, and the rejection by the court of the paper exhibit when offered, as well as the oral testimony of the witness of the value of the property as appraised, are obviously correct.

The 12th, 13th, 14th, and 16th errors assigned will be considered together, as they are but varied attacks, under different forms of expression, against the verdict of the jury.

It is stated in effect that the verdict of the jury must be held to settle the questions of the *bona fides* of the plaintiff's mortgage, and of his possession of the goods under it at the time of their seizure and conversion by the defendant. Their value is also fixed by the verdict, there being evidence to sustain it. Henry F. Braash testified to the

value of the property to the sum of \$1,106.14. The witness, G. W. Green, testified to the value at \$1,200, while F. C. Ashhall and other witnesses on the part of the defendant fixed the value of the property at \$700. The jury it seems struck a medium, and doubtless considered all of this evidence, and as they not unusually do, fixed upon a value between the higher and lower estimates, and being the sole judges of the evidence their estimate must control.

It will be observed that no error is assigned or exception taken, in the petition in error, to the instructions given by the court on its own motion, or to those given as asked by the defendant in error. The giving of these instructions will not be further considered.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

The other Judges concur.

NATHAN H. WARREN ET AL., APPELLANTS, V. ELLA W.
PEABODY ET AL., APPELLEES.

[FILED JULY 11, 1889.]

The Evidence considered, and *held*, to sustain the findings and decree of the district court.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

John P. Maule, for plaintiff in error, cited: *Parchen v. Anderson*, 5 Pac. Rep., 588; *Culley v. Edwards*, 51 Am. Rep., 614; *Pomeroy's Equity*, vol. 1, sec. 105; 1 *Perry* on Trusts, sec. 166; *Cook v. Tullis*, 18 Wall., 332.

O. P. Mason, for defendant in error, Williams, cited: *Weil v. Lankins*, 3 Neb., 387; *Weinland v. Cochran*, 9 Id., 482; *Crowell v. Horacek*, 12 Id., 625.

COBB, J.

This cause was appealed from the decision of the district court of Fillmore county. Nathan H. Warren, Cyrus T. Warren, and Charles C. Warren, appellants, allege that they are partners doing business in Chicago, Illinois, under the firm name of N. H. Warren & Co., not incorporated; that they are grain commission merchants and own a number of grain elevators in this state, where they have persons buy grain for them upon such terms as they may agree upon; that on July 24, 1884, James Peabody and H. F. Googins commenced buying grain in Fairmont, Fillmore county, and shipping the same to them in Chicago, using an elevator in Fairmont owned by plaintiffs. That plaintiffs furnished the money to buy the grain; Googins lived in Chicago, and Peabody in Fairmont, and managed the business without having any money in it; and had no money anyhow, having formerly been a clerk or employed in the office of the Burlington & Missouri River R. R. Co. On September 30, 1885, the plaintiffs bought of Googins his interest in the business, and from that time at Fairmont it was conducted in the name of Jas. Peabody & Co., the firm being James Peabody and the plaintiffs; that they continued the business there till August 1, 1886, when it expired by limitation. It is alleged that Peabody never had any money in the business of the last partnership, but that the plaintiffs furnished all the money for the purchase of grain, for which purpose, exclusively, the partnership was formed; that Peabody would draw on them, from time to time, ostensibly for carrying on the legitimate business of the partnership, the purchase of grain. The plaintiffs in Chicago knew nothing about what Peabody was doing except

as reported by him, and his reports were always that the money was being used for the purchase of grain, and that large amounts of grain were on hand, etc.

It is alleged that Peabody, not being satisfied with his limited and legitimate sphere of a country grain buyer and shipper, undertook to build railroads and water works, and to operate transportation companies with the money of plaintiffs, diverting it from the purchase of grain. That desiring a home and domicile for himself and Ella W. Peabody, his wife, he purchased, with the money of the plaintiffs, lots six, seven, and eight in the Park addition to Fairmont, and had the lots deeded to his wife. He then erected a valuable dwelling house and out-buildings, paying for the same in like manner, with money sent to buy grain, the amount of \$5,000, without the knowledge or consent of plaintiffs.

It is also alleged that Harriet W. Williams is the mother of Ella W. Peabody, and that on August 2, 1886, Peabody and his wife, anticipating a suit by the plaintiffs, to set aside the deed to Ella W. Peabody for said lots, and have the title decreed to be in them, and for the purpose of defrauding the plaintiffs, and without any consideration from Harriet W. Williams, executed to her a mortgage on said lots for the sum of \$2,000; that the mortgage was never delivered to her, and that she did not know of its execution, but that the same was at the instance of Peabody and his wife without the knowledge of the mortgagee. It is further alleged that Peabody and his wife are insolvent and execution proof.

The prayer is that the mortgage be declared null and void; that it be found that the lots, dwelling house, and improvements were purchased and built with the money of the plaintiffs, to whom the real property shall be conveyed by Peabody and wife, and for general relief, etc.

The defendants, James Peabody and Ella W. Peabody, answering, deny every allegation of the plaintiffs except

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those admitted by them to be true. Peabody admits that he was a member of a copartnership with Googins, whose interest was purchased by the plaintiffs and was carried on under the firm name of Jas. Peabody & Co. until August 1, 1886. They admit that they purchased lots Nos. 6, 7, and 8 in the Park addition to Fairmont, and that the same were bought and paid for before the plaintiffs entered into copartnership with defendant Peabody, and that at the time the lots were bought he was not indebted to the plaintiffs in any sum whatever, and that the house which defendants built on the lots was nearly completed when the partnership was formed between the plaintiffs and defendant; that defendant Peabody says that no settlement of the partnership has been had between the plaintiffs and himself, and that he has many times, before and since the dissolution, demanded a settlement, and says that he does not owe anything to the plaintiffs, and especially denies that he is insolvent, or unable to pay his just indebtedness. These defendants say that the house and lots mentioned constitute their homestead, and at the commencement of this action, and for a long time prior, said premises were occupied by them as their homestead and continue so to the present. They admit that the premises were mortgaged to Harriet W. Williams, and that they received as a consideration therefor \$2,000 in cash from the mortgagee.

The plaintiffs reply, denying all the allegations of the answer.

The defendant, Harriet W. Williams, answering, admits the partnership of the plaintiffs and the defendant as Jas. Peabody & Co. at Fairmont, Nebraska, in the grain business, but denies that the plaintiffs furnished or advanced any money to Peabody and Googins while they were doing business at Fairmont or while they were together, except as advances on the shipments of grain to them, and admits that on September 30, 1885, the plaintiffs purchased the interest of Googins in the business for \$4,500; that Googins

lived in Chicago and was an equal partner with Peabody, whose interest was one-half, and worth equally as much as that of Googins, and that the plaintiffs and Peabody were from that time equal partners in said business at Fairmont; and defendant denies that Peabody never had any money in the business of Jas. Peabody & Co., and denies that the plaintiffs furnished all the money for the purchase of grain, or that the partnership was formed exclusively for the purchase of grain, but was formed for buying and selling and for receiving and storing grain, and it was agreed that the plaintiffs were to furnish the money to purchase the grain with, and after the plaintiffs had purchased the interest of Googins, Peabody was to buy and ship, and sell, or consign grain to the plaintiffs, and was to draw on the plaintiffs for money to carry on the business and was to share alike in the profits and loss. The defendant denies that the plaintiffs knew nothing of what Peabody was doing, but alleges that they secured from him monthly statements showing the exact situation of the business; and denies that he conceived the building of water works, or railroads, or operating transportation companies, or that he actually entered into the prosecution of the same; but admits Peabody invested money in the water works at Fairmont, and there is due seven or eight thousand dollars from that village, with the knowledge and consent of plaintiffs, and the claim is assigned to plaintiffs, who are proceeding to collect it. The defendant admits that James Peabody is married and the head of a family, and denies that he purchased with the money or the means of the plaintiffs the lots mentioned, or used any of the money of the plaintiffs therefor, but that the same were purchased with his wife's money and were deeded to her, and are now held by her, subject to the mortgage before mentioned to defendant. She admits that Peabody, out of the money loaned him and his wife by defendant, built a dwelling house upon the lots, and used no money belonging to the plaintiffs therefor,

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and denies that any money sent to Peabody to purchase grain with was used in purchasing the lots or erecting the dwelling house thereon. She denies that she is the mother of Ella W. Peabody or that James Peabody is her son-in-law, and she denies each and every allegation of the paragraph in the plaintiffs' petition, that "on August 2, 1886, James and Ella W. Peabody, in anticipation of a suit being commenced by the plaintiffs, to set aside the deeds to said lots, and have the title of the deed declared to be in them, and for the purpose of defrauding the rights of these plaintiffs, and without any consideration whatever from the said Harriet W. Williams, who lives in the state of New York, and was not in Nebraska on August 2, 1886, executed to said Harriet W. Williams a mortgage on said lots for the sum of \$2,000;" and this defendant denies every statement, averment, and fact set forth in the foregoing paragraph of the petition as the same is therein alleged. And she denies that the mortgage was never delivered to her, and denies that she did not know of its execution; and she says that she is the wife of John L. Williams, and that after some family discussion and negotiation it was arranged that \$2,000 should be loaned to the brother, James Peabody, who agreed at the time that he would give security upon the house and lots mentioned; that she parted with the money upon the faith, agreement, and expectation that a mortgage would be issued by James Peabody and wife to secure the payment of said \$2,000 and the interest, and she remitted to said James Peabody, who, in pursuance of said agreement, made, executed, and acknowledged said mortgage to defendant to secure said \$2,000 so advanced to him, and he, at the request of defendant, had the mortgage recorded, all of which was done at the time of and contemporaneously with said loan. And the defendant, in good faith and for said consideration of \$2,000, through her brother, accepted said mortgage without any knowledge, information, or notice that the plaintiffs have or claimed to have an equita-

ble or any other lien upon said premises, and she is an innocent holder of said security and mortgage for value, and in good faith; and that she had no knowledge of the dealings between the plaintiffs and her co-defendants. She prays that her mortgage to secure said \$2,000 be decreed to be a first lien upon said lots and premises; and for further relief, etc.

The plaintiffs reply to this answer, denying all the allegations of the defendant. These pleadings constitute the issue in the case.

There was a trial to the court, which found upon the proofs adduced that the allegations of the plaintiffs' petition were not sustained, and therefore found in favor of the defendants and against the plaintiffs, with a judgment that the plaintiffs take nothing by this action, that the cause be dismissed, and that the defendants go hence without day and recover their costs.

To all of which the appellants except.

It appears from the bill of exceptions that on March 30, 1884, H. F. Googins, Alvah Perry, Sarah A. Scott, and James Peabody executed a contract to enter into copartnership under the firm name of Peabody, Perry, Scott & Company for the purpose of conducting a commercial business of such character, and at such place, as might from time to time be mutually agreed upon; that the copartners should contribute to the capital of the firm each \$3,000, excepting James Peabody, who should contribute no money to the capital stock, but that his business experience and friendly relations with the Chicago, Burlington & Quincy Railroad Company should be considered and accepted by the other partners as a full equivalent of the sum to be contributed; that each of the partners who should devote his time exclusively towards the conduct of the business of the firm should receive compensation not exceeding \$100 per month, and except as stipulated, neither party, except by the unanimous consent in writing of ... should with-

draw from the general fund of the firm any sum whatever until July 1, 1885, when an inventory of assets and liabilities being had, such amounts might be withdrawn as should be agreed upon; provided, however, that the original contribution of each party, as specified, should remain *intact*, as the capital of the firm, until the expiration of the contract; that neither of the copartners, severally or jointly, should enter into any contract involving the location or establishing of new enterprises, or the employment of more than the amount of capital specified in the contract without the consent of all the parties thereto; that during the life of the contract neither of the copartners, severally or jointly, should engage in any speculation, deals in stock, grain, or other product, but should confine their transactions to a strictly commercial business, and with other specific provisions not deemed important to set forth; that the contract of partnership should take effect July 1, 1884, and continue in force till July 1, 1886, and thereafter, until a written notice, for three months, should be given by one or more of the copartners of an intention to withdraw, to each of the others.

It appears that H. F. Googins paid in the \$3,000; that Alvah Perry paid \$1,000 and no more, and that Sarah A. Scott failed to pay any sum of her proportion; that Googins and Peabody, on August 24, 1884, entered into a written agreement reciting the copartnership contract and the failure of Perry and Scott to comply with its terms, and declaring it to be their agreement that the firm be changed to Peabody & Company, and that the copartnership contract should remain in full force except as to Perry and Scott, who were excluded from all partnership therein. Upon the execution of this agreement the firm of Peabody & Co. commenced business at Fairmont. The plaintiffs, N. H. Warren & Co., were the owners of elevators for the reception and storage of grain at Fairmont and Geneva, which were used and occupied for that purpose by Peabody

& Co. in buying and shipping grain. At what time, or upon what terms, this firm first occupied the elevators, or what relations by contract, or commercial usage, existed between it and the owners of the elevators it is not possible to state from the record of the case. N. H. Warren, of the plaintiff's firm, whose deposition was read upon the trial, was asked the question, What arrangements, if any, did the plaintiffs have with Peabody & Co. in relation to furnishing them money to carry on the business?

A. They were to furnish the money to do the business, but in case they were blocked and could not get cars, we agreed they might draw for \$3,000.

Q. State whether Peabody understood the arrangement.

A. I think there was no definite arrangement made, except that he was to furnish the money to buy the grain and ship to us.

Q. Under what circumstances was he to draw upon the plaintiffs for grain purchased?

A. He was to draw upon shipments of grain.

This firm of Peabody & Co., consisting of James Peabody and H. F. Googins, continued in business until about September 30, 1885, when the plaintiffs purchased the interest of Googins in the firm. Up to this time I am unable to discover that there were any trust relations existing between the defendant James Peabody and the plaintiffs.

It is claimed in the appellants' brief that in consideration of the use of the elevators, the firm of Peabody & Co. was to pay one-half of the profits to the firm of N. H. Warren & Co. I am unable to find this obligation in the record, but as the record is voluminous, and without an index, it may have been overlooked. But if such were the terms upon which Peabody & Co. accepted and used the elevators, that fact did not create the relationship of partners between the two firms, or the members of either. In this I but state the position of appellants in their brief. (See page 10.)

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The same relationship then existed between these two firms as commonly exists between any western firm of grain buyers and a firm of like dealers at Chicago or St. Louis to which they are in the habit of shipping grain, and upon which they draw for advances and sales. It is true, Warren states that in case Peabody & Co. were blocked and could not get cars, his firm agreed that they might draw \$3,000, but it does not appear, in the case, that they were *blocked* at any time, or could not get cars for shipments; nor does it appear directly that they availed themselves of the privilege of drawing \$3,000. It does appear, however, from the deposition of Warren that at the time of the purchase of the interest of Googins by N. H. Warren & Co., the firm of Peabody & Co. owed the plaintiffs \$7,397.19, but it does not appear from the testimony of Warren, or that of any other witness, that this indebtedness bore any other character than that of an ordinary contract debt.

Exhibit E, introduced in evidence by the plaintiffs, is the only direct evidence showing the dates and amounts of money expended by James Peabody in the erection of the house and improvements involved in this controversy, by which it appears that checks to the amount of \$800 were drawn in payment of labor, material, and furniture supposed to have gone into the building of the house and the improvement of the property. These items appear to have been selected from the account books of James Peabody & Co., which is alleged as the name assumed by the firm of Peabody & Co., assumed after N. H. Warren & Co. had bought the partnership interest of Googins. And it is by a considerable stretch of liberality in the application of evidence that the items of Exhibit E can be considered in the case at all.

By the terms of the original partnership of Peabody, Perry, Scott & Co., Peabody, or such member of the firm as should devote his entire time to its business, was entitled

to draw out not to exceed \$100 monthly, and this provision was continued throughout the changes down to Peabody & Co., and subsequently to James Peabody & Co. From September 30, 1885, when the plaintiffs took the place of Googins, to August 1, 1886, a period of ten months, Peabody was accordingly entitled to draw out and use on his personal account the amount of \$1,000 *prima facie*, and in the absence of evidence to the contrary, not furnished by the record, these checks must be presumed to have been drawn, and the amount thus represented to have been from the partnership funds under and by virtue of that authority. The record therefore fails to show that partnership funds in which the plaintiffs had an interest were subverted and used either in the purchase of the lots or the erection and completion of the house on the premises in controversy. When the plaintiffs bought out the interest of Googins they must be presumed to have had full knowledge of the condition of the partnership accounts as between Peabody and Googins, and, in point of fact, the evidence shows that they did know and were satisfied with such conditions at the time; and it is obvious, from the evidence that the chief, if not the only, cause of dissatisfaction arose from the failure of Peabody to fully realize the claims which he represented to have upon the railroad company for rebates on transportation. His overdrafts on the funds of Peabody & Co., before the purchase of the plaintiffs of the interest of Googins, I regard as a personal debt to the firm of James Peabody & Co., in which the plaintiffs have an interest but which in their hands bears no impress of a fiducial character. Upon a settlement between the members of that firm, and the ascertainment of the amount due from Peabody to the firm and its liquidation by judgment, the plaintiffs would have the ordinary process of a creditor's bill to subject the individual property of Peabody, in whosoever hand the same might be, to the payment of it.

To this view of the case the authorities from this court

cited by counsel for the appellees are applicable; (*Weil v. Lankin*, 3 Neb., 387; *Weinland v. Cochran*, 9 Id., 482; *Crowell v. Horacek*, 12 Id., 625.) It having been decided, in the cases cited, that "a mere general creditor, who has not reduced his claim to judgment, cannot maintain an action to enjoin a debtor from transferring his property."

It is not my intention, in this opinion, to pass upon the general proposition argued by counsel for appellants "that where property held upon any trust to keep or use or to invest in a particular way is misapplied by the trustee and converted into different property, or is sold, and the proceeds are then invested, the property may be followed wherever it can be traced through its transformations, and will be subject when found in its new form to the rights of the original owner;" but only to sustain the findings and decision of the district court "that the allegations of the petition, in this respect, are not supported by the proof." It is therefore deemed unnecessary to discuss either the evidence or the law especially applicable to the mortgage executed by the defendant Peabody and his wife to the defendant Williams, or any other issue arising in the case.

The decree of the district court is affirmed.

DECREE AFFIRMED.

THE other Judges concur.

WILLIAM LAMB V. MICHAEL WOGAN

[FILED JULY 11, 1889.]

Homestead. O. was the owner of a homestead on which he lived with his wife and her several grown sons and daughters by a former marriage. Owing to ill treatment by O. of the family, and especially of the daughters, the family left the homestead and went to a distant part of the county, where they remained, the wife and mother going with them and remaining with them for the most part until the death of O., but several times returning and remaining at the homestead for longer or shorter lengths of time; at one time, when O. was sick, for about three weeks. O. remained on the homestead for a year, more or less, after the departure of the family, when on account of illness he was removed to a hospital at the county seat, where he died. *Held*, That upon the death of O. the widow, Bridget O'Brian, became vested with a life estate in the homestead.

ERROR to the district court for Platte county. Tried below before POST, J.

M. Whitmoyer, and Sullivan & Reeder, for plaintiff in error, cited: *Dickman v. Birkhauser*, 16 Neb., 686.

George C. Bowman, for defendant in error.

COBB, J.

This action was brought by the plaintiff in error in the district court of Platte county in the nature of ejectment for the recovery of land, and to this court for review on error.

The plaintiff alleges that he has a legal estate in, and is entitled to, the possession of the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section eight, township seventeen, range one west, containing eighty acres in said county, and since January, 1885, the defendant has unlawfully kept, and still

keeps the plaintiff out of the possession thereof; that while in the unlawful possession of the premises the defendant has received the rents and profits thereof, from said date to the commencement of this suit, amounting to \$100, and has applied the same to his own use, to the plaintiff's damage in that sum; with prayer for judgment of the right of possession, and for damages for the rents and profits stated.

The defendant answered, denying each and every allegation of the plaintiff. There was a trial to the court, a jury being waived, with findings for the plaintiff and judgment for the recovery of the plaintiff's right of possession of the lands described, with five cents damages, and costs of suit. Whereupon the defendant demanded another trial of the action, and a jury being waived, and the cause being again submitted to the court, it was found that the defendant was entitled to the possession of the premises, under a conveyance of Bridget O'Brien. The plaintiff's motion for a new trial being overruled, judgment was entered for the defendant, dismissing the action, and for costs. The plaintiff in error assigns the following grounds for review:

1. That the findings and decision of the court are not sustained by sufficient evidence, and are contrary to law.
2. Errors of law at the trial, and excepted to by the plaintiff.
3. Error in overruling plaintiff's motion for a new trial.
4. Error in entering judgment for the defendant.

The only question presented by the record, in this case, and argued by counsel for plaintiff in error, in the brief, is one of fact. The question raised is whether Bridget O'Brien, wife of David O'Brien, had, previous to the death of her husband, voluntarily abandoned him, and their homestead in which they resided, with the intent of renouncing her marital relations with him, permanently. If she had, then the contention of the plaintiff in error is well founded;

but otherwise if she had not. The only case cited by counsel is that of *Dickman v. Birkhauser*, 16 Neb., 686, where the court says, in the syllabus: "Where a wife voluntarily abandoned her husband several years before his death, purchased lots in her own name, erected a house thereon in which she had her home: *held*, that upon his death she could not claim the homestead of her late husband as her own," etc.

There was considerable conflicting evidence on the trial, as shown by the bill of exceptions, but the undoubted weight of evidence was to the effect that the land in question was the homestead of David O'Brien; that he lived upon it for at least a year prior to his last sickness; that during the year, and for a longer time to April 1, preceding the fall of the year when his fatal sickness commenced, his wife, Bridget O'Brien, together with several sons and daughters, by a former marriage, lived with him as a part of his family; that about April 1, 1882, or 1883 (the evidence is doubtful as to the year of separation, and of the husband's death), his treatment of his family, and especially that towards the daughters of his wife, his stepdaughters, was such as to render it impossible for them to live with him. The family, taking some portion of the household goods and personal property, left the homestead and went to another residence in the northern part of Platte county. Here the young people remained, continuously, thereafter. Whether they there took up land, or established a permanent home of their own, does not appear. But, however, they lived there and their mother remained with them, for the most part, up to the time of the death of David O'Brien, though she made frequent journeys back to the homestead as long as she remained there, and subsequently. It also appears that O'Brien, with the defendant in this case, continued to occupy the homestead until sometime in the fall of the same year in which the members of the family had left it; the health of O'Brien becoming bad,

Rathbun v. McConnell.

and his life precarious, during a portion of the summer season, was reckoned dangerous as cold weather approached, and he was removed to a hospital at Columbus, dying there sometime in the following spring.

There is evidence that during his sickness at the homestead his wife, Bridget O'Brien, visited him on several occasions, at one time spending three or four weeks, until his temporary improvement was reached; also, that after his removal to the hospital she went there, and if she failed to see him and remain for some time, it was because she was prevented from so doing by the inflexible rules of the fraternity of the hospital.

Upon the evidence in the case the trial court doubtless found that the wife, Bridget O'Brien, never voluntarily abandoned the homestead, or, in law, did not abandon it as a claimant in possession.

In this finding I think the court simply followed the rules of evidence, and could not have found otherwise.

The judgment of the court below is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

ISAAC H. RATHBUN, APPELLEE, V. JOHN MCCONNELL,
APPELLANT.

[FILED JULY 11, 1889.]

Partnership: CONTRACT: CONSTRUCTION. Where the terms of a written agreement of partnership are somewhat vague and ambiguous, the practical construction of the contract of the parties themselves is entitled to great, if not controlling, influence.

APPEAL from the district court of Johnson county.
Heard below before BROADY, J.

37	239
41	59
41	458
27	239
52	188
55	433

O. P. Mason, for appellant.

S. P. Davidson, for appellee.

MAXWELL, J.

This is an action to settle the affairs of a partnership. The plaintiff and defendant entered into a written contract as follows:

"This agreement, entered into this second day of August, A. D. 1883, between Isaac H. Rathbun, of Milan, Ill., of the first part, and John McConnell, of Bowling township, Rock Island, Ill., of the second part, witnesseth: the party of the second part agrees to buy the stock of drugs, paints, oils, fixtures, etc., now in the possession of the firm known and doing business in the town of Milan, Ill., under the firm name of Miller & Rathbun, paying therefor in good and lawful moneys whatever it may amount to, when invoiced according to the prices current of Colburn, Burks & Co., of Peoria, or of Lord, Stoutenburg & Co., of Chicago, Ill. And the party of the second part further agrees to advance money enough to make the amount of money advanced, and the value of the stock aforesaid, amount to the sum of \$2,500, as against the experience in and knowledge of drug business, and influence of the party of the first part, thereby forming a copartnership to be known under the firm name of Rathbun & McConnell, for the purpose of carrying on a general retail drug business at any place within the United States which may be mutually agreed upon by both parties to the said agreement. The aforesaid copartnership to be known as a limited copartnership, to run three years from date of above agreement, and renewable only with full and free consent of both parties.

"Also that party of the first part and party of the second part are to become equal and joint owners of all the

stock, fixtures, and money aforesaid from the date of the agreement, and shall share equally and alike in all the profits arising and accruing from the said copartnership, but in no case does the party of the first agree to become responsible for any loss or damage which may occur from the said copartnership, or other than the usual losses from breakage and deterioration of stock and appurtenances.

"It is further agreed by both parties that they will do their best endeavor and use their best influence to improve and increase the business of the above copartnership; and that they will not either one draw out of the above copartnership any money other than is necessary for the living expenses of the parties aforesaid, but will apply all profits to increasing of stock until such a time as the stock shall be equal to the demands of the trade, or until the expiration of this agreement.

"It is further agreed by both parties that they will not go on any paper or writing as surety, bail, or bond, for any person or persons during existence of this copartnership; also, that they will not dispose of their interest in the same to any person or persons whomsoever, without the full and free consent of the other party.

"It is further agreed by both parties that they will live moral and temperate lives, and will not engage in any games of chance upon which there is any money or property at stake; also, that they will not engage in any but straight, legitimate business relating to the object for which the copartnership was formed, without the free and full consent of both parties, nor will they enter into any speculation separately or individually.

"It is further agreed that they will keep a record of all moneys received and paid out by the firm, and that all books and records shall be open to both parties for inspection at all times. All insurance, and necessary running expenses, are to be paid out of the proceeds of business;

also that due deference and respect be paid one to the other at all times.

"Witnesses present: (Signed)

"JOHN DICKSON.

ISAAC RATHBUN.

"JOHN MCCONNELL."

This contract was entered into in Illinois, where the plaintiff possessed a drug store. Shortly afterwards the parties removed to this state and opened a drug store at Crab Orchard, in Johnson county. In 1885 they sold the third interest in the store to one Dilworth, and this firm continued in business until August, 1886, when the defendant claimed that the contract with the plaintiff had terminated and he sought to exclude him from the store. After some delay this action was brought to wind up the affairs of the partnership and divide the assets. On the trial of the cause the court held that, as between plaintiff and defendant, the plaintiff was entitled to one-half of the capital stock paid in by the defendant. In other respects there is no objection to the decree. In construing the contract alone, that plaintiff and defendant "shall share equally and alike in all the profits arising and accruing from the said copartnership, but in no case does the party of the first agree to become responsible for any loss or damage which may occur from the said copartnership other than the usual losses from breakage and a deterioration of stock and appurtenances," these words apparently limit the interest of the plaintiff in the partnership business to a share of the profits. But the parties themselves seem to have placed a different construction on the contract. Thus in the winter of 1885-86 the plaintiff thought of changing his location, when a conversation took place between the defendant and Dilworth as to the interest of the plaintiff in the store. Dilworth, who was called as a witness on behalf of the plaintiff, testified on that point as follows :

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A. Mr. Rathbun was thinking some of going to Odell, I believe that was the name of the town, and Mr. McConnell and I had a conversation regarding this, and I asked him whether Rathbun would take out his part of the stock or sell it, and McConnell said he had not heard him say, but he supposed he would want to sell it, and he asked me whether I would, or whether I could buy one-half of the drug interest in the store; and I told him I could not do it, I didn't have the means to buy then; and McConnell said that he would buy it then, and own two-thirds of the stock and me one-third, or that he would buy it and sell to me on time so that I could pay for it without any trouble.

Q. About when was that conversation?

A. Well, I don't remember the date, but it was sometime during the winter of 1885-6.

W. S. Dilworth, the father of the last witness, also testified on that point, as follows:

Q. Are you acquainted with the parties to this suit?

A. I am.

Q. State whether you had a conversation with defendant sometime during the winter of 1886, in reference to defendant and J. Milton Dilworth buying Dr. Rathbun out.

A. I had such conversation during the winter of 1885-6.

Q. What part of the winter, the latter or first part?

A. I could not say as to that.

Q. Tell the court what the conversation was.

A. I can tell you what gave rise to the conversation; what brought it about. The doctor had been out looking for a location, thinking he could do better somewhere else, not being satisfied with his practice at Crab Orchard, and I felt a little interested, my son being a member of the firm; I did not know what disposition might be made of the stock—I did not know anything of the contract between the parties. I met McConnell on the sidewalk and we had some other conversation about something else first; then it being on my mind, I asked him what disposition

would be made of the doctor's share, provided he retires; if he sells, you might get some other man you didn't want. He said, "If the doctor sold his interest, he would not sell out without the consent of the other parties, and they could buy him out; I told him my son I didn't think was able to buy the half interest in the doctor's share, and he said he would like to have him do so, so as to be an equal partner with him, but if he could not he would buy it and own two-thirds of the stock, but he would prefer that my son should buy, and be an equal partner, and if he wanted he would buy and sell to him on terms so he could buy. I still insisted that I didn't think he better do so, as he had about all he had in the firm and I didn't want him to get involved and in debt. That is about all I remember of the conversation.

The testimony of these witnesses is practically undenied by the defendant. This therefore may be taken as the construction placed on the contract by the parties themselves and will prevail over the mere words. In other words, the contract will be read in the light of the circumstances surrounding it. Where the language of a contract is ambiguous the construction placed upon it by the parties themselves is of great, if not controlling, influence. (*Topliff v. Topliff*, 122 U. S., 121; *Chicago v. Sheldon*, 9 Wall. U. S., 50, 54; *Coleman v. Grubb*, 23 Pa. St., 393, 409; *St. Louis Gas Light Co. v. St. Louis*, 46 Mo., 121; *Jackson v. Perrine*, 35 N. J. L., 137; *Stone v. Clarke*, 1 Metc. (Mass.), 378; *Nickerson v. R. Co.*, 3 McCrary (U. S.), 455; *Gronstadt v. Withoff*, 21 Fed. Rep., 253; *Forbes v. Watt*, L. R., 1 Sc. & Div. App., 214; *Butler v. Moses*, 43 Ohio St., 166; 3 Am. & Eng. Encyc., 869.)

The construction placed upon the contract, therefore, by the court below is clearly right and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM FISCHER V. THOMAS BURCHALL.

[FILED JULY 11, 1889.]

27	245
45	798
27	245
49	749
52	816
27	245
67	453

1. **Replevin.** An action in replevin is to be tried on the facts as they existed when the action was brought, and the court should so instruct the jury.
2. **Instructions.** The testimony not being preserved in the record, the court cannot say that it was error to refuse certain instructions.

ERROR to the district court for Hayes county. Tried below before COCHRAN, J.

J. Byron Jennings, and *R. B. Likes*, for plaintiff in error, cited: *Wells on Replevin*, sec. 94; *Cassel v. Western Stage Co.*, 12 Ia., 48; *Kay v. Noll*, 20 Neb., 380.

J. M. Lucas, for defendant in error.

MAXWELL, J.

This is an action of replevin and on the trial judgment was rendered in favor of the defendant.

The plaintiff alleges in his petition that "he is the owner of and entitled to the immediate possession of the following described goods and chattels, to-wit:

" 'One three-year-old cow, branded (S) on the left hip, of the value of thirty dollars;' that the said defendant wrongfully and unlawfully detained the said goods and chattels from the said plaintiff, and has detained the same as aforesaid for the space of one year, to plaintiff's damage in the sum of thirty dollars; that said goods were not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine, or amercement assessed against him or by virtue of any order of delivery

issued under the chapter of the Code of Civil Procedure, providing for the replevin of property, or on any other *mesne* or final process issued against the said plaintiff."

The answer is a general denial.

The court instructed the jury: "You are instructed that in order to entitle the plaintiff, William Fischer, to recover a verdict in his favor in this case it is incumbent upon him (Fischer, the plaintiff) to prove by a fair preponderance of the evidence that the plaintiff Fischer is the owner of the cow in dispute, or has such a special ownership or interest in the cow in dispute as to entitle him to its possession."

The plaintiff also asked the following instruction, which was refused:

"The statute of Nebraska, section 16, page 421, chapter 51, reads as follows: 'In all suits in law, or in equity, or in any criminal proceedings, when the title to any stock is involved, the brand on any animal shall be *prima facie* evidence of the ownership of the person whose brand it may be: *Provided*, That such brand has been duly recorded as provided by law. Proof of the right of any person to use said brand shall be made by a copy of the record of the same, certified by the county clerk of that county, or of any county in which the same is recorded, under the hand and seal of office of such clerk.'

"You are instructed by the court that if the brand of the plaintiff was and has been recorded in this county, before the institution of this suit, and that plaintiff's brand so recorded was at the said time on the cow in controversy and the brand A. J. Coons on the cow in controversy was not, and had not been recorded in this county, at the institution of this suit, then and in that event the burden of proof is on the defendant to show by a fair preponderance of the evidence that plaintiff is not the owner of said cow."

The instruction given by the court is clearly erroneous.

In *Kay v. Noll*, 20 Neb., 380, it was held in effect that the question presented was the right to the property at the commencement of the action, and proof is to be directed to the rights of the respective parties at that time. The plaintiff must file an affidavit showing, *First*, a description of the property claimed; *Second*, That the plaintiff is the owner thereof or has a special ownership therein and that he is entitled to the immediate possession of the property; *Third*, That it is wrongfully detained by the defendant; and *Fourth*, That it was not taken in execution on any order or judgment, except, etc. All these requirements have relation to the commencement of the action. In Wells on Replevin, sec. 791, the rule is stated as follows: "According to the general rule, the suit is tried on the state of facts as they existed at the commencement of the suit. This rule must prevail, unless there be some peculiar reasons existing to the contrary. Where the defendant justified as an officer, under an attachment, evidence to show that it was dissolved after the property was replevied was immaterial, as the rights of the parties depend upon the facts existing at the time the suit was begun. So in suit on bond, when the issue in replevin was title to the property, and that was found for the defendant, he was not allowed, in the suit upon the bond, to set up a subsequently acquired title as a defense. But this rule will not prevent the consideration of damages to the time of the judgment, as interest is computed on a note; neither will the court refuse to consider the rights of the defendant to a return at the time return is asked." The instruction, therefore, should have submitted the question of the right of the plaintiff to the immediate possession of the property when the action was brought, and as it failed to do so the judgment must be reversed.

Second — In regard to the instruction asked, as the evidence is not before us we cannot say that the court erred in refusing it.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

WILLIAM SMITH, APPELLANT, V. HENRY ATKINS ET AL., APPELLEES.

[FILED JULY 11, 1889.]

1. **Mortgage:** CONSIDERATION. In an action in equity to cancel a note and mortgage upon the ground that they had been given to indemnify the mortgagee as surety on an appeal bond, and that the surety had been required to pay nothing thereon, the defendant answered by cross-petition praying for the foreclosure of the mortgage, and a decree was rendered in his favor for the amount claimed. It appeared from the evidence that \$90 had been included in the note and mortgage to indemnify the mortgagee against possible damages in signing an appeal bond, and that he had suffered no loss thereby. *Held*, That the decree should be reduced \$90 with 12 per cent interest thereon, that being the rate allowed in the decree.
2. **Evidence.** *Held*, That the proof failed to show that the plaintiff was entitled to protection as a *bona fide* purchaser of the note before maturity.

APPEAL from the district court for Lancaster county.
 Heard below before CHAPMAN, J.

Harwood, Ames & Kelly, for appellants, cited: *Jones on Mortgages*, vol. 2, sec. 1431; *Wheeler v. Van Kuren*, 1 Barb. Ch., 490; *Tower v. White*, 10 Paige, 395; *McKernan v. Neff*, 43 Ind., 503.

D. G. Courtney, for appellee, cited: *Atkinson v. Brooks*, 26 Vt., 574; *Dixon v. Dixon*, 31 Id., 450; *Quinn v. Hard*,

43 Id., 375; *Russell v. Splater*, 47 Id., 273; *Tarbell v. Sturtevant*, 26 Id., 513.

MAXWELL, J.

This action was brought by the plaintiff against the defendants to cancel and declare void a certain note and mortgage upon real estate, executed by the plaintiff to Henry Atkins and by him delivered to Irene Atkins. To this petition Henry Atkins filed an answer, in which he disclaims any interest in the premises. Irene filed an answer in the nature of a cross-bill, in which she alleges that "on the 11th day of January, 1879, the said William H. Smith, and Emeline Smith, his wife, executed and delivered to one Henry Atkins a certain promissory note in words and figures following:

"LINCOLN, January 11, 1879.

"Six months after date, for value received, we promise to pay to the order of Henry Atkins \$615, at Lincoln, with interest at 12 per cent per annum from date until paid, with a sum equal to 10 per cent of said amount as attorney's fees if action is brought on the note, or on the mortgage given to secure the same, or if the same is not paid when due.

WILLIAM H. SMITH.

"\$615. Due, ———.

EMELINE SMITH."

Endorsed: "Paid by note, \$10, to apply on the within. Henry Atkins, July the 8th, 1884."

Then follows an allegation that on the same day Smith and wife executed a mortgage upon the real estate in controversy to secure said note, and failed to pay the same, and praying for a decree of foreclosure and sale. The defendants allege that "on or about the 11th day of March, 1879, for a valuable consideration, Henry Atkins, the mortgagee, assigned said note and mortgage, and the moneys due thereon, to the said Irene Atkins, defendant herein,

and prior to the day on which said note and mortgage became due; that she has paid the following taxes on said property in question, to-wit, for the year 1878, \$11.35; and for the year 1879, \$13.45; total, \$24.80, with interest at 10 per cent per annum.

"There is now due and remaining unpaid from the said William H. and Emeline Smith to this defendant, Irene Atkins, on account of said note and mortgage, and the taxes paid on said property, the sum of \$24.80, with interest at 10 per cent from March 1st, 1880, to entering of this decree."

The court below found the issues in favor of Irene Atkins and entered a decree of foreclosure in her favor. The plaintiff, in his testimony, contends that the note and mortgage were given to indemnify Henry Atkins against possible loss from signing an appeal bond for the sum of \$90 and for nothing else; and that he sustained no loss in consequence of signing the same. It is evident, however, that he is mistaken as to the consideration, and that other matters were taken into the account. Smith's testimony is vague, indefinite, and too uncertain, in most respects, to found a decree upon, and wholly fails to impeach the note and mortgage, except as to \$90 and interest thereon, which \$90 Atkins admits were included in the note and mortgage as indemnity for signing an appeal bond, and that he has suffered no loss by said appeal. The plaintiff, therefore, is entitled to a modification of the decree by deducting therefrom \$90 with 12 per cent interest thereon, 12 per cent being the rate of interest allowed in the decree.

It is claimed that Irene Atkins is entitled to protection as an innocent purchaser of the note before due, but the proof fails to establish that claim. She testifies in effect that she held a note of Henry Atkins for \$2,500; that Henry transferred to her the note and mortgage in question and that she endorsed the amount thereof on Henry's note. Whether this of itself would constitute her a *bona fide* pur-

Hower v. Aultman.

chaser we need not stop to inquire, as it is evident from other evidence in the case that Henry Atkins treated the note and mortgage as his own as late as 1884. We do not care to comment on the attempted transfer in this case where the entire consideration had not been paid, but a purchaser, to be protected, must be without notice, and the consideration actually paid. The testimony fails to show that Irene Atkins occupies this position.

The note and mortgage in question are subject to the equities between the parties and the decree will be reduced as here indicated.

DECREE ACCORDINGLY.

THE other Judges concur.

HENRY HOWER V. AULTMAN, MILLER & Co.

[FILED JULY 11, 1889.]

1. **Limitation of Actions.** "All actions, or causes of action, which are, or have been, barred by the laws of this state, or any state or territory of the United States, shall be deemed barred under the laws of this state." (Section 18, Civil Code.)
2. **Answer: DEMURRER: JUDGMENT.** Under the Code, as prior to it, on a demurrer to the answer, if the complaint fails to state a cause of action, judgment on such demurrer should be in favor of the defendant.
3. **Petition: DEMURRER: STATUTE OF LIMITATIONS.** Where a petition was demurrable as not containing facts sufficient to constitute a cause of action, it being shown upon its face that the plaintiff's cause of action was barred by the statute of limitations, and an answer was filed pleading the statute of another state in which the defendant resided at the time of service upon him in this state, and to which a general demurrer was filed by the plaintiff and sustained by the district court, it was *held*, first, that the allegations of the answer were sufficient to constitute a defense, and, second, that as the petition failed to state a cause of action, the demurrer should have been overruled.

27	251
37	647
27	251
140	901
27	251
44	304
27	251
45	681
145	873
27	251
49	228
52	224
53	777
54	556

ERROR to the district court for Webster county. Tried below before GASLIN, J.

J. M. Chaffin, G. R. Chaney, and C. E. Davis, for plaintiff in error, cited: *Maxwell's Pl. and Pr.*, 4th Ed., 121, 146; *Hedges v. Roach*, 16 Neb., 674; *Ætna Ins. Co. v. Baker*, 71 Ind., 102; *Aurora City v. West*, 7 Wall., 93; *Cooke v. Graham's Admr.*, 3 Cranch (U. S.), 235; *Fox v. Wray*, 56 Ind., 426; *Wood on Limitation of Actions*, p. 128, sec. 64; p. 139, sec. 68; p. 172, sec. 71; *Bell v. Morrison*, 1 Pet. (U. S.), 361; *Fort Scott v. Hickman*, 112 U. S., 150; *Mayberry v. Willoughby*, 5 Neb., 372.

Case & McNeny, for defendant in error.

REESE, CH. J.

This was an action upon a promissory note. An answer was filed to the petition, when defendant in error filed a demurrer to the answer, which was sustained by the district court. From the judgment of the court, sustaining the demurrer, and rendering judgment in favor of the plaintiff in the action, defendant brings error to this court. There is but one question presented and that is as to the statute of limitations. The pleadings being short, they will be here copied in full. The petition was as follows:

"Plaintiff complains of the defendant for on or about September 6, 1877, the defendant made, executed, and delivered to the plaintiff herein a certain promissory note in writing, in words and figures as follows:

"\$83. DECATUR, IND., Sept. 6, 1877.

"On or before the 1st day of June, 1879, I promise to pay to the order of Aultman, Miller & Co. eighty-three dollars, with interest at six per cent from date, and attorney's fees, payable, without relief from valuation or appraisement laws, at the banking office of Adams county, for value received in one Buckeye mower and reaper, and with annual inter-

Hower v. Aultman.

est at ten per cent per annum from maturity on the amount then due until paid. The drawers and endorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note, and all defense on the ground of any extension of time of its payment that may be given by the holders or holder to them or either of them, and it is further agreed that this note shall be due on demand if the maker attempt to move out for the purpose of obtaining credit.

“I certify that I own in my own name — acres of land, in the township of —, county of —, state of —, which acres are improved, and the whole worth \$—; and that — and it is unencumbered except the amount of —. I also am worth of personal property over all indebtedness and legal exemptions, and there are no judgments against me.’

“Plaintiff further says that payment has been demanded and refused, and that by the conditions of said note defendant agreed to pay attorney’s fees if suit was brought to enforce payment; that said attorney’s fees amount to the sum of twenty-five dollars; that there is now due and unpaid on said note the sum of one hundred and fifty-eight and $\frac{2}{100}$ dollars, besides the interest at ten per cent from October 20, 1886, and the further sum of twenty-five dollars for attorney’s fees as aforesaid, for which sum plaintiff demands judgment, besides costs of this suit.”

The answer was as follows:

“The defendant, in answer to the plaintiff’s petition, admits the execution of said note, but says that no part of the amount claimed in said note has at any time been paid, and no promise, in writing or otherwise, has been made to pay said note, or any part thereof, since the same became due, or any acknowledgment made by this defendant of said alleged indebtedness; that the cause of action stated in the petition did not accrue within five years next before the commencement of this action; that said defendant left

the state of Indiana in the summer of 1879, and came to the state of Kansas, where he has ever since enjoyed a continuous and *bona fide* residence, and where he resided at the time this action was brought, and where he now resides; that by the statute of limitations of the said state of Kansas, in force at the time the suit was instituted, said action was barred. A copy of subdivision one (1) of section eighteen (18) of the Civil Code of the state of Kansas is hereunto attached and made a part of this answer, which reads as follows:

“Civil actions, other than for the recovery of real property, can only be brought within the following periods after the cause of action shall have accrued: First, within five years; an action upon any agreement or promise in writing.”

“Wherefore defendant demands judgment for his costs, and all other proper relief.”

The demurrer was based upon the ground alone that the facts stated in the answer were not sufficient to constitute a defense to the action. As will be seen by reference to the petition, the note matured on the 1st day of June, 1879. It was not alleged that any payments had ever been made on it after its execution. In addition to this it was alleged affirmatively in the answer that no such payment had ever been made, and that no promise, either verbally or in writing, had ever been made since the execution of the note to pay it, and that no acknowledgment of any indebtedness had been made by plaintiff in error; that plaintiff in error resided in the state of Kansas, and had resided there since the summer of 1879, continuously; and that during the time of his residence in that state the statute of limitations, which is set out in his answer, was five years. There is no brief on the part of defendant in error, and therefore it is impossible for us to say upon what theory the district court made the ruling, and the question here discussed may not have been presented to that court.

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By section eighteen of the civil code it is provided that "All actions or causes of action which are or have been barred by the laws of this state, or any state or territory of the United States, shall be deemed barred under the laws of this state."

If the statute of limitations had run against the claim in the state of Kansas where plaintiff in error resides, and the cause of action was barred by the law of that state as alleged in the answer, this was a defense to the action, and the answer could not be assailed by demurrer as not presenting a defense. Moreover, the petition itself showed upon its face that the cause of action was barred and was defective as not stating a cause of action against plaintiff in error, and a demurrer might have been interposed upon that ground. (Maxwell's Pl. and Pr., 121; *Peters v. Dunnella*, 5 Neb., 460; *Hurley v. Cox*, 9 Id., 230; *Hedges v. Roach*, 16 Id., 674.)

It is a well established rule of pleading, under the code as well as at common law, that a judgment upon demurrer must be against the party whose pleading was first defective in substance, and that a demurrer searches the entire record and must go against the first error, or, as stated in plaintiff's brief, a bad answer is good enough for a bad petition, or a bad reply for a bad answer. (See *Bennett v. Hargus*, 1 Neb., 424; *Stratton v. Allen*, 7 Minn., 409; *Lockwood v. Bigelow*, 11 Id., 70; *Ferson v. Drew*, 19 Wis., 241; *Bank v. Lockwood*, 16 Ind., 307; *Elna Ins. Co. v. Baker*, 71 Id., 102; *Hillier v. Stewart*, 26 O. S., 652; *R. R. Co. v. Mowatt*, 35 Id., 286; *People v. Banker*, 8 How. Pr., 258; *Stoddard v. Conference*, 12 Barb., 573; Bliss on Code Pleading, sec. 417a.)

The judgment of the district court is reversed, the demurrer overruled, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other Judges concur.

HART BROS. ET AL., APPELLEES, V. OTTO H. DOGGE ET AL., APPELLANTS.

[FILED JULY 11, 1889.]

1. **Creditor's Bill: HUSBAND AND WIFE: EVIDENCE.** In an action in equity, in the nature of a creditor's bill to subject certain property held in the name of a wife to the payment of debts of one who conveyed property in fraud of his creditors to her husband, the defense being that the property was the separate estate of the wife derived from her parents, *he'd*, that there being a conflict of testimony on that point and doubt as to such separate estate, the judgment of the trial court finding against the same would not be set aside.
2. **Fraud: INCREMENT: CREDITORS NOT ENTITLED TO.** Where property, which has been purchased with money held in fraud of creditors, advances in value beyond the legal rate of interest, the creditors, nevertheless, in subjecting the property, will be restricted to the purchase price with legal interest thereon.

APPEAL from the district court for Lancaster county.
 Heard below before CHAPMAN, J.

Billingsley & Woodward, H. J. Whitmore, and J. B. Strobe, for appellants, cited: *Freeman on Judgments*, sec. 319; *Bigelow on Estoppel* p. 45; *Truesdell v. Searles*, 104 N. Y., 164; *Clemens v. Brillhart*, 17 Neb., 386; *Ransom v. Schmela*, 13 Id., 77; *Jones on Chattel Mortgages*, 245; *Bispham's Eq. Jur.*, 52; *Estes v. Wilcox*, 67 N. Y. 264; *Rogers on Expert Testimony*, sec. 135, p. 186.

Pound & Burr, for appellees, cited: *Wait on Fraudulent Conveyances*, secs. 26, 27, 28, 44; *Lathrop v. Bampton*, 31 Cal., 17; *Clements v. Moore*, 6 Wall., 315, 316; *Phipps v. Sedgwick*, 95 U. S., 3; *Story's Eq. Jur.*, sec. 1258; *Perry on Trusts*, secs. 217, 828, 829; *Winchester v. Charter*, 102 Mass., 275, 276; *Kempner v. Churchill*, 8 Wall., 364.

MAXWELL, J.

The plaintiffs recovered certain judgments against one C. G. Herold, and executions having been issued thereon were returned unsatisfied. An action in the nature of a creditor's bill was thereupon brought against the defendants, and on the trial findings and a decree were rendered as follows:

"The court finds for the plaintiffs generally, and that the allegations of said petition are true, and that the said Hart Bros., at the January, 1885, term of the said county court, recovered said three judgments against said defendant, Christian G. Herold, in the sum of one thousand five hundred fifty-three and $\frac{2}{100}$ dollars debt, and \$15.20 costs of suit.

* * * * *

"That at the time of and prior to the commencement of this action the said Christian G. Herold was and is wholly insolvent and unable to pay his debts, and that on or about the 1st day of November, A. D. 1884, the said defendants, and all of them, entered into a confederation and conspiracy to cheat, swindle, and defraud all of said plaintiffs and creditors of the said Herold, and for that purpose and for no other consideration said Herold commenced to pay over and did pay over to the said Otto H. Dogge large sums of money and property, amounting in all to upwards of fifteen thousand dollars, which money having been kept by said Otto H. Dogge and Bertha Dogge, his wife, until the 30th day of March, 1886, said Otto H. Dogge and Bertha Dogge did on said day purchase with said money from one Alfred Irwin the property in dispute in this action, described as that part of subdivision fifty-four (54) of S. W. Little's subdivision of the west half of the southwest quarter of section twenty-four, in township No. ten (10) north, of range six (6) east, of the sixth (6) principal meridian, in

Lancaster county, Nebraska, and more particularly described as follows: Beginning at the southwest corner of said subdivision fifty-four, thence east on the north line of P street in said city one hundred (100) feet, thence north and parallel with the east line of Grand avenue one hundred and forty-two (142) feet, thence west one hundred (100) feet to said Grand avenue, thence south and along the east side of said Grand avenue one hundred and forty-two (142) feet to place of beginning, and took said conveyance in the name of Bertha Dogge, wife of said Otto H. Dogge, for the purpose of hindering, delaying, defrauding, and cheating the said plaintiffs, said money being paid to said Irwin out of the moneys given to said Bertha Dogge and Otto H. Dogge as aforesaid, and which property is now occupied by said parties and claimed as their homestead.

"The court further finds that the said deed of date March 30, 1886, of Alfred Irwin and wife to the said Bertha Dogge, conveying to her the said premises as set forth in the petition, was made with the intent to hinder, delay, cheat, and defraud the plaintiffs, the creditors of the said Christian G. Herold, all of which the said Bertha Dogge and Otto H. Dogge had full knowledge at the time of receiving the same, and that the payment made to the said Irwin was made out of the money received by said Bertha Dogge and Otto H. Dogge from the said Christian G. Herold.

"It is therefore considered by the court that the deed described in the said petition, from Alfred Irwin and wife to the said Bertha Dogge, from the premises above described, and the same is hereby adjudged and decreed and declared to be held in trust by the said Bertha Dogge for all of said plaintiffs and that said property may be subjected to the payment of the debts set forth in the petition, and that the sheriff of Lancaster county is directed to proceed as upon execution to sell said property and pay the proceeds thereof over to said plaintiffs as herein decreed, and

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that the defendants pay the costs of this action taxed at \$415.10."

The testimony tends to show that about the year 1882 Dr. Dogge removed to Plattsmouth, in this state, and opened a small drug store and remained at that place about a year, when he removed to Lincoln; that while residing at Plattsmouth he became very intimate with C. G. Herold, a merchant there; that after Dogge removed to Lincoln he urged Herold also to remove to Lincoln; that principally through his efforts Herold did remove to Lincoln in 1883 and opened two stores there; that during 1884, and prior to December 25th of that year, Herold had contracted debts for goods to a very large amount, estimated by some of the witnesses at \$45,000, and Herold himself at about \$38,000; that there was an attempt on the part of Herold at least to place a considerable portion of his goods beyond the reach of his creditors; that during all this time Dogge was the confidential friend of Herold, and professed to be able to effect a compromise of his debts at twenty-five cents on the dollar. To accomplish this purpose, Herold about the 25th of December, 1884, gave Dogge \$9,600, and he already owed Herold \$400, and had previously received considerable sums. Dogge thereupon went to Chicago, when he wrote to Mrs. Herold a letter in German, which is translated in the record as follows:

"CHICAGO, February 22nd, 1885.

"VERY HONORED MRS. HEROLD: I arrived at Dixon and here at Chicago safe, but I couldn't do anything for Mrs. Robertson and her children, as they asked \$2,000 for the lot and don't know yet if she sells, so I have concluded to let the lot matter go as long as I can. As I meet here a few good old friends which are going to New Orleans, and they persuaded me into going along; so I have concluded, as I feel so very bad now, to go along with them, but I shall only stay a short time, and from there at once to New Mexico, and on this trip to contemplate what is

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necessary for you and I. Now, as to how I feel; now I cannot exist, as I am getting worse and I want rest. I also pray to you not to trouble yourself, and in no way be afraid to be before the court, as you are innocent of everything and don't know nothing, and Charlie neither; now you will stay on this truth that your husband never explained anything to you about his business, and you never asked him anything about it, and you always signed the papers that your husband laid before you, and that money what you received from Shafer with that will your husband commence business and the money your husband had taken along to New Mexico.

"If you stay by this truth then you can have no trouble, and don't let the words be changed. I would like to be there from the wish of my heart, as long as the court is in session, but am feeling so bad that I am afraid I'll get worse sick, and then I couldn't stay by you at all, and then we must not often be together as long as the court is in session, as they might make me a big trouble, which I didn't deserve, especially if they found out that your husband is gone. I shall hunt up Mr. Herold and shall guide everything for your best and come back when the court is over. Now I pray to you, again, honored Mrs. Herold, don't trouble yourself; everything will go better than you think. Dear Charlie, stay by your dear mamma and try and make it easy for and gladly humor her, and hope that when I come again to meet you all well and not forsaken. I will hunt up the Jew in St. Louis if I find him so as to get that money. I pray to you me to answer immediately to New Orleans. I will call at the post for the letter.

"Heartiest regards an all to all.

"I remain your friend,

"O. H. DOGGE."

There is testimony in the record tending to show that he had promised to purchase a certain lot for Mrs. Herold and also that he promised that he would meet Mr. Herold

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in New Mexico when they would engage in business there; that in pursuance of this arrangement Herold went to Las Vegas, N. M., and stayed there a long time, expecting Dogge on every train.

Dogge seems to have failed to compromise the debts, or any of them, if indeed he made any effort to do so, and soon after went to Europe, where his wife and children had preceded him; that Dr. Dogge received a large amount of funds belonging to Herold for which he gave no consideration is proved beyond question, and as against creditors of Herold he is a trustee for the amount so held. But it is said that the property in question was purchased with the money of the wife, and therefore she is not chargeable. It does appear that from 1872 to about the year 1876 or 1877, while the doctor resided in Wisconsin, she was possessed of some money and loaned the same; but the testimony also shows that she was quite a traveler and there is but little tangible proof of her possessing means after that time except as hereinafter stated. On the other hand, Dr. J. Massman testifies that he was acquainted with Dr. and Bertha Dogge at Mayville, Wis., in 1880 or 1881; that he had several conversations with Bertha Dogge, who stated "that she had hardly any money at all;" that if they could sell their house, on which there was a mortgage, they could get together perhaps \$600 or \$800.

Dr. Schoen, of the same place, testifies that the house in question was sold for about \$400; that when Dr. Dogge came to Mayville in 1879 his wife was in Europe; that upon her arrival in New York she telegraphed to her husband for money to pay her expenses to Wisconsin and that thereupon Dr. Schoen telegraphed his correspondent in New York to pay her \$25.00, which was done. He also testifies that after the return of Mrs. Dogge he had several conversations with the doctor and his wife, and that he knew from conversations with both of them "that they were

as poor as a church mouse." These gentlemen are disinterested witnesses and apparently friends of the family and familiar with their circumstances, and their testimony apparently is perfectly reliable. A number of witnesses in this state who were acquainted with the Dogges after their removal here were called as witnesses. M. A. Hartigan testifies that Mrs. Dogge stated to him and Mrs. C. G. Herold, in the city of Lincoln, shortly before the bringing of this action that "she must get all she could out of them (the Herolds), because what she got out of them was all she had in the world."

In this he is corroborated by Mrs. C. G. Herold.

Mrs. Herman Herold testifies that while Dr. Dogge and his wife lived at Plattsmouth she had a conversation with Mrs. Dogge in which she stated "that she had such a hard time of it," in the way that she had to get along financially.

Lena Halen testifies that about the year 1884 she had frequent conversations with Mrs. Dogge about her financial condition, and that "she talked as though she did not have very much."

William Morris testifies that after the trial and acquittal of Dr. Dogge, on the criminal charge, he was standing on Eleventh street, nearly opposite the cigar store between N and O streets, and Dr. Dogge and some gentlemen were standing talking, and Mrs. Dogge rode up in a buggy. They shook hands, he helped her out of the buggy, and said, "Mr. Herold has gone up (he was convicted), we have got his money and don't care where he goes."

Judge S. W. Lamoreaux, of Mayville, Wisconsin, testifies that he had resided in Mayville thirty-five years, and was county judge of Dodge county, Wisconsin; that he was acquainted with Dr. Dogge and wife; that before Dr. Dogge left Mayville he had a conversation with him "in reference to his business affairs. From the conversation I had with him and my knowledge of his affairs, I would

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judge he had about from \$500 to \$800, which did include his house and lot. I did know Mrs. Bertha Dogge, his wife. To my knowledge his wife, Bertha, had no property. She came to me for assistance, stating that she wanted some money till she heard from her husband. My recollection is the doctor was gone. It was after the doctor ceased business here."

There is a large amount of testimony to the same effect, which if referred to would extend this opinion to too great length, but at every place where the doctor resided—at Milwaukee, Fond du Lac, Mayville, Marshville, and Platts-mouth—he seems to have been in straitened circumstances. Reliable, trustworthy, disinterested witnesses considered them poor, and it was not until they met Herold that they began to exhibit signs of wealth. Acts speak more potently than words, and circumstances are more reliable than mere assertions. All the outward indications were that these people were poor when they moved to this state. The doctor has changed his residence too often to build up a lucrative business at any place where he has resided since coming to this country in 1872. It is true that there is in evidence what purports to be a book of original entries of his business from June 27, 1884, to February 17, 1885, in which the charges amount to a very large sum. This book is remarkable for the uniformity of the entries, in color of the ink, style of writing, and general appearance, as though written up within a few days. That the same kind of ink should have been used during a period of nine months is not out of the ordinary course, and that the entries should be made with the same pen where a non-corroding one is used, but that there should be no change in the penmanship, through all the climatic conditions affecting the human frame, is remarkable. The doctor, however, testifies on cross-examination that the entries were made as they occurred, with different pens of the same kind—steel pens, apparently. Mrs. Dogge and several witnesses tes-

tify that she had about \$7,000, in cash, when she came to Lincoln. This money was kept in no bank or other reliable depository, nor in any place where the fact of its existence could be established, but the proof depends alone upon assertions, which are strongly disproved by circumstances. There is a direct conflict in the testimony of the witnesses in this case, and it is evident that some of them have deliberately sworn to what is untrue. The trial court having passed upon the weight to be given to the testimony of the several witnesses, most of whom testified before it, this court cannot reverse its judgment unless it appears to be clearly wrong, which is not the case. This court will, as far as consistent with good faith to creditors of her husband, or creditors who have been defrauded by him, protect the rights of the wife in the enjoyment of her separate estate; but in order to do this it must be proved that there was a separate estate belonging to her which was seized for the debts of another. In this case, however, there is too much doubt about the separate estate of the wife to entitle her to relief. It is fully shown that a large amount of Herold's property passed into their (the Dogges,) hands and that no consideration was paid for the same, and that the creditors of Herold were thereby prevented from recovering their just dues. That the property in dispute was derived from the proceeds of the Herold property transferred to the Dogges is clearly apparent, and it should be applied to the payment of such creditors. The judgment therefore in that regard should be affirmed. The property, however, is shown to be of much greater value than \$8,500, there having been a considerable increase in value since the purchase. This increase in speculative value the creditors of Herold are not entitled to. In other words, they are entitled to the amount invested with legal interest thereon, and not to money made by speculation in excess of the legal interest.

The judgment of the district court will, therefore, be

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modified to subject the property to the amount of \$5,000, with interest thereon at seven per cent per annum.

JUDGMENT ACCORDINGLY.

COBB, J., concurs.

REESE, CH. J., dissenting.

I am unable to agree to the conclusion arrived at in this case by my associates, and will very briefly give my reasons therefor.

I agree that there is sufficient evidence to sustain the finding of the district court, that the Herolds and Otto H. Dogge entered into a conspiracy, the purpose of which was to defraud the creditors of C. G. Herold, and, did the evidence as clearly, or even to any degree, connect Bertha Dogge with the transactions which are alleged to have occurred between the Herolds and Otto H. Dogge, the decree of the district court would have to be affirmed. It is true that Otto H. Dogge in his testimony contradicts every material statement of the Herolds which tends to connect him with any fraudulent purpose on their part, but there is ample evidence to sustain the finding of the trial court that the facts were substantially as stated by Herold; but as the real contest is with Mrs. Dogge, that part of the case need not be further noticed.

In reading the bill of exceptions my attention is directed to what seems to me to be a clear want of evidence connecting Bertha Dogge with the transactions between her husband and the Herolds; and also a clear want of evidence to sustain the finding that the property in question, which seems to have been purchased by and deeded to Bertha Dogge, was purchased with the money derived from any transaction with Herold. It is shown by her, and her testimony is corroborated, to some extent, by certified copies of public records in Germany, that after

her marriage with Dogge and when she came to this country she brought with her some \$4,000 in money ; that at Hamburg, before crossing the ocean, she procured her money to be exchanged and converted into the money of this country.

On their arrival at New York they remained there a short time and, before settling in Wisconsin, they visited and remained some time in Baltimore, Philadelphia, other portions of Pennsylvania, and in Chicago ; that during this time she had carried her money with her and kept it from the possession of her husband ; that they first settled in Milwaukee, Wis., and after remaining there some time, removed to Fond du Lac. During this time she was advised to invest her money in United States bonds, when she purchased two \$1,000 six per cent bonds and four \$500 five per cent bonds ; that after some time she was informed that the six per cent bonds had ceased to draw interest, owing to their having been called for payment ; that she then disposed of all the bonds and placed the money and its accrued interest in the hands of a Mr. Allinger, to be loaned. It seems from her testimony, and that which is introduced for the purpose of corroborating her in that particular, that she did not place all the money with Mr. Allinger at once, but that she went to his office and there, upon his recommendation, loaned the sum of \$1,500 upon an assignment of a real estate mortgage, \$100 in some other method, and left with Mr. Allinger the sum of \$400, which he soon thereafter loaned to other parties ; that afterwards he negotiated loans for her to the extent of the other \$2,000 which was furnished by her ; that after remaining in Wisconsin for some time, a part of which was in Mayville and a part in Marshville, her husband, Otto H. Dogge, came to Plattsmouth with a view of locating there, and wrote to her to dispose of their property and follow him. She then notified Mr. Allinger to collect the money which had been loaned by him, together with its interest ;

and in about two months from that time he collected the money due her, with which, and the money she had received for property which she had sold, she came to Nebraska, bringing with her about \$7,000. Their residence in Wisconsin extended over a number of years, perhaps from the year 1872, the time of their arrival in Wisconsin, until the year 1887, the time of their removal to this state. During this time she had been a portion of the time in Europe and the business of loaning her money had remained in the hands of Mr. Allinger; that after she came into this state she had allowed her husband to make use of her money, but that a short time prior to a contemplated return to Germany she had insisted upon her money being returned to her, but that it was not done; that about the month of June, 1884, she returned to Germany, where she remained until in January, 1885, when she was joined by her husband; that she then informed him that she must have her money returned to her; but that he insisted that he had not the money to pay, but would transfer to her certain notes which she could collect upon her return to this country; that these notes were received, and after her return she collected them, giving the names of all the persons who had signed the notes and from which the claims were made. The names and amount of the collections are given in her testimony. The amounts range from \$23 to \$1,000, the total amount being nearly \$6,000. This money, so collected, was used in the purchase of the property in question, the purchase price being \$8,500, of which \$5,000 was paid in cash. Throughout her testimony, which was quite lengthy, she adhered to these statements, and denied all knowledge of, or complicity with, the fraudulent action of C. G. Herold. For the purpose of disproving her statement it is shown that upon many occasions she denied having any money, and insisted that she was in need. The evidence of various bankers in Fond du Lac, and elsewhere, perhaps, was taken for the

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purpose of showing that she negotiated the sale of no government bonds through them. The evidence of the recording officer of the county in which she resided was taken showing that the records of the county failed to show any transfer of mortgages to her. But he also testified that in many instances the assignments of mortgages were not presented for record until their payment, when the assignment and satisfaction were presented together. We also observe that in his testimony he refers to mortgages as being upon record executed by and to the same persons named by her, but that they did not show to have been transferred. The evidence of Mrs. Dogge and others having knowledge of the facts shows that the money loaned by her, upon the assignments named, was paid by the borrower, and the assignments returned, so that her testimony might be true and yet the facts of the assignment not appear upon the records. Mr. Allinger, his wife, and daughter, with whom Mrs. Dogge appears to have been well acquainted, all testified that at the time of Mrs. Dogge's departure from Wisconsin to come to this state she went to Mr. Allinger's house, closed up her business with him and received her money, and that prior to her departure they assisted her in counting the money which she had in her possession, which amounted to \$7,000, and which she testified she brought directly to this state. These facts, when taken in connection with what seems to me to be an absolute want of any proof connecting her with the alleged fraudulent transactions of the Herolds and Dr. Dogge, and the failure to trace any of Herold's money or property into her hands, impress me with the belief that the decree should be reversed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1889.

PRESENT:

HON. M. B. REESE, CHIEF JUSTICE.
 " AMASA COBB, } JUDGES.
 " SAMUEL MAXWELL, }

N. D. BLACKWELL ET AL. V. GEORGE D. WRIGHT.

[FILED SEPTEMBER 17, 1889.]

1. **Usury: EVIDENCE.** Plaintiffs, who were in possession of a promissory note, and chattel mortgage given to secure it, instituted an action in replevin against the mortgagor for the possession of the mortgaged property. The defense presented was that the note was tainted with the vice of usury, of which the plaintiff had knowledge at the time of the alleged purchase; that the purchase was colorable only and not *bona fide*, and that sufficient payments had been made on the original indebtedness to cancel it. Defendant called a member of plaintiff firm to the witness stand and over the objection of the plaintiff interrogated him as to his knowledge of the business methods of the payee of the note, and showed by him that he was somewhat familiar with the transactions of the payee's bank—a member of which was the brother of the witness—and that usurious interest was usually charged by such payee. It was *held*, that although not conclusive against plaintiff, yet the evidence was

(269)

27	269
39	491
39	697
27	269
41	44
27	269
45	286
27	269
52	604
53	624

competent as a circumstance to be considered by the jury in connection with other proven or admitted facts as tending to establish notice of defense.

2. **Impeaching Party's Own Witness.** While a party who calls a witness as his own may not discredit his testimony by impeaching him, yet this rule does not prevent such party from proving the truth by other witnesses even though the witness first called may be contradicted thereby.
3. **Usury : ONUS PROBANDI : VERDICT.** Usury being shown in the original transaction, and the burden of proof being upon plaintiffs to show the good faith of the transfer of the promissory note to them before maturity, the verdict in favor of defendant is sustained, as not being against the evidence.

ERROR to the district court for Hamilton county.
Tried below before NORVAL, J.

L. G. Hurd, and *Robert Ryan*, for plaintiff in error :

The testimony offered by defendant contradicting their own witness Updike was inapplicable except for impeachment, and inadmissible. (*Hooper v. Browning*, 19 Neb., 427-8 ; *Strader v. White*, 2 Id., 359, 360 ; 1 Green Ev. (10th Ed.), sec. 442.) Defendant seeks to enforce the penalty in the case of notes made more than a year before cause of action accrued, and is barred by sec. 13 of the Code. No money damages should be awarded, as the judgment was for the value of the property. (*Romburg v. Hughes*, 18 Neb., 579 ; 26 N. W. Rep., 351.) The judgment was not for a fixed sum, and therefore improper.

Agee & Stevenson, and *Hainer & Kellogg*, for defendant in error :

The burden of proof was on plaintiffs to show that they were *bona fide* holders, which they failed to do. The testimony contradicting Updike was offered not to impeach but to establish material facts. The objection made to it at the time was a different one and was too general. (*Wilhelm v. Russell*, 8 Neb., 120 ; *Gregory v. Langdon*, 11 Id.,

166 ; *Ry. Co. v. Walker*, 15 N. E. Rep., 234 ; 113 Ind., 196 ; *Steele v. Ry. Co.*, 74 Cal., 323.) But it was admissible even if impeaching. (*Wallack v. Wylie*, 28 Kas., 138 ; *Johnson v. Leggett*, Id., 590.) Defendant seeks not to enforce a forfeiture or a penalty, but to exercise his right of defense. The judgment is alternative in form and comes within provisions of sec. 596 of Code.

REESE, CH. J.

This was an action in replevin instituted in the district court of Hamilton county by the assignee of the mortgagee for the possession of certain personal property mortgaged by defendant in error to Updike & Titus for the purpose of securing the payment of a promissory note made by defendant to them, which note, it is claimed by plaintiff, was endorsed to them by the payee before maturity, in the due course of trade and for value. The defense presented was that the note was tainted with the vice of usury ; that it was a renewal of a number of preceding notes, upon which interest had been paid, more than sufficient to cancel the original indebtedness ; with a denial of plaintiffs' claim that they were good-faith purchasers before maturity.

A jury trial was had which resulted in a verdict in favor of defendant, finding the value of the property in dispute to be \$408, and assessing his damages at \$5. A motion for a new trial was filed, based upon the following grounds :

"(1.) The verdict is not sustained by sufficient evidence.

"(2.) Errors of law occurring at the trial and duly excepted to.

"(3.) The verdict is contrary to law."

Before a ruling upon the motion for a new trial was made, the defendant remitted \$4.99 from the verdict for damages, when the motion was overruled and judgment was rendered for a return of the property and one cent damages, or if a return could not be had, for \$408, the value of the property.

From this judgment the cause is brought to this court by plaintiff by proceedings in error.

Upon the trial plaintiff placed George W. Updike, a member of the firm of M. D. Blackwell & Co., plaintiffs, who are bankers in Harvard, upon the witness stand for the purpose of identifying the note and mortgage, and proving ownership thereof, and demand of defendant for the possession of the property in dispute; and after the introduction of the note and mortgage, plaintiff rested his case. Defendant thereupon recalled the same witness for the purpose of proving the circumstances under which the note was purchased, by which, doubtless, he desired to throw suspicion upon the transaction, and show thereby that the transfer was colorable only, and with intent to deprive defendant of any defense he might have to the note in the hands of the payees, Updike & Titus, which was also a banking firm doing business in Harvard, and which consisted of Edmund Updike and I. J. Titus. The testimony of this witness, while given with apparent candor, was not such as would fully establish the fact sought to be shown by defendant. In this connection defendant was permitted to interrogate him as to his knowledge of the methods of Updike & Titus in their business transactions and the rate of interest charged by them; Updike, of the firm of Updike & Titus, being a brother of the witness. It was shown that the rate of interest usually charged was more than the legal rate, of which the witness had knowledge. This was doubtless for the purpose of impeaching the *bona fides* of the purchase. While the fact alone that the purchaser of the note knew that the vendor and payee was loaning money at an usurious rate, might not of itself be sufficient to charge the purchaser with notice of the defense of usury, yet it would be competent as a circumstance to be considered in connection with other proven or admitted facts as tending in that direction; and the court did not err in overruling plaintiff's objection to the question asked.

The note and mortgage were offered and received in evidence, and are referred to in the bill of exceptions as exhibits "A" and "B," but are not attached thereto, nor is a copy of either to be found therein. We are unable, therefore, to say just when the note matured. George W. Updike, when called by plaintiff, testified that the purchase was made between the 20th and 30th of July, 1886. He also testified to the same thing in substance when called as a witness by defendant. We may assume, perhaps, that upon its face the note matured the first day of the following September, but of this there is no proof in the record. After George W. Updike had thus testified, defendant called other witnesses for the purpose of proving that on the 30th day of July he had offered to sell the note at a heavy discount, and that he had not seen defendant, nor learned of his proposed defense, until about the 6th of August. The objection to this evidence is that it was offered for the purpose of impeaching the defendant's own witness, George W. Updike, and therefore it was incompetent. While we fully recognize the principle of law contended for by plaintiff in error, that a person may not impeach the character of his own witness, and that having called him was equivalent to a recommendation that he was entitled to belief, which could not be contradicted, yet we do not apprehend that the testimony offered by defendant would fall under this rule. The rule will not prevent a person from proving the fact to be different from that which is stated by his own witness. The witness may be mistaken, may be misinformed, or he may have misled the party calling him. In either event, the party so calling him would not be prevented from showing the exact facts as they occurred, and this is not considered an impeachment of his witness.

It is contended that these facts, if true, have no significance whatever, and were improperly admitted in evidence. While it is no doubt true that there is nothing very con-

vincing in the evidence introduced, yet it was competent as a circumstance tending to show the want of good faith in the purchase of the note. If, immediately after the alleged purchase, and before plaintiff in error had an opportunity to see defendant, or had any knowledge as to what his purpose was, they went upon the market and sought to sell the note at a heavy discount, it would be competent to show that fact as tending to throw some light upon their alleged *bona fides*. While it is true that the evidence was not of as high a quality perhaps as might be desired, yet it would have some tendency to throw light upon the conduct of the parties, and for that purpose would be competent for the consideration of the jury, and to be given such weight, and only such, as they might deem it entitled to.

It was contended and urged by defendant in error on the trial that the note referred to was a final renewal of a long series of notes, which had been executed to the bank of Updike & Titus, and while upon the witness stand he exhibited what he claimed to be the notes which had formerly been executed to that bank, and of which the note in question was a renewal. These ran from exhibit "C" to exhibit "Z," and showed a large increase over the original note, notwithstanding endorsements aggregating a large amount upon the notes referred to. They were presented by him and identified and introduced in evidence. Not having the note involved in this suit, nor a copy of it, before us, and having no proof as to the amount for which it calls, we, of course, cannot enter upon an examination of this question. The various notes were payable to Updike & Titus, and it was for the jury to say, after hearing all the evidence, whether or not the note in question was a renewal of the indebtedness represented by them in the order of their dates.

It is insisted that as section 13 of the Civil Code permits an action to be instituted upon a statute for a penalty or forfeiture only within one year from the time

Blackwell v. Wright.

the cause of action accrued, the court erred in permitting defendant to show the alleged payments upon a claim to Updike & Titus, more than one year prior to the commencement of the action. This was not an attempt on the part of defendant to enforce a statute penalty, nor a forfeiture, but was for the purpose of showing that the indebtedness, which was the basis of plaintiffs' action, had been paid, and that therefore they were not entitled to the possession of the property described in the mortgage. Had the action been instituted by Updike & Titus, there can be no doubt but that it would have been entirely competent for the defendant to introduce, first, the proof of the usury, and, second, the evidence that he had entirely paid the debt, and that there was nothing due. Now if the transfer to Blackwell & Co. were not in good faith and for value, or if they purchased with notice of the rights of defendant, then the evidence would be competent for the same purpose as against plaintiffs in error. In this the court did not err.

Some objection is made to the ruling of the court upon the question of damages, but as the jury returned a verdict for \$5, and as \$4.99 of that sum was remitted, it is not deemed necessary to examine this question.

The next contention is that the verdict of the jury is not sustained by sufficient evidence; that there was not sufficient proof to establish the fact that the plaintiffs were not purchasers of the note and mortgage referred to, in good faith and for value, and that the verdict should have been in their favor. It is conceded that the usury having been shown, which is perhaps not denied, the burden of proving the good faith of the transaction is upon the party relying upon the fact of the purchase, without notice of the usury. (*Darst v. Backus*, 18 Neb., 231.) While it is true that the evidence submitted to the jury may leave the question of the *bona fides* of plaintiffs in doubt, yet we apprehend that that there is no doubt but that the note and

the whole transaction were tainted with usury of rather a rapacious character. The proof shows that perhaps a short time before the maturity of the note the firm of Updike & Titus claim to have transferred the note to Blackwell & Co. Edmund Updike, of the firm of Updike & Titus, was a brother of Geo. W. Updike, of the firm of Blackwell & Co.

It is said by some of the witnesses on the part of plaintiff that the note was purchased as an investment, while it is said by others that Updike & Titus were indebted to Blackwell & Co. in a large amount, and that they desired the payment of the money, which could not be made without embarrassment to Updike & Titus, and upon their request Blackwell & Co. accepted a part of the demand in promissory notes; so that it may be doubted whether or not the purchase of the note was a voluntary investment by Blackwell & Co., or whether they were not taken as the best means of collecting a pre-existing debt. Blackwell & Co. were familiar with the methods of Updike & Titus in the transaction of their business, and as to the rate of interest charged.

The testimony introduced by plaintiff in error is not entirely consistent with good faith on their part, and we cannot see that the verdict is so clearly against the weight of evidence as to require that it be set aside, the burden being upon plaintiffs.

Finding no error in the proceedings, the judgment of the district court must be affirmed, which is done.

JUDGMENT AFFIRMED.

THE other Judges concur.

C. AUGUSTA EARLE v. R. T. EARLE.

[FILED SEPTEMBER 17, 1889.]

27	277
142	680
27	277
44	884
27	277
62	615

1. **Implied Jurisdiction.** Courts of general equity and common law jurisdiction are not necessarily limited in the exercise of such jurisdiction to the provisions of the statutes.
2. **Husband and Wife: SEPARATE SUIT FOR ALIMONY.** The law of the land having made it the legal duty of a husband to support his wife and children, courts of equity within this state have the power, in a suit by the wife for alimony and support, to enforce the discharge of such duty, without reference to whether the action is for a divorce or not.
3. **Construction of Statute.** Whether or not section 40 of chapter 25 of the Compiled Statutes confers such authority by implication *quære*.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Estabrook & Irvine, and *A. Steere, Jr.*, for plaintiff in error:

The wife has a legal right to support from the husband. (Schouler, Husband and Wife, sec. 66.) Failure to support is a wrong for which there should be a remedy. Courts of equity have taken jurisdiction to decree alimony independent of a suit for divorce. (*Butler v. Butler*, 4 Litt. (Ky.), 202; *Galland v. Galland*, 38 Cal., 265; *Graves v. Graves*, 36 Ia., 310; *Garland v. Garland*, 50 Miss., 694. See also *Glover v. Glover*, 16 Ala., 440; *Rhame v. Rhame*, 1 McCord Ch. (S. C.), 197; *Purcell v. Purcell*, 4 Hen. & Mun. (Va.), 507; *Almond v. Almond*, 4 Randolph (Va.), 662; *Logan v. Logan*, 2 B. Mon. (Ky.), 124.)

Savage, Morris & Davis, for defendant in error:

The wife has no equitable right which enables her to invoke an equitable remedy independent of statute. The cases

cited by plaintiff in error may be explained and modified. *Butler v. Butler*, 4 Litt. (Ky.), 202, contains a misstatement of the law; *Glover v. Glover*, 16 Ala., 440, is a dictum; Iowa, Mississippi, and South Carolina are lacking in statutory remedies; hence the willingness of their courts of equity to assume jurisdiction. Such jurisdiction is denied by the following authorities: *Ball v. Montgomery*, 2 Vesey, Jr., 195; *Fishli v. Fishli*, 1 Blackf. (Ind.), 360; *Chapman v. Chapman*, 13 Ind., 396; *Moon v. Baum*, 58 Ind., 194; *Parsons v. Parsons*, 9 N. H., 309; *Doyle v. Doyle*, 26 Mo., 549; *Ramsden v. Ramsden*, 91 N. Y., 281; *Adams v. Adams*, 100 Mass., 365; *Anshultz v. Anshultz*, 16 N. J. Eq., 162; *Peltier v. Peltier*, Harring. Ch. (Mich.), 29; *Perkins v. Perkins*, 16 Mich., 162; *Heyob v. Husband*, 18 La. An., 41; *Moore v. Moore*, Id., 613.

REESE, CH. J.

This action was instituted in the district court of Douglas county, by the wife against the husband for maintenance and support, but without a prayer for divorce. It was alleged in the petition, substantially, that plaintiff and defendant were married on the 15th day of May, 1871; that the issue of the said marriage was one child, born in July, 1879; that on or about the 1st day of January, of that year, defendant sent plaintiff away from him and has ever since refused to permit her to return, contributing to her support and maintenance separate and apart from himself; that in the month of August, 1885, defendant ceased and refused to further provide for the support of plaintiff and their said child, and at no time since that date has he contributed or offered to contribute in any way to their support or maintenance; that plaintiff was entirely without means to support herself and child during the pendency of the suit; that she was also without means to carry it on; that her daughter, the child aforesaid, now seven years of age, was wholly dependent upon her (the plaintiff) for

support, maintenance, care, and education; that defendant was an officer in the United States army, commissioned as first lieutenant, and receiving a salary of \$120 per month.

The prayer of the petition was that defendant be required to pay plaintiff a reasonable sum for her maintenance and support during the pendency of the suit, and such further sum as would enable her to carry on the action; and that on a final hearing she be decreed reasonable alimony out of the property and income of defendant, together with the costs, etc.; with prayer for general relief.

To the petition defendant interposed a demurrer, upon two grounds:

First, That the court had no jurisdiction of the subject of the action; and, *Second*, That the petition did not state facts sufficient to constitute a cause of action.

This demurrer was sustained by the district court, to which plaintiff excepted, and upon her refusing to amend or further plead, the cause was dismissed.

The case is presented to this court by proceedings in error, the error assigned being that the court erred in sustaining the demurrer.

The question presented is, whether or not an action for maintenance and support can be maintained in this state, when not coupled with a petition for a divorce, either from the bonds of matrimony or from bed and board.

Upon this question the statutes of this state are substantially silent. The nearest approach to authorizing an action of this kind is found at section 40 of chapter 25, Compiled Statutes, entitled Divorce and Alimony. The chapter provides for divorce of two kinds, to-wit, of divorce from the bonds of matrimony, and from bed and board.

Sec. 40, in treating of an action for a divorce from bed and board, provides that "in case of an application for a divorce from bed and board, although a decree for such divorce be not made, the court may make such order or

decree for the support and maintenance of the wife and children, or any of them, by the husband, or out of his property, as the nature of the case may render suitable and proper." While it appears that an order of the kind sought in this case cannot perhaps be made except in an action for a divorce from bed and board, yet it is specially provided that the authority of the court to make an order for the maintenance of the wife or children, or either of them, by the husband shall not depend upon a decree of divorce from bed and board having been rendered, but that such order may be made without reference thereto. By this section the court is given the authority and jurisdiction to render a decree of the kind sought by the plaintiff, but it is contended that such order can only be made in an action for a divorce of the kind named.

Assuming that this section does not give the court the authority to make the order claimed by plaintiff, but of which there may be some doubt, it then becomes necessary to enquire whether a court of equity would have the jurisdiction independent of any statutory provision upon the subject.

We apprehend that courts of common law and equity jurisdiction are not necessarily limited to the provisions of the statutes in matters of jurisdiction, and might perhaps render such decrees in equity causes as the nature of the case would require, assuming that the plaintiff showed that she was entitled to equitable relief.

This question has been before the courts of some of the states, and it seems that a majority have decided that courts of equity would not have jurisdiction to enter a decree of the kind prayed for, while others have held that such jurisdiction did exist.

It is a well established rule of law that it is the duty of the husband to provide his family with support and means of living — the style of support, requisite lodging, food, clothing, etc., to be such as fit his means, position, and sta-

tion in life—and for this purpose the wife has generally the right to use his credit for the purchase of necessaries. At common law, where the husband heedlessly and wantonly and from improper motives refused a wife the necessary comforts of life and refused to provide for her, a criminal prosecution with recognizance was sometimes resorted to, for the purpose of compelling a competent husband to support his family. (Schouler on Husband and Wife, sec. 66.) It is the common expression of all writers, found in the text books, that there is no wrong without some remedy. Now if the allegations of the petition are true, which the demurrer admits, there is evidently a wrong. The question is, whether or not the plaintiff shall be compelled to resort to a proceeding for a divorce, which she does not desire to do, and which probably she is unwilling to do, from conscientious convictions, or, in failing to do so, shall be deprived of that support which her husband is bound to give her. The authority or jurisdiction to grant divorces was exercised in England by the ecclesiastical courts, which have never existed in this country, and therefore no court has such jurisdiction here except by statute. But the authority to grant alimony grows out of the equity powers of the court.

While the statute books of this and other states amply provide for the granting of divorces in meritorious cases, yet we do not apprehend that it is the purpose of the law to compel a wife, when the aggrieved party, to resort to this proceeding, and thus liberate her husband from all obligations to her, in order that the rights which the law gives her, by reason of her marital relations with her husband, may be enforced. Such a conclusion would not generally strike the conscience of a court of equity as being entirely equitable.

In *Butler v. Butler*, 4 Litt. (Ky.), 202, the court says: "It is clear that strong moral obligations must lie on any husband, who has abandoned his wife, to support her. The

marriage contract, and every principle, binds him to this. If he fails to do it, it is a wrong acknowledged by common law, though the law knows no remedy, because the wife cannot sue the husband; but in equity the wife can sue the husband, and it is the province of the court of equity to afford the remedy where conscience and law acknowledge a right, but know no remedy. Why then should the chancellor shrink at this case and refuse a remedy."

In *Galland v. Galland*, 38 Cal., 265, this rule was followed, but by a divided court. From the syllabus in that case we quote the following:

"Provisions for alimony made in the statutes concerning divorces are not intended to be a prohibition to the granting of alimony in other cases. The power to decree alimony falls within the general powers of a court of equity, and exists independent of a statutory authority, and in the exercise of this original and inherent power a court of equity will in a proper case decree alimony to the wife in an action which has no reference to a divorce or separation."

In *Garland v. Garland*, 50 Miss., 694, in which there is a pretty general review of the cases, the court says:

"Courts of equity in America should always interpose to redress wrongs when the complainant is without fair and adequate and complete remedy at law. Here there is no such process as *supplicavit* nor a distinct proceeding for the restitution of the conjugal relation. If a wife is abandoned by her husband, without means of support, a bill in equity will lie to compel the husband to support the wife without asking for a decree of divorce." (See also *Almond v. Almond*, 4 Rand. (Va.), 662; *Purcell v. Purcell*, 4 Hen. & Munf., 506; *Jelineau v. Jelineau*, 2 Des. (S. C.), 45; *Prince v. Prince*, 1 Rich. Eq. Rep., 282; *Graves v. Graves*, 36 Iowa, 310; 2 Bishop on Marriage and Divorce, sec. 354, *et seq.*; *Glover v. Glover*, 16 Ala., 440; *Wray v. Wray*, 33 Id., 187.)

Earle v. Earle.

The cases cited in defendant's brief show that the states of Indiana, New Hampshire, Missouri, New York, Massachusetts, New Jersey, Michigan, and Louisiana have held to the opposite doctrine.

There being this conflict in the decisions of the courts, it becomes the duty of this court to decide the case upon what may be deemed the soundest principles and those most in consonance with the spirit of the present civilization and of our law. As we have already said in substance, there is not much to commend an alleged principle of equity which would hold that the wife, with her family of one or more children to support, must be driven to going into court for a divorce when such a proceeding is abhorrent to her, or, in case of her refusal so to do, being compelled to submit to a deprivation of the rights which equity and humanity clearly give her; that, in order to obtain that to which she is clearly entitled, she must institute her action for a divorce, make her grievances public, which she would otherwise prefer to keep to herself, and finally liberate a husband from an obligation of which he is already tired, but from which he is not entitled to be relieved. It seems to us that a declaration of such a doctrine as the law of the land would place it within the power of every man, who, unrestrained by conscience, seeks to be freed from his obligations to his wife and family, by withholding the necessary comforts and support due them, to compel her to do that for him which the law would not do upon his own application. This, it seems to us, must have been the view of the legislature in the enactment of the law of divorce and alimony, which we have hereinbefore copied. But however that may be, we are of the opinion that courts of equity should have and do have the jurisdiction to grant relief in cases of this kind without reference to the statutes of the state, but by and through the jurisdiction growing out of the general equity powers of the court.

The judgment of the district court is reversed, the demurrer overruled, and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

NEBRASKA TELEPHONE COMPANY, APPELLANT, V.
YORK GAS AND ELECTRIC LIGHT COMPANY, AP-
PELLEE.

[FILED SEPTEMBER 17, 1889.]

- 1 **Telephones: ELECTRIC LIGHT WIRES: PRIORITY OF CONSTRUCTION.** In an action instituted by a telephone company, to enjoin an electric light company from erecting its poles and wires in the same street upon which the telephone wires were placed, it was shown by sufficient evidence that the ordinance giving the authority to the electric light company to erect its poles and wires upon the street was passed, and said company had constructed its plant and erected a part of its poles and wires, had decided upon the streets and public ground which it would occupy, and notified the telephone company of the fact, before it had constructed its lines thereon, and which the officers and agents of the telephone company stated would be satisfactory to them, and had also commenced the erection of its line on the streets designated, when the telephone company erected its poles and wires on the designated line, which was immediately followed by the erection of the electric light poles and wires. It was *held*, that the finding of the district court that the electric light company first occupied the street, was sustained by the evidence.
2. ———: ———: **INJUNCTION REFUSED.** In such case, where there was sufficient evidence to sustain the finding of the above fact, the trial court would be justified in refusing an injunction against the electric light company, restraining it from occupying the streets in question.

3. ———: ———: NEARNESS WITHOUT INTERFERENCE. It having been shown upon the trial, and practically admitted by the attorneys and witnesses for the electric light company, that the erection of the telephone wire near the electric light wire would not injure the usefulness of the electric light wire, and no affirmative relief having been demanded by the answer, or sought at the trial, a decree of the district court restraining the telephone company from placing its line of wires near the wires of the electric light company was, to that extent, reversed.

APPEAL from the district court for York county. Heard below before NORVAL, J.

Sedgwick & Power, for appellant:

Defendant should not have been granted affirmative relief. (Code, secs. 429, 262, taken from Ohio Code; *Klonne v. Bradstreet*, 7 O. S., 326; Boone, Code Pleading, secs. 101, 102.) Some of the findings below are clearly wrong and should be set aside. (*Mfg. Co. v. Feary*, 22 Neb., 68; 33 N. W. Rep., 485; *Seymour v. Street*, 5 Neb., 85.) Defendant cannot rely on estoppel, having failed to plead it, and there being no evidence to support it if pleaded. (*R. Co. v. Harris*, 8 Neb., 142; Bigelow, Estoppel [3d Ed.], 484, 486.) The grant is rather that of an easement or license than of a franchise (*People v. Gas Co.*, 38 Mich., 154); and is within the powers of the city. (Comp. Stats., 1887, ch. 14, sec. 69, subds. 12, 28; Laws 1887, p. 634; *Quincy v. Bull*, 106 Ill., 349.)

France & Harlan, for appellee:

The matters litigated are all of an equitable nature and it was proper to grant affirmative relief. (1 Story Eq. Jur., sec. 71, N. 1, and cases cited; *Wallace v. Wallace*, 63 Mich., 326; 29 N. W. Rep., 841; *Whipple v. Farrar*, 8 Mich., 436; *Miller v. Stepper*, 32 Mich., 194; *Bradley v. Bosley*, 1 Barb. Ch., 151.) Plaintiff is estopped by its own acts. (*Nosser v. Seeley*, 10 Neb., 460; 6 N. W. Rep., 755.) A

franchise is a special privilege. (*Bank v. Earle*, 13 Peters, 519; *Curtis v. Leavitt*, 15 N. Y., 9-170); and must be a grant from a sovereign authority. (*Bridge Co. v. Shepherd*, 21 How., 112-123; *Thompson v. Moran*, 44 Mich., 602.) A municipal corporation cannot grant what has not been granted to it. (*Minturn v. Larue*, 23 How., 435, 437; *Gas Light Co. v. City Gas Co.*, 25 Conn., 19.) Public grants are to be construed strictly. (*Thompson v. R. Co.*, 3 Sandf. Ch., 625; 1 High on Inj., secs. 902, 909; Boone, Corporations, sec. 293, and cases cited.) The right to use the streets as in this case granted is a franchise and can only emanate from the state. (4 Wait's Act. & Def., pp. 614-16, sec. 12, cases cited; *Boston v. Richardson*, 18 Allen, 160; *State v. Gas Co.*, 18 O. S., 262, 274, 292; *Milhan v. Sharp*, 15 Barb., 210; *Com. v. Boston*, 97 Mass., 555.) There is no statute from which the power to grant such franchises, by a city of the second class, may be derived. Defendant is justly entitled to freedom from interference. (*Walker v. Armstrong*, 2 Kas., 198-220.) An injunction should be refused where defendant has been allowed to proceed at length and incur large expense. (1 High on Inj., sec. 915; *S. C. R. Co. v. C., etc., R. Co.*, 13 Rich. Eq. (S. C.), 339; *Fremont Ferry v. Dodge County*, 6 Neb., 18-26.) Injunction does not lie unless actual injury to a franchise exists. There is a legitimate object for the erection of defendant's poles and wires, and equity will not restrain the accomplishment of such object merely because it may be perverted. (*Del., etc., R. Co. v. Camden, etc., R. Co.*, 2 McCart. (N. J.), 1; 1 C. E. Green (N. J.), 321; 3 Id., 546; *Penn. R. Co. v. Nat. R. Co.*, 8 Id., 441; *Central R. Co. v. Penn. R. Co.*, 31 N. J. Eq., 475.)

REESE, CH. J.

This action was instituted in the district court of York county and was for an injunction to restrain defendant

from interfering with the telephone system of the plaintiff in the city of York. A trial was had to the district court, which resulted in findings and a decree in favor of plaintiff in part, and of defendant in part, which is hereinafter set out at length.

It was alleged in the amended petition of plaintiff that plaintiff was incorporated under the laws of this state, and was doing a general telephone business in the various cities thereof, and that by an ordinance of the city of York, which is set out in full in the petition, the plaintiff was authorized to construct and operate its telephone system in the said city, and had before the institution of this action commenced the construction and operation of such system therein, connecting its system in the city of York with its general telephone system throughout the state; that the defendant had been authorized by an ordinance to construct an electric light and tower system in the city of York, and that it had commenced constructing the same; that in carrying on said business defendant used lines of wire for the purpose of conducting electricity, and that it was using and contemplated using wires for conducting electricity for the purpose of furnishing incandescent light to its patrons and the public, and wires for the conducting of electricity for furnishing arc lights for the use of its patrons and the public, and also for the purpose of furnishing power to its patrons and the public, to be used and applied in propelling machinery and for other purposes; that in conducting electricity for the purpose of supplying incandescent light a large quantity and force of electricity was and would be necessarily used, much larger in quantity and power than the current of electricity necessarily conducted over the lines of wires of plaintiff in the transaction of its telephone business, and in the conduction of electricity for the purpose of supplying arc light a still larger quantity and power of electricity was and would be necessarily conducted over the said wires of defendant than the quantity and

intensity of electricity used in supplying the incandescent light; that the wires charged with the amount of electricity necessary for supplying the incandescent light, when placed parallel with the wires of plaintiff, by reason of the incandescent light wires carrying a larger quantity and force of electricity, would greatly interfere with the use and operation of the wires of plaintiff in the transaction of its business—so much so that it would be impossible for it to carry on its business successfully if the wires carrying electricity for the purpose of supplying incandescent light were used and operated parallel with the wires of plaintiff, and at a less distance than three feet from its wires, even when the incandescent light wires were most cautiously and carefully operated. And even when the natural conditions were the most favorable for such operation of the incandescent light, and under circumstances that from the nature of the business of supplying electricity for lighting purposes were liable at any time to occur even with the most careful management, the current of electricity for supplying the incandescent light, if from wires parallel with the wires of plaintiff even at a greater distance than three feet, would interfere with and wholly prevent the operation and use of the line of wires of plaintiff; that the wires of defendant placed and operated for the purpose of supplying electricity for arc light would, when charged with electricity for the purpose for which they were intended and erected, and when running parallel with the wires of the plaintiff, if they were placed and so used within a less distance than ten feet of the wires of plaintiff, interfere with and wholly prevent the operation of wires of plaintiff in the transaction of its telephone business. And the wires for supplying electricity for arc light would, when charged with electricity for the purpose for which they were intended, and when crossing the wires of plaintiff, if they were placed and so used at a less distance than ten feet from the wires of

plaintiff, interfere with the proper operation of its wires; and from the liability of the wires to come in contact with the wires of plaintiff there would be great danger of accident, not only to the property of plaintiff, but the property of others, unless the arc light wires of defendant were securely enclosed in good boxing so as to prevent the possibility of the wires coming in contact with the wires of plaintiff. And if the arc light wires so crossing the wires of plaintiff were placed at a less distance than five feet from the wires of the plaintiff, they would greatly interfere with the proper operation of its wires. That the wires of defendant placed and used for the purpose of conducting electricity for the purpose of power would have greater force and effect and interfere with the operation of plaintiff's wires when running parallel therewith, or when crossing the same, than the wires charged with electricity for the purpose of supplying the incandescent or arc light, and if any of the wires of defendant were placed parallel with the wires of plaintiff, and on the same side of the street or alley of the poles and wires of plaintiff, and were used for the purpose of conducting the electricity for incandescent or arc light, or for power purposes, by reason of the wires of plaintiff becoming loose or misplaced by accident or other cause, the wires of plaintiff coming in contact with the wires of defendant, the current of electricity being conducted over said wires of defendant and being transmitted thereby to the wires of plaintiff, and by reason of other circumstances and conditions necessarily arising and that would necessarily arise in the carrying on of the business, there would be continual danger and liability of damage and destruction of the instruments and appliances and the property of plaintiff, and of the property of other persons adjacent to the wires so placed and operated. That at the time of the commencement of the action and after plaintiff had chosen its site for the erection of its poles and wires and had occupied the same upon the several streets and avenues of the city with

its poles and wires, and had placed its wires and instruments and made its preparations to build its said system of telephone communication, defendant, by its agents and employees, placed certain poles and wires for the purpose and intention of using the same for the conduction of electricity for supplying incandescent lights and arc lights, and for power purposes, on the said street and upon the same side of the street so occupied by plaintiff, and along the side of and over and below and against and among the poles and wires of plaintiff, and threatened and was about to place its poles upon the same side of the street occupied by plaintiff, and to place its wires thereon, under and along the side of, and over against and among the wires of the plaintiff and threatened to, and unless restrained by the order of the court would, operate its system of electric lighting by supplying the incandescent and arc lights by an electrical current and also employ electricity for power purposes over and upon the said poles and wires and upon the same side of the streets and avenues, and along and among the wires of plaintiff, and that if defendant was allowed to place its poles and wires as aforesaid and to operate its system of electric lighting and of electricity for power purposes, or either or any of them, over its said poles and wires so placed, or was allowed to place and operate its wires upon the same side of the street parallel with the wires of plaintiff, or was allowed to place and operate its wires at a less distance than ten feet from the wires of the plaintiff and parallel thereto, or was allowed to place and operate its wires, or any of them, across the wires of plaintiff at a less angle than forty-five degrees with the wires of plaintiff, or across the wires of plaintiff at a less distance than five feet from the wires of plaintiff, it would destroy or render valueless plaintiff's poles, wires, and system of telephone in the city of York, and render the same and the property and franchise of plaintiff of no value whatever and would greatly injure the operation of the

plaintiff's system of telephones in other towns and cities in connection with the said system of telephones in the city of York, and would cause great and irreparable injury, etc.

An order of injunction was prayed for restraining defendant, its agents and employees, from proceeding with the poles and wires and other property of plaintiff, as well as its franchise, and from erecting or maintaining or using its wires or conductors of electricity upon the same side of any street previously occupied by the poles and wires of plaintiff, and from erecting or maintaining or using its wires or any wires or conductors of electricity parallel with the wires of plaintiff within a distance of ten feet from its wires erected or to be placed upon its poles and from so placing its wires, or using the same so as to make it interfere, by induction, contact, or otherwise, with the completion or operation of plaintiff's system of telephonic communication.

The defendant answered setting up its authority from the city of York, to erect its electric light and power system in the city, and that it had commenced the erection of its system, and admitting that it was incorporated for the purpose of furnishing electricity for the purposes named. It was alleged that long prior to the time that plaintiff commenced the erection of its poles with its system of wires thereon in the city, and long prior to the time it commenced the erection of any poles with system of wires thereon for the purpose of connecting any other towns or cities with telephonic communication with York, or for any other purpose whatever, or having spent any money whatever therefor, that plaintiff had full knowledge of the franchise allowed by the mayor and councilmen of the city of York and of the ordinance mentioned in its petition granting to the defendant rights and privileges as an electric and power company; that plaintiff had full knowledge that defendant had erected and constructed an electric light station and an electric light plant at a cost of \$6,000, in the city, and that it occupied with its poles and wires

necessarily used in the operation of its light certain streets, alleys, avenues, and public grounds of the city and certain streets named in the answer, to-wit, Lincoln and Grant avenues, and Fifth and Sixth streets; and also that defendant had a contract with a large number of citizens, residents of the city of York, and with the city itself, to furnish and place in their respective places of business and had places designated for arc and incandescent lights, and to furnish electricity for lighting the residences and places of business as well as public grounds in pursuance of said contract, and that it was authorized to place many other lights in the city under new contracts as well as in the carrying out of the contract already made; that long prior to the placing of any poles, wires, or other appurtenances for telephonic purposes in said city by plaintiff, plaintiff informed defendant and the city council of the city of York, and other citizens, that defendant's electric light system, or the franchise granted defendant by said ordinance, would not and could not interfere with plaintiff's telephone system, and that plaintiff intended to put up and would put up poles around the public square in the city forty-five feet in length, and on Lincoln and Grant avenues and on Fifth and Sixth streets and all business parts of said city it intended to and would put up poles forty-two feet in length, and place wires thereon not less than thirty feet from the ground. The answer also contained a general denial of all the allegations contained in the petition not admitted.

To this answer plaintiff filed a reply, admitting the passage of the ordinance authorizing the defendant to erect his electric light and power system, and that the defendant had constructed and erected an electric light station and an electric light plant and had erected certain poles and wires and appurtenances for the operation of electric lights in the city of York, but denied that the defendant had ever lawfully occupied any part of the streets named prior

to the commencement of the action except as it had erected and placed its poles and wires against and among the poles and wires of plaintiff before that time erected and placed by it as set forth in the petition. It was further admitted that the plaintiff had knowledge of the fact of the ordinance referred to prior to the erection and completion of its telephone system, but denied that it had any knowledge of any occupation on the part of defendant of any of the streets named or any part thereof prior to the commencement of the suit except as was fully set forth in the petition.

The plaintiff also denied that it had ever informed defendant or any other person that defendant's electric light wires would not and could not interfere with plaintiff's telephone system; or that plaintiff intended to put up or would put up poles around the public square and along the streets named of the length named; or that plaintiff intended to or would put up its wires not less than thirty feet from the ground. The reply also contained a general denial of all the allegations of the answer not admitted. The findings and decree of the district court were as follows:

"1. That the plaintiff and defendant are corporations duly incorporated under the laws of the state of Nebraska.

"2. That on the 19th day of September, 1887, the mayor and city council of the city of York, Nebraska, duly passed the ordinance set forth in the defendant's answer, which ordinance was duly approved by the mayor of said city, and was published as required by law. That said ordinance authorized the defendant to construct and maintain an electric light power, or gas plant, or both, in said city, and to that end authorized said defendant to use any of the streets, avenues, alleys, bridges, sidewalks, or public grounds of said city, for the purpose of making necessary excavations or erecting poles, posts, or wire therein. Said ordinance requires all poles conveying wires shall reach at least eighteen feet above ground.

"3. That on the 7th day of November, 1887, the mayor and said city council of the city of York passed the ordinance set forth in the plaintiff's amended petition, which ordinance was duly approved by the mayor of said city, and was published as required by law. That said ordinance granted to the plaintiff the right of way for the erection and maintaining of poles and wires, with all the appurtenances thereto, for the purpose of transacting a general telephone and telegraph business through, upon, and over the streets, alleys, and public grounds of the said city of York.

"4. That in pursuance of said ordinance set forth in defendant's answer, the defendant, prior to November 7, 1887, had constructed and erected its electric light station and electric light plant at the cost of about \$6,000.00, and had occupied, with its poles, wires, and appurtenances necessarily used in the operation of its electric light, some of the streets and alleys of said city, prior to the erection of any poles or wires by the plaintiff in said city. That said plant so put in by the defendant was for the purpose of both arc and incandescent systems of lighting by electricity. That prior to the commencement of this action the said defendant had erected its poles and wires along the east side of a portion of Lincoln avenue and Grant avenue, and along the south side of a portion of Fifth street and the north side of a portion of Sixth street, of said city, for the purpose of carrying on its said business of electric lighting. That at the time the said defendant erected its poles upon the aforesaid streets and avenues, the officers and employees of the plaintiff had full knowledge thereof, and made no objection thereto. That prior to the erection of the poles by the defendant, the superintendent of construction of the plaintiff company stated to the manager of the defendant company that the same would not interfere with plaintiff's telephone system, and that the officers of the plaintiff company stated to the officers of the defendant company, before the defendant had erected any poles, that

the plaintiff company would erect forty-five-foot poles in the business part of said city of York where it should erect its poles.

"The court finds that each side of the public square or court house square of said city is a portion of the business part of said city ; that the plaintiff has erected on the south side and west side of said square forty-five-foot poles, and on the east and north sides, poles of thirty feet in length.

"The court finds that the defendant occupied the north side of Sixth street with its poles prior to the occupancy thereof by the plaintiff. That the plaintiff occupied Fifth street and Grand avenue prior to the occupancy thereof by the defendant. That prior to the commencement of this action the defendant was proceeding to extend and complete its said system of poles and wires through the city of York, and in many places running parallel to the poles and wires of the plaintiff on the same side of the street.

"5. That prior and at the time of the commencement of this action the plaintiff had erected and was maintaining a system of lines and telephones in at least forty of the towns and cities of the state of Nebraska, and between and connecting the said towns and cities of the state of Nebraska and between and connecting the said towns and cities in which they were so operating, for the purpose of supplying its patrons and the public with a means of communication from point to point in said cities and towns, and also between said towns and cities, by the use of electricity upon said wires operating telephone instruments and other apparatus. That at the commencement of this action the plaintiff had erected and was maintaining and operating a line of its said poles and wires from said city of York, connecting with the other towns and cities of its said system of telephonic connection, and had in connection with its said systems erected and placed poles and wires upon the west side of a portion of Lincoln avenue, upon the east side of a portion

of Grant avenue, upon the south side of a portion of Fifth street, and upon the north side of a portion of Sixth street of said city, had located its central office on the south side of the public square of said city of York, and was proceeding further to extend and complete its system in the city of York. And in pursuance with contracts made with various citizens in the city of York, the plaintiff had placed certain of its telephone instruments in the offices and residences of many of the citizens of York, and which said instruments were connected with other and said system in said city was in operation for telephonic communication.

"6. The court further finds that it will be of great and irreparable injury and damage to the business of the plaintiff and its property, telephone instruments, apparatus and appliances, and will be dangerous to the lives and property of the public and will be dangerous to the patrons of the plaintiff as well as to the public, and will greatly interfere with the use and operation of the wires of the plaintiff for the defendant to use a wire or wires running parallel with the wires of the plaintiff and on the same side of the street with the telephone wires in the use of the plaintiff, for the purpose of conducting electricity for arc lighting.

"The court further finds that the wires of the incandescent system of lighting used by the defendant, when run on the same side of the street as the telephone wires in use and parallel therewith at a less distance from the said telephone wires than eight feet and for a greater distance than three hundred feet, will greatly interfere with the use and operation of the wires of the plaintiff and will cause plaintiff great and irreparable injury as well as damage to both life and property.

"7. The court finds that the defendant had the prior occupancy of the north side of Sixth street, west from Grant avenue to the first alley west of Lincoln avenue, and

had the right to use said street with its poles and wires for both arc and incandescent lighting without molestation and interference on the part of the plaintiff.

"8. The court further finds that it will cause plaintiff great and irreparable injury and will be dangerous to both life and property for telephone and electric light wires to cross each other at a less angle than forty-five degrees or nearer to each other than five feet, unless the wires of the system is boxed with wooden boxes or a strong iron guard wire is suspended midway between the two systems so that the wires of the upper system will not fall upon the lower.

"9. The court further finds that the plaintiff insists upon the use and occupancy of the said north side of Sixth street with its poles and wires and that the defendant has no right to use the same with its poles and wires and that the plaintiff insists and claims that the defendant shall not occupy with its poles and wires the same side of the streets that the plaintiff uses and occupies with its poles and wires. That the defendant insists that it has the right to and threatens to place its poles and wires upon the same side of the street, and along and parallel with the wires and poles of the plaintiff and in close proximity thereto.

"10. The court further finds that the defendant can run its wires for incandescent lighting on the same side of the street of and parallel with the telephone wires when not nearer than eight feet from each other, or for a distance of not exceeding three hundred feet, without injury to the plaintiff, provided a strong iron guard wire is suspended at least every hundred feet and midway between the two systems so as to prevent the upper wire from falling upon the lower.

"11. The court further finds that the greatest number of plaintiff's wires, and on account of the manner in which said plaintiff's system in York was planned, laid out, and erected, the bulk of its business will be done over the wires and poles placed on the south and west sides of the

public square; that but few of its wires are placed on the north side and east side of the square and that the said system was planned by the plaintiff with a view of not placing many wires on its poles on the said east and north sides. The court finds that the plaintiff placed thirty-foot instead of forty-foot poles on the east side and north side of said square, 'the same being a portion of the business part of said city of York,' for the purpose of preventing the defendant from using its poles and wires on said east and north sides of the square, the defendant's poles being twenty-five feet in length before being set.

"It is therefore ordered, considered, adjudged, and decreed by the court that the defendant has the right to use its poles and arc and incandescent wires for electric lighting on the north side of Sixth street between Grant avenue and the first alley west of Lincoln avenue without let or hindrance on the part of the plaintiff, its agents, employees, or servants, and also the defendant has the right to use its poles and incandescent wires for incandescent lighting on the east side of Grant avenue from Fifth street to Sixth street, and on the south side of Fifth street from Grant avenue to Lincoln avenue, when said wires are not more than twenty-two feet from the ground, without interference on the part of plaintiff or its agents, employees, or servants.

"It is further adjudged and decreed, with the above exceptions, that the defendant, its agents, servants, and employees, are perpetually enjoined from using for arc lighting purposes any wires running parallel with and on the same side of the street with a telephone wire of the plaintiff, and the said defendant, its agents, servants, and employees, are also perpetually enjoined, 'with the exceptions above stated,' from using for incandescent lighting purposes any wire which runs parallel with any telephone wire of the plaintiff on the same side of the street which is less than eight feet from such telephone wire, nor in any case for

more than three hundred feet, and not in that case unless a strong iron guard wire is suspended every one hundred feet and midway between the said telephone and electric wires so as to prevent the upper wires from falling on the lower.

"It is further ordered, adjudged, and decreed that the defendant, its agents, servants, and employees, are perpetually enjoined from using any electric light wire which the defendant has already strung or shall hereafter string across any telephone wire of the plaintiff unless said wires cross at an angle of at least forty-five degrees and at least five feet apart, and not in that case unless the wires of one system is boxed in wooden boxes, or a strong iron guard wire is suspended midway between the two systems so as to prevent the wires of the upper system from falling upon that of the lower.

"It is further ordered, adjudged, and decreed that where the wires of the one system already cross that of the other, or where the wires of the one system shall hereafter be constructed across that of the other, it shall be the duty of the company that cross or shall hereafter cross the wires of the other company to construct the boxes or guard wires aforesaid, and for that purpose shall have the right to use the poles of either company.

"It is further ordered, adjudged, and decreed that the plaintiff, its agents, servants and employes, be perpetually enjoined from constructing or using any telephone wire parallel and within eight feet of any electric light wire of the defendant. And it is further ordered that this decree shall take effect and be in force from and after the fifth day of March, A.D. 1888, and each party pay its own costs."

From this decree plaintiff appeals. It is now contended by plaintiff that the nature of the two systems is such that they cannot be successfully and safely operated near together nor on the same side of the street, excepting in a very limited manner and for a very short distance, and that with the greatest precaution. It is contended that the dis-

trict court erred in decreeing defendant any affirmative relief; also that some of the findings of the district court were not supported by the evidence; that some of the findings are inconsistent with each other, and lastly, that the decree is in many respects inconsistent with the findings.

From a careful examination of the pleadings and evidence in the case, we are persuaded that the first contention of appellant is well founded. We are unable to find anything in the answer of defendant demanding or entitling it to affirmative relief. In addition to this the evidence submitted to the trial court shows that it does not need and is not entitled to any protection from the telephone system of plaintiff. We are unable to find any proof that that the proximity of the plaintiff's wires to those of defendant will render defendant's service any less effective than were they more remote, as it seems to be pretty clearly shown by the evidence that plaintiff would be the only sufferer by the transmission of electricity from defendant's system to that of plaintiff; the electrical force used by defendant being so much greater than that of plaintiff. There is much said in the testimony about injury to persons and property from the wires of the two systems coming in contact, by falling one upon the other; but of this we presume the municipal authorities of the city of York will have complete control in the exercise of the police powers granted to it for the protection of life and property upon the street, and within its jurisdiction. So much of the decree therefore as enjoins plaintiff and its agents and servants from constructing or using any telephone wire parallel to and within eight feet of any electric light wire of defendant, will be vacated, and the decree to that extent modified, as not properly in the case submitted to the court upon the pleadings and evidence.

The real contest in this case, is as to the right to occupy the streets on the north, south, and east sides of the public square, which is upon the north side of Sixth street be-

tween Lincoln avenue and Grant avenue, on the east side of Grant avenue, between Fifth and Sixth streets, and on the south sides of Fifth street, between Grant and Lincoln avenues, and therefore it is not deemed necessary to notice here all the questions presented and discussed in the very able briefs and oral arguments submitted by the attorneys for either side.

It may be observed, as shown in the findings and decree, that the ordinance under which defendant was given the right to occupy the streets and public grounds of the city, was passed on the 19th day of September, 1887, and that under which plaintiff obtained its right was passed on the 7th of the following November, thus in point of time giving to defendant the first authority to occupy the streets and public ground, but of course not to the exclusion of plaintiff; that in pursuance of the ordinance passed in September, and prior to the time of the passage of the ordinance under which plaintiff asserts its right to occupy the streets and public grounds of the city, defendant had constructed and erected its electric light station and plant, at a cost of about \$6,000, and, prior to the erection of any poles or wires by defendant, had occupied with its poles and wires some of the streets and alleys of the city; and in this connection it may be noticed that one of the findings of the district court is to the effect, that at the time of the erection of its poles and wires by defendant, plaintiff and its officers had full knowledge of the fact and made no objection thereto. The proof shows that the building and machinery constructed by defendant prior to the taking of any action by plaintiff toward the erection of its poles and wires, were placed on the alley west of Lincoln avenue, running north and south, and nearly one block north of Sixth street, which is the northern boundary of the public square, and that it constructed a line of poles, thence south along the alley to a point opposite the south side of the square, or on Fifth street, and that upon the pole on the

north side of Sixth street—but within the street—a cross arm was placed facing to the east, along the north side of said Sixth street, and in addition thereto, a pole was set on the north side of that street at the west side of Lincoln avenue, which indicated a purpose to run east along the north side of the square to Grant avenue, and that at the time of the erection of this last pole, plaintiff's poles had been laid along the north side of the square in Sixth street, and on the east side of the square in Grant avenue, but had not been set up. We think it is also sufficiently established that at or prior to this time, the officers and agents of the parties had a conference upon the subject of the occupancy of the streets, when it was said by the representatives of the plaintiff that there would be no conflict, that plaintiff would place its wires upon poles of such length as would enable defendant to erect its poles and wires the height prescribed by ordinance upon the same side of the street without injury to the use of plaintiff's wires; but that when defendant's servants were erecting its lines from the alley to Lincoln avenue, a force of men was put to digging holes on the north and east sides of the square and placing the poles therein, and at the noon hour which immediately followed, the poles were set up and a wire placed thereon, so low that defendant could not place its wires without interference; but that defendant, during the afternoon, erected its poles and placed a wire thereon which extended some two feet above the wire of plaintiff, and at about that time this action was instituted by plaintiff. It is also pretty clearly shown that plaintiff's superintendent had prior to this time represented that the poles to be erected by him within the business part of the city would be at least forty feet long, but that those actually erected were much shorter, and that after plaintiff's agents and officers had induced the agents and officers of defendant to believe that there would be no objection to the occupancy of the same side of the street by both parties under the arrange-

ment made between them, plaintiff's agents and officers so far changed their minds as to conclude that they would so occupy the street as to prevent its occupancy by defendant; and in this there is shown something of a want of good faith on the part of plaintiff's officers and agents. But it is contended that the finding of the court that defendant first occupied the east and south sides of the public square is entirely unsupported by the evidence, since it was shown, by substantially all of the witnesses, that the poles of plaintiff were distributed along the street some four days prior to the erection of the defendant's poles and wires. While it is true that the proof shows these facts, yet for the purpose of examining this finding, the whole of this part of the case must be considered. As we have said, defendant had constructed its building and placed its machinery therein, and had commenced the construction of a line of wires, prior to the construction by plaintiff of its system. If defendant's witnesses are to be believed—and they must in support of the decree—a mutual understanding existed between the officers and agents of the two companies, by which it was fully understood that defendant had already entered upon the construction of that part of its system which was to occupy the ground in dispute. In violation of the representation made to the citizens of the city, as well as to the officers and agents of defendant, that poles forty feet in length would be used, plaintiff caused poles thirty-five feet in length to be scattered along the street. This was observed by one of the agents of defendant; but relying on the representations formerly made to him and others, he supposed that a mistake had been made in placing the poles of that length upon the ground, and that they would be removed, and the agreement carried out. At this time, as we have said, defendant had entered upon the construction of the line of wire, and was not aware of plaintiff's purpose, until a large number of men had commenced digging holes for the erection of

plaintiff's lines upon the poles, which the plaintiff had repeatedly agreed should not be used, and this, in part, at an hour in the day when labor was usually suspended. During the afternoon, defendant proceeded to place its wires on the line in accordance with the ordinance and the previous agreement of the parties.

We are quite certain that plaintiff cannot well deny the correctness of this finding, but it is insisted, in this connection, that defendant cannot insist that plaintiff was estopped by anything its officers or agents had said or done previous to the commencement of the action, for the reason that no estoppel was pleaded in the answer. While this is true, as a general rule, yet we know of no rule of equity which will permit a plaintiff to mislead a defendant by representations which he does not propose to carry out, and go into equity for the purpose of enjoining such defendant from acting in accordance with the previous arrangement, and then insist that plaintiff's failure must be pleaded as estoppel. We apprehend that quite the reverse is the rule in cases of this kind. If plaintiff and defendant had entered upon an agreement upon which the defendant relied, plaintiff could not enjoin defendant from living up to such an agreement upon the ground that it was not pleaded as an estoppel. While defendant might not be entitled to any affirmative relief growing out of such conditions, without alleging the facts, it is quite clear that its failure to plead the estoppel would not entitle plaintiff to equitable relief which it would not be otherwise entitled to in an action instituted by itself.

But it is insisted that it is impossible to comply with the provisions of the decree for the reason that, by it, defendant is permitted to establish and operate its lines along the north, east, and south sides of the public square, which it is said in the brief is six hundred feet upon a side, while at the same time the court enjoined the defendant from operating its system of wires along and parallel to the

plaintiff's wires for more than three hundred feet. While we are unable to find anything in the evidence which gives the distances upon the sides of the square, yet we apprehend that the plaintiff cannot, for this reason, complain of the decree. The decree is entirely consistent with itself. By it defendant, having first occupied the north, east, and south sides of the public square, is entitled to such occupancy without reference to any claims of right which plaintiff may have. But in other portions of the city, where plaintiff's and defendant's lines come in contact, defendant is not permitted to erect and use its lines, so as to run parallel with the lines of plaintiff, for a greater distance than three hundred feet, and then only when properly protected by guard wires.

The provision of the decree in this respect can have no reference to that part which confers upon defendant the right to the occupancy of the streets named. If plaintiff can so adjust its wires upon the north, east, and south sides of the public square as to render its system in that portion useful, by any kind of protection which it may devise, there is no legal objection to its occupying the part of the street named in the decree, to-wit, the north, east, and south sides of the public square, either by the erection of poles of sufficient height to protect the wires from the influence of defendant's wires, or by any other method which it may adopt, so long as it does not interfere with the right of defendant to use and exercise its own franchise. We see nothing in the case by which defendant could complain if plaintiff should construct its wires upon the same side of the street, and immediately over or under those of defendant, for defendant's wires could not suffer by reason of proximity to those of plaintiff.

It would seem, from the evidence, that plaintiff might make use of the side of the street named by the construction of a system of wires on poles more than forty feet high, and in such case defendant could not complain; but of this,

of course, defendant must judge for itself. The decree in this particular is right.

Subject to the modification hereinbefore referred to, the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

GEORGE BUCK, JR., v. JAMES D. GAGE.

[FILED SEPTEMBER 17, 1889.]

1. **Ejectment: RECORD SUBSTITUTED FOR ORIGINAL DEED.** Under the provisions of section 13, of chapter 73, of the Compiled Statutes of 1887, the record of a deed duly recorded, or a transcript thereof duly certified, may be read in evidence with like force and effect as the original deed whenever, by the party's oath or otherwise, the original is known to be lost, or not belonging to the party seeking to use it, nor within his control; and therefore, in an action in ejectment, where the defendant seeks to prove title in a stranger as a defense, and it sufficiently appears that the original deed does not belong to him, a copy of the record will be competent evidence in the first instance, without proof of the loss of the original, or that it is not under the control of the party seeking to use it.
2. —: **GROUND OF RECOVERY.** In an action in ejectment, plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of the defendant in possession.
3. —: **ACKNOWLEDGMENT ANTEDATING DEED: ADMISSIBILITY.** The certificate of acknowledgment as shown by the record of a deed, was dated on the 16th day of August, 1872, while the deed itself bore date of the 16th day of October of the same year. It was *held* that the date of the certificate of acknowledgment would prevail over that of the deed, and that the district court did not err in admitting a copy of the record in evidence, when objected to on account of the discrepancy in dates.

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35	591
27	306
47	606
48	516
27	306
54	450

ERROR to the district court for Franklin county. Tried below before GASLIN, J.

H. Whitmoyer, and *Case & McNeny*, for plaintiff in error:

The record was introduced in evidence without proper foundation, as required by sec. 13, ch. 73, Comp. Stats., 1887. The evidence fails to establish a subsisting legal title in the Franklin Town Company, such as is necessary when defendant in ejectment sets up an outstanding legal title. (*Jackson v. Hudson*, 3 Johns., 375; 3 Am. Dec., 501; *Bennett v. Horr*, 47 Mich., 221; *McDonald v. Schneider*, 27 Mo., 405; *Sutton v. McLeod*, 29 Ga., 589). The Franklin Town Company was never organized, and was not a competent grantee; hence the conveyance was invalid. (*Miller v. Chittenden*, 2 Iowa, 368; *Jackson v. Cory*, 8 Johns, 385; *Bundy v. Birdsall*, 29 Barb., 31; *Hulick v. Scovil*, 4 Gilm. (Ill.) 159.)

E. A. Fletcher, for defendant in error:

Plaintiff was not a *bona fide* purchaser for value. (*Broadwell v. Merrett*, 2 West. Rep. (Mo.), 182; *Uhl v. Rau*, 13 Neb., 361; 3 Wait's Act. and Def., 13; *Fowler v. Nixon*, 7 Heisk. [Tenn.], 719.) One who acquires by a quit-claim deed is not an innocent purchaser. (*McAdow v. Black*, 6 Mont., 601; *Snowdon v. Tyler*, 21 Neb., 199; *Wine v. Woods*, 7 West. Rep. (Ind.), 534; *Stokes v. Riley*, 6 West. Rep. (Ill.), 784; *Huber v. Bossart*, 70 Ia., 718; *May v. LeClaire*, 11 Wall., 232.) Only a purchaser for value can take advantage of defects in acknowledgment of deed. (*Bishop v. Schneider*, 46 Mo., 482.) Since plaintiff's grantor could not have raised a question as to the acknowledgment of deed offered in evidence by defendant, plaintiff cannot do so. (*Harrison v. McWhirter*, 12 Neb., 155; *Freeman on Judgments*, 91, 165; *Bigelow on Estoppel*, 82; *Field on Corporations*, sec. 386; *Smith v. Sheeley*, 12 Wall.,

361; *Broadwell v. Merrett*, *supra*.) Corporate existence cannot be questioned in a collateral proceeding. (Cooley, Const. Lim., 254; Bliss, Code Pl., 253; 2 Parsons on Cont. (7 Ed.), 942, N.) As the parties to this suit were not parties to the original deeds the record of the same was admissible without showing their loss. (*Delaney v. Errickson*, 10 Neb., 500; 1 Green. Ev. (14 Ed.), sec. 91 and N. b.) The record of the deeds was *prima facie* evidence of delivery (which was the execution of the bargain), and date of deed is immaterial. (*Fowler v. Merrell*, 11 How. [U. S.], 375.) Post-dating would not prevent a deed operating at once when delivered. (*Stonebreaker v. Kerr*, 40 Ind., 186; *Partridge v. Swazey*, 46 Me., 414; *Jacobs v. Denison*, 1 New Eng. Rep. (Mass.), 765.) The recording of the deed was conclusive evidence that the original was genuine, and the record would not be impeached collaterally by an offer to show a discrepancy between it and the original. (*Ames v. Phelps*, 18 Pick., 314; *Fuller v. Cunningham*, 105 Mass., 442; *Adams v. Pratt*, 109 Id., 59; *Chapin v. Kingsbury*, 138 Id., 194, 196.) It is immaterial that the acknowledgment antedates the deed. (*Hagenbuch v. Phillips*, 3 Cent. Rep. (Pa.), 154, 155.) Defendant did not need to show title in himself. (2 Green. Ev., secs. 307, N. d.; 331, N.; 3 Wait's Act. and Def., 109; *East v. Pedin*, 6 West. Rep., 291; Sedg. and W., Title, [2d Ed.], secs. 507, 831; *Love v. Simms*, 9 Wheat., 515; *Partridge v. Shepard*, 12 Pac. Rep., 480.)

REESE, CH. J.

This action was instituted in the district court of Franklin county, and was in ejectment for the possession of the west half of the southwest quarter of section 31, township 2 north, range 14 west, in that county. The petition was in the usual form. The answer denied plaintiff's estate in the land and denied his right of possession. The cause was

tried to the court without the intervention of a jury, and resulted in a finding that plaintiff did not have the legal title to the property and was not entitled to the possession thereof, and in a judgment in favor of defendant. Plaintiff filed his motion for a new trial, alleging as grounds therefor:

"First. The verdict is not sustained by sufficient evidence;

"Second. The verdict is contrary to law;

"Third. Errors of law occurring at the trial and excepted to by plaintiff at the time."

This motion being overruled, plaintiff brings the cause to this court by proceedings in error. It appears from the record that the land was patented by the United States to E. A. Kirkpatrick, and that on the 15th day of August, 1872, he sold and conveyed it by warranty deed to I. T. Roberts for the consideration of \$400, and that on the 1st day of October of the same year Roberts, for the consideration of \$500, sold and conveyed by warranty deed to the Franklin Town Company. Subsequent to Kirkpatrick's conveyance to Roberts, and on the 17th day of July, 1883, Kirkpatrick by a quit-claim deed for the consideration of \$50, conveyed the land to plaintiff, and on the next day, for the consideration of \$20, Roberts made a similar conveyance to plaintiff. The original deeds were not introduced in evidence, copies of the deed record being used. Those introduced by plaintiff were received without objection. Those introduced by defendant were objected to on the ground that no sufficient foundation had been laid for their introduction, there being no proof of the loss of the original deed, nor that they were not in the possession of the defendant. This objection was overruled, and the ruling of the district court is now assigned for error. Sec. 13, of chapter 73, of the Compiled Statutes of 1887, is in part as follows:

"The record of a deed duly recorded, or a transcript thereof duly certified, may also be read in evidence with the like force and effect as the original deed, whenever by the

party's oath or otherwise, the original is known to be lost, or not belonging to the party wishing to use the same, nor within his control."

In *Delany v. Errickson*, 10 Neb., 500, where the deed to the grantor of the party wishing to use the record included a large number of descriptions of real estate in addition to that claimed by the party seeking to use the record, it was held that the record was competent evidence in the first instance, without proving the loss of the original deed. By an examination of that portion of the section above quoted, it will be observed that the record of a deed is competent evidence in the first instance whenever by the party's oath or otherwise the original is known to be lost, or not belonging to the party wishing to use it, nor within his control. And it was very clear to the mind of the court, no doubt, and sufficient proof had been made, that the original deed, a copy of which was introduced in evidence, did not belong to the party wishing to use it, as he was a stranger to the conveyance and was not entitled to its possession or control. It may be admitted that so far as it was disclosed he claimed nothing under it, yet it was competent evidence for the purpose of showing that the grantor of plaintiff had parted with his title prior to his conveyance to the plaintiff, and that thereby plaintiff received no title by the quit-claim deed hereinbefore referred to, his grantor having no title to convey. If plaintiff recover at all he must recover upon the strength of his own title and not upon the weakness of that of his adversary. (*Franklin v. Kelly*, 2 Neb., 112; *Morton v. Green*, Id., 451; *Butler v. Davis*, 5 Id., 525; *O'Brien v. Gaslin*, 24 Id., 562.)

Defendant being in possession it was competent for him to show title in any party who was a stranger to the action for the purpose of defeating the alleged title set up by plaintiff. (2 Greenleaf on Evidence [14th Ed.], sec. 307.)

"It is a maxim of our law that the party in possession of property is considered to be the owner until the con-

Buck v. Gage.

trary is proved. It is necessary, therefore, for a claimant in ejectment to show in himself a good and sufficient title to the disputed lands. He will not be assisted by the weakness of defendant's claim, for the possession of the latter gives him a right against every man who cannot establish a title. If he can answer the case on the part of the claimant by showing the real title to be in another, it will be sufficient for his defense (excepting, of course, those cases in which the defendant is estopped from disputing the claimant's title), although he does not pretend that he holds the lands with the consent or under the authority of the real owner." (Adams on Ejectment, 33.)

Again, it is insisted that the court erred in admitting in evidence the record of the deed from Kirkpatrick to Roberts, for the reason that the date of the acknowledgment, as shown by the certificate, was the 16th day of August, 1872, while the date of the deed itself was the 16th day of October of the same year. This objection cannot avail plaintiff in error. While there is a discrepancy between the date of the deed and the date upon which it was acknowledged, the date of the acknowledgment must prevail, and in that case the date of the instrument itself is of but secondary importance. The officer before whom the acknowledgment was taken, certified that upon the day named in the certificate the grantor appeared before him and acknowledged the execution of that particular deed to be his voluntary act and deed, and by such acknowledgment and subsequent recording, vitality was given to the deed as to third parties. As between the parties to it, it was valid and binding without either. (*Harrison v. McWhirter*, 12 Neb., 152.) There was no proof that the Franklin Town Company to which Roberts had made the deed of conveyance was incorporated under the laws of this state, nor that it still held the title conveyed to it by the deed referred to. As to the first contention that it was necessary to prove the incorporation of that company, it may be disposed of in a few

words by the remark that it was shown upon the trial that plaintiff was himself at one time a member of and an active agent for the said Franklin Town Company during the time that it claimed to hold title to the real estate in question. Whether or not as such agent he assumed to act for the company in dealing with any of the property involved in this litigation it is not necessary to enquire, yet we think it sufficiently appears that he did. The court therefore would not require that strict proof of legal corporate capacity which might be required under other circumstances. As to the suggestion that there was no proof of continuing title in the company, it must be sufficient to say that there was no defeasance in its title deeds and no proof that it had ever conveyed its title to another.

Taking the whole case together it is apparent that although defendant in error may not have had the title to the property at the time of the commencement of the action or at the time of the trial, yet it is very clear that plaintiff had no such title and that he could not recover against anyone in possession. So far as we are able to see, the judgment of the district court was correct and will therefore be affirmed.

JUDGMENT AFFIRMED.

The other Judges concur.

27 312
42 254

JASPER CULVER ET AL., APPELLANTS, V. FREDERICK
GARBE ET AL., APPELLEES.

[FILED SEPTEMBER 17, 1889.]

Mill-Dams: EMINENT DOMAIN: WATER RIGHTS. Appellant's assignor instituted *ad quod damnum* proceedings for the purpose of securing the right to overflow appellee's land by the construction of a mill-dam. After the jury of inquest had made

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its report, a compromise was effected, in pursuance of which the land owner leased a portion of the real estate to the plaintiff in the action by a lease which is set out at length in the opinion. Subsequently appellee sought to create a fish pond by the construction of two dams within the leased land and in the channel of the stream, and cutting a ditch from above the upper dam to below the lower one, thereby reducing the quantity of water in the reservoir and straightening the channel of the stream and endangering the permanency of appellant's dam. In an action by appellant to enjoin appellee from constructing the dam and ditch, the injunction was, upon final trial, refused, and appellant was enjoined from interfering with the construction of said dams and ditch. Upon appeal it was *held*, that appellant had a vested right in the stream and water within the land covered by the lease, and that appellee had no right or authority to interfere therewith, and would be enjoined from changing the course of the stream, constructing the dam, or diminishing appellant's reservoir or supply of water.

APPEAL from the district court for Fillmore county.
Heard below before MORRIS, J.

Robert Ryan, and P. B. Tolles, for appellants:

The trial court's construction of the lease, restricting appellants' right to the natural flowage, involves a contradiction in the terms, and should be rejected. (Bishop on Contracts, sec. 384.) Every lease implies a covenant for quiet enjoyment, and landlord may not enter without lessee's consent. (*Sherman v. Williams*, 113 Mass., 481; *Mayor v. Mabie*, 13 N. Y., 157; *Dexter v. Manley*, 4 Cush. (Mass.), 24; *Mack v. Patchin*, 42 N. Y., 171; *Lovering v. Lovering*, 13 N. H., 518; *Hamilton v. Wright*, 28 Mo., 205.) A covenant that lessee shall occupy premises for a certain time amounts to one for quiet enjoyment. (*Ellis v. Welch*, 6 Mass., 246.) The entry of the landlord is trespass. (*Bryant v. Sparrow*, 62 Me., 546.) A lessee for a two-thirds share may maintain trespass. (*Blake v. Coats*, 3 G. Greene [Ia.], 548); also where the rental is for half, the landlord furnishing a horse. (*Hatchell v. Kimbrough*, (4 Jones' Law [N. C.], 163.) A tenant at will may main-

tain trespass against his landlord. (*Dickinson v. Goodspeed*, 8 Cush., 119.) The obstruction of water courses, diversion of streams from mills, back-flowage, etc., are proper subjects for equitable interposition. (*Universities v. Richardson*, 6 Vesey Jr., 706; *Lane v. Newdigate*, 10 Id., 192; *Chalk v. Wyatt*, 3 Meriv., 688; *Robinson v. Lord Byron*, 1 Bro. C. C., 585; 2 Story Eq. Jur., sec. 927; *Binney's case*, 2 Bland Ch. [Md.], 99; *Wright v. Moore*, 38 Ala., 593; *Arthur v. Case*, 1 Paige Ch., 447; *Webb v. Mfg. Co.*, 3 Sumner (C. C.), 189; *Tyler v. Wilkinson*, 4 Mason (C. C.), 397; *Mayor v. Com'rs*, 7 Pa. St., 348; *Hulme v. Shreve*, 3 Green Ch. [N. J.], 116; *Hart v. Mayor*, 3 Paige Ch. [N. Y.], 213; *Burwell v. Hobson*, 12 Gratt. [Va.], 322; *Burnham v. Kempton*, 44 N. H., 94-5; *Crossley v. Lightowler*, L. R., 3 Eq. Cas., 296-7; *Roath v. Driscoll*, 20 Conn., 533; *Shields v. Arndt*, 3 Green Ch. [N. J.], 245, and cases cited.)

O. P. Mason, for appellees:

The findings below are in conformity with the law as established by this court. (*Johnson v. Sutliff*, 17 Neb., 423.) As to the rights acquired by the *ad quod damnum* proceedings, see Lewis on Eminent Domain, sec. 183; and it is with reference to these rights that the lease must be construed; hence the construction of the court below is correct. (Pomeroy on Riparian Rights, secs. 55-6.)

REESE, CH. J.

This action was instituted in the district court of Fillmore county by Jasper and Helen Culver, appellants in this court, who alleged in their petition that on and prior to the 8th day of June, 1881, one Jerusha A. Ellis was the owner of a water mill situated on section one, township eight north, range four west in Fillmore county, and that at said time Frederick Garbe and Wilhelmina Garbe,

were, and still are, the owners of the southwest quarter of the northeast quarter of section one, township eight north, of range four west, also of that part of the northwest quarter of said section, described as follows: Commencing 13 chains and 82 links north of the center of the said section, and running thence north to the section line; thence west 36 chains and 15 links; thence south 3 chains and 84 links; thence in a southeasterly direction, and along the south bank of the river to the place of beginning; that said Jerusha A. Ellis, for her heirs, executors, administrators, and assigns, leased the above described land for such a period of time as said Jerusha A. Ellis, her heirs, etc., and assigns should keep up and maintain a mill on or near the present site, on said section, for the consideration of \$941. A copy of the lease is set out in the petition.

It was alleged that by assignments, which need not here be detailed, the property and lease were conveyed to plaintiffs; that the lease was given to preserve the rights of the owners of the mill to the use of the land described therein for water mill and dam purposes, and that the land described in said lease had been in the possession of plaintiffs and their assignors from the day of that date until the 18th day of October, 1886, when defendant, without the knowledge or consent of plaintiff, entered upon the land on the north side of the Blue river, described in the lease, and were engaged in digging a large ditch across the land and erecting two dams in said river, for the purpose of changing the channel of the river and diverting the water therefrom; that said defendants threatened to make a fish-pond on said land, and destroy plaintiff's mill race and dam; that the effect of the construction of said dams, ditch, and pond, would be to prevent the water from going into the mill race of said plaintiff, at other times causing the water to flow in such quantities against plaintiff's dam as to cause it to be destroyed, and otherwise so injuring said land that it could not be used for the purpose it was in-

tended by the terms of the lease. A temporary injunction was asked, with prayer, as final relief, for perpetual injunction, restraining the defendants from digging the ditch, or erecting any dam or pond or making any excavation on the leased land, etc. A temporary injunction was allowed by the county judge of Fillmore country.

Defendant answered, asserting the ownership of the land as alleged, and averring that on the 11th day of May, 1880, said Jerusha A. Ellis commenced proceedings in *ad quod damnum* to subject the part of plaintiff's land, described in the lease set forth in plaintiff's petition, to overflow, and such proceedings were had in said cause as resulted in the execution of said lease therein described, to said Jerusha A. Ellis, her heirs, and assigns, to overflow said land the same as though it had been condemned in proceedings in *ad quod damnum*; and which said lease, executed during said proceedings, conveyed the same, and no other or greater rights than if said land had been condemned in said *ad quod damnum* proceedings, which was simply the right of flowage, and to make and maintain their mill. A transcript of the *ad quod damnum* proceedings was set out in the answer and made a part of it. Plaintiff's possession of the land was denied, and it was denied that defendant entered upon the land on the north side of the river and commenced digging a ditch across said land, and erecting two dams in the river for the purpose of changing the water from the channel of the river. They admitted that they did commence to make a fish pond on the land, as they might lawfully do, and denied that they threatened to destroy plaintiff's mill race or do any other unlawful act, or that they ever threatened or attempted to divert the water from plaintiff's mill or injure his race or dam.

Substantially all the allegations of the petition were denied. It was alleged that the defendant admitted, and ever has admitted, the plaintiff's right to use the land mentioned in the lease, with the right to use the same

as though the land had been condemned in *ad quod damnum* proceedings, and not otherwise; that defendants did commence on said land to cut a small ditch so as to turn the water, to enable them to make a fish pond upon the land, without in any measure diminishing the flow or quantity of water to the mill, and without in any manner interfering with the dam or race; that that was all they had threatened or proposed to do. Defendant further alleged that the plaintiffs claimed the exclusive right to pasture the land and gather the grass and herbage therefrom in utter disregard of the rights of the defendants, and in violation of the lease, and defendants claimed the right to enter upon the land, and build and make a fish pond, so long as they in no way interfered with the flow of water to the mill, and to use and occupy the land for pasture and cultivation, and for all other purposes, so long as the same in no way or manner interfered with the usefulness of plaintiff's mill. Defendants also prayed an injunction against plaintiff's restraining them from interfering with the ditch or pond and enjoining them from pasturing the land or taking the grass therefrom, or from in any way using the land contrary to the terms of the lease, and for general relief. Plaintiffs replied, admitting the execution of the lease as alleged in both petition and answer, and admitted that the lease was made after and for the purpose of closing the proceedings in *ad quod damnum* instituted in the district court, and contending that the lease fully defines the rights of the respective parties. The trial was had to the district court, which resulted in the following decree:

"And now on this second day of June, A. D. 1888, this cause came on to be heard on the pleadings and proof adduced by the respective parties, and the court being fully advised in the premises doth find, from the issues joined in the case, for the defendants; and the temporary order of injunction hereinbefore granted is dissolved, and that said

restraining order of injunction was wrongfully obtained; and the court doth further find that under and by virtue of the lease stipulation and transcript of the record of the district court in the proceedings in *ad quod damnum* in the district court of Fillmore county, in the state of Nebraska, in the case of Jerusha A. Ellis v. The Burlington & Missouri River Railroad Company in Nebraska, a corporation duly organized under the laws of the state of Nebraska, and Frederic Garbe, defendants: That the said plaintiffs, by virtue of *mesne* conveyance from Jerusha A. Ellis, have the right to use said lands mentioned in said lease set forth in defendants' answer, and in said transcript of the record of the proceedings in *ad quod damnum* herein referred to, the same as though said lands had been condemned in said proceedings in *ad quod damnum* and not otherwise, which is the right to flow the water back upon and over said lands for the said purpose of operating their said mill, and none other or greater rights; that the said defendants have the right to cut a ditch upon and over said lands and to so turn the water as to enable them to make and maintain a fish pond upon said lands without in any manner diminishing the flow or quantity of water to said plaintiffs' mill, and without in any manner interfering with the dam or race of said plaintiffs' mill; and the court further finds that said defendants have the exclusive right to pasture said lands and gather the grass and herbage therefrom, and to cut and take the timber from said lands mentioned in said lease, and to use and occupy said lands for pasture, meadow, or cultivation, and for all other purposes so long as they in no way interfere with the usefulness of plaintiffs' mill, or interfere or trespass upon the water rights of the plaintiffs, which is the right to flow said lands for mill purposes. And the said defendants have the right to use said lands for all legitimate purposes, preserving and maintaining the water rights of said plaintiffs; and the court doth further find that the said defendants have the right to

erect and maintain a fish pond or ponds upon said lands mentioned in said lease, upon the condition that the same does not diminish the supply of water to plaintiffs' mill, and to dig ditches and take the water from said Blue river, on said leased lands, for fish pond or ponds; and the court doth further find and decree in accordance with the findings as set forth above.

"And the plaintiffs, their agents, servants, attorneys, and assigns, are forever and perpetually enjoined from in any way or manner interfering with ditch or ditches, fish pond or ponds, and they and each of them are enjoined from pasturing said lands mentioned in said lease, or taking the grass therefrom, or from using said lands, or in any way or manner contrary to the terms of said lease as herein interpreted, and it is further found, adjudged, and decreed that said plaintiffs' bill be and the same is hereby dismissed at the cost of said plaintiffs, and it is further considered, adjudged, and decreed, that said defendants recover their costs herein expended, taxed at \$——."

From this decree plaintiff appeals. It appears from the record that about the time stated in the petition, Jerusha A. Ellis instituted proceedings in *ad quod damnum* against defendant for the purpose of securing the right to overflow the banks of the Blue river above her mill; that a jury was impaneled to assess her damages and returned their verdict in favor of defendants in the sum of \$240; that defendants then appeared and filed their exceptions to the proceeding, when some kind of a compromise was made by which the lease referred to was entered into, and the sum of \$941 was paid therefor. The stipulation referred to in the lease is not found in the record of this case.

The principal inquiry in this case is as to the proper construction to be given to the lease, as some of its provisions are contradictory and rather indefinite. The lease is as follows:

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LEASE.

"Know all men by these presents, that we, Frederic Garbe and Wilhelminie Garbe, his wife, of the first part, for and in consideration of the sum of nine hundred and forty-one dollars, as well as for the purpose of carrying out the terms of the stipulation in the case of Jerusha A. Ellis against F. Garbe and Burlington & Missouri River Railroad Company in Nebraska, dated June 8th, 1881, and filed in district court of Fillmore county, Nebraska, do hereby, and by these presents, lease unto Jerusha A. Ellis, her heirs, executors, administrators, and assigns, for so long and for such a period of time as the said Jerusha A. Ellis, her heirs, executors, administrators, or assigns shall keep up and maintain a mill on or near the present site on section one, township 8 N., R. 4 W., the following described lands:

"All of the southwest quarter of the northeast quarter of section one, township number eight north, of range four west, except that part thereof lying southwest of the river and not overflowed by the mill dam of the said Jerusha A. Ellis as now maintained on said premises, said amount of land so reserved out of said S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, amounting to eight and 32-100 acres. Also all that part of the northwest quarter of said section one, township 8 N., R. 4 west, more particularly described as follows: Commencing thirteen chains and eighty-two links north of the center of said section and running thence north to the section line, thence west 36 chains and 15 links, thence south 3 chains and 84 links, thence in a southeasterly direction and along the south bank of the river to the place of beginning:

"All of said land so leased to the said Jerusha A. Ellis, her heirs, executors, administrators, and assigns, amounting to (94 and 10-100) ninety-four and ten-one-hundredths acres, as the same was surveyed and platted by W. S. Crawford, county surveyor of Fillmore county, Nebraska,

on the 20th and 21st days of October, A. D. 1881, and as will more fully appear from the plat of said survey on file in the office of the clerk of the district court of Fillmore county, Nebraska, in the case of F. Garbe vs. Jerusha A. Ellis and the B. & M. R. R. Co. in Neb.:

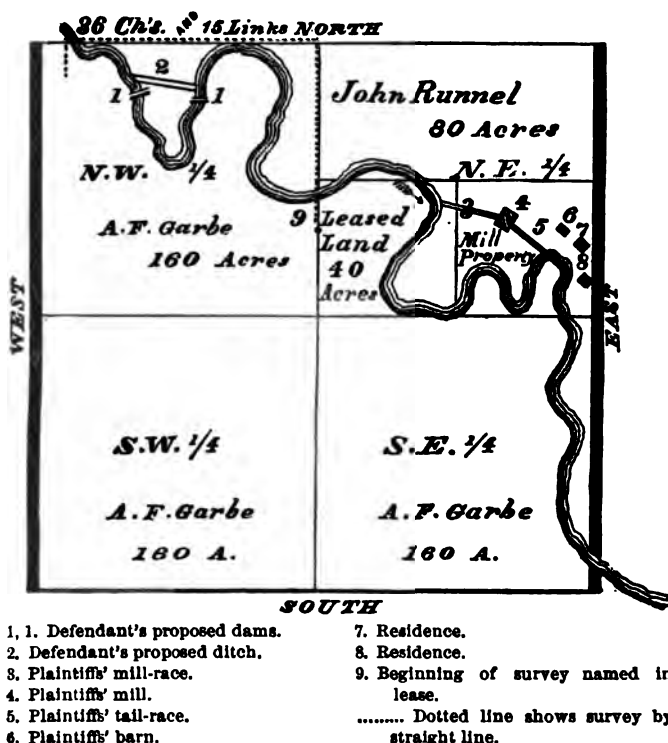
"To have and to hold the same to her and her heirs, executors, and administrators and assigns, for the purpose of running, maintaining, and operating a mill and for mill purposes, the said Jerusha A. Ellis and personal representatives and assigns to have all the rights, privileges, and use and benefit of said land as described in this lease for the purpose aforesaid, as though she were the owner thereof in fee simple. Except that said lessee nor his heirs or personal representatives or assigns are not to cut the timber, if any there be growing on said land so leased, but said lessors or their assigns are to have the right to this timber growing on said land, and provided further the said lessors and their assigns shall forever have free access to the southwest side of said river and dam for farming and stock purposes.

"This lease is an absolute lease for all the lands described in said lease for the period of time therein named and for all purposes save the exceptions expressly named.

"The rights of said Jerusha A. Ellis and her assigns under this lease are as to all of said leased lands, the same as if said lands had been condemned on proceedings in *ad quod damnum*. And the said Jerusha A. Ellis and her representatives and assigns are to pay all taxes hereafter assessed or levied upon the lands described in this lease.

"Witness our hands this 6th day of January, A. D. 1882."

Upon the trial, a rough plat or diagram of the whole of section one, showing the course of the river through it, was introduced in evidence, which, as an aid to an understanding of the contentions of the parties, we approximately reproduce:



It is contended by plaintiffs, that by a proper and reasonable interpretation of the lease, they are entitled to the exclusive use of the land lying north of the south bank of the river, and are therefore entitled to pasture it, or to make of it such other use as they may desire; that defendants have no right to use it for any purpose, that it was so understood by defendants at the time of the execution of the lease, and therefore the reservations were made, and subject to which the rights of plaintiffs are as though she, the lessee, were the owner thereof in fee simple; and that "the lease is an absolute lease for all the land described therein for the period of time stated, and for all purposes save the exceptions expressly named."

This language, when taken in connection with the fact that a much larger sum was paid than named by the jury of inquest, and that the lessees were required "to pay all taxes hereafter assessed or levied upon the land described in this lease," and the reservation of the land on the southwest side of the river for farming purposes, would seem to indicate that the whole of the land described in the lease was to be conveyed thereby to the lessee; but it is quite probable that these quoted portions of the lease are modified by the other provisions, which limit the right of the lessees "to have and to hold" the property "for the purpose of running, maintaining, and operating a mill, and for mill purposes," and that the right of the lessee should be "the same as if said land had been condemned on proceedings in *ad quod damnum*."

Comparatively little evidence of the circumstances accompanying and surrounding the execution of the lease, and which might have aided in its interpretation, was given, and for this reason we are inclined to accept the construction adopted by the district court, so far as the use of the farm or pasture land is concerned, as final; although we may not feel entirely certain of its correctness. This part of the decree therefore will not be molested.

But it will be observed that by the decree the right of defendants to construct the two dams in the river, and to change the channel into the ditch or race is declared, and plaintiffs are enjoined from interfering therewith.

If the proper interpretation of the lease is as contended for by plaintiffs, that defendants have no higher or greater right than if the land had been condemned by proceedings in *ad quod damnum*, yet we are persuaded that that part of the decree is wrong and cannot stand. If it is true that plaintiffs have the same and no other rights than they would have had, had the *ad quod damnum* proceedings been prosecuted to the end, we apprehend there is no doubt but that they would have been protected from any inter-

ference with the stream above their dam, to the head of dead water, which might be to their damage; and by section 24, chapter 57, of the Compiled Statutes, the owner or occupier of the mill would have the right to enter upon any land through which the stream might pass, to restore any injury which may have been done to the banks, and thus prevent the water escaping therefrom. The owner of such mill, after procuring the right to dam a stream, and cause the water to set back upon said stream, has a vested right not only in the water, which he would have by reason of his title to the land through which it runs, and to the fall caused by his dam, but to the reservoir of water created thereby, and in this right he is entitled to protection the same as in any other. It must be apparent that by two dams within the dead water caused by the plaintiff's dam, the reservoir would be greatly diminished, and to that extent the value of the franchise would be impaired. But aside from this, the uncontradicted testimony of John Runnell, who has been in the milling business for thirty-five years, and who has resided near the property in question for the last ten years, was to the effect that by damming the water, as proposed by defendant, plaintiffs' dam might be washed away; that it was difficult to make a dam that would withstand the water when high, and that on an occasional high water the dam, when erected by defendant, would wash out, and cause the destruction of plaintiffs' dam. Upon cross-examination he testified to the question, "Do you mean to say that the cutting across there would endanger the dam below?" His answer was, "Yes, sir; I do—it might at times." He was then asked, "How might it if there was a free flow through here?" To which he answered, "He can't cut the channel so as not to check the water through there without cutting twelve feet deep."

A careful examination of the evidence and plat of the river at the point where it is proposed to construct the

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ditch and dams, satisfies us that the proposed improvement cannot be made without endangering plaintiffs' property. This being true, the law will afford relief and protection.

The decree of the district court must therefore be modified so as to protect the rights of plaintiffs to the exclusive use of the river and the water therein in defendant's land, and defendant will be enjoined from constructing the dams and ditch referred to. As thus modified, the decree will be affirmed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

GEORGE MARTIN V. THE STATE OF NEBRASKA.

[FILED SEPTEMBER 17, 1889.]

The former decision in this case reported in 23 Neb., 371, adhered to.

REHEARING of case reported in 23 Neb., 371.

O. P. Mason, for plaintiff in error.

William Leese, Attorney General, for defendant in error.

REESE, CH. J.

This case is upon a rehearing granted after the decision reported in 23 Neb., 371, was announced.

An exhaustive brief has been filed by counsel for plaintiff in error, in which substantially every question in the former opinion is ably reviewed. But after a careful reëxamination of the propositions presented we are satisfied with

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the conclusions reached at that time. The judgment of the court as then entered will stand.

JUDGMENT AFFIRMED.

COBB, J., concurs.

MAXWELL, J. dissents.

PAUL A. ENGLISH, APPELLEE, v. JOHN O. MILLIGAN,
APPELLANT.

JOHN O. MILLIGAN, APPELLANT, v. PAUL A. ENGLISH,
APPELLEE.

[FILED SEPTEMBER 17, 1889.]

1. **Evidence.** The finding of facts by the district court *held* to be sustained by sufficient evidence.
2. **Partnership: DISSOLUTION CONTRACT: SPECIFIC PERFORMANCE.** A and B were in partnership in carrying on the business of dealing in lumber, grain, agricultural implements, etc., and were possessed of an elevator and offices for the transaction of business, and other real estate, most of which was held in the name of B. The partnership was dissolved, when B made a written proposition to sell his interest in the firm, including a portion of the real estate, for a specified sum of money to be paid in part by taking a portion of the real estate at an agreed price, the balance to be paid in money, to be realized out of the collection of notes and accounts due the firm, after the payment of all firm indebtedness, the same to be collected by A without expense to B; the loss of all the uncollectable claims to be borne equally by the two, the balance of the purchase price to be paid in money by A after the business had been wound up. Under this contract the parties took possession of the real estate designated as belonging to each, but B refused to execute the necessary conveyances. In an action by A against B for the specific performance of the contract, it was held that A was entitled to

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maintain the action, in order to the protection of his rights, but that he was not entitled to a final decree until he had complied with all the terms of the contract on his part to be complied with, and the full payment of the purchase price.

APPEALS from the district court for Wayne county.
Heard below before NORRIS, J.

Northrop & Welch, and *J. C. Crawford*, for appellant Milligan:

Misrepresentations were made by appellee, and whether fraudulent or not, if acted upon by another to his prejudice, are grounds of relief in equity. (*Morgan v. Hardy*, 16 Neb., 427). Mutuality of obligation is a necessary element in contract. (*State v. Barker*, 4 Kas., 380). As to the requisites of a decree of specific performance; Pomeroy, Eq. Jur., Vol. 3, Sec. 1,405 N. 1. *Morgan v. Hardy*, 16 Neb., 438. The alleged contract of April 28 failed to show the name of the proposed vendee or to describe the property, and upon its face was an agreement for credit whose terms were not fixed; hence it is wholly insufficient. (*Schmeling v. Kreisel*, 45 Wis., 325; *Blanchard v. McDougal*, 6 Id., 167; *Knoll v. Harvey*, 19 Id., 99; *Tiernan v. Gibney*, 24 Id., 190; *Iron Co. v. Todd*, 14 Atl. Rep., 27.) As the possession of English was uninterrupted throughout, there could be no new possession, but only a continuation of that which he had. (*Blanchard v. McDougal*, 6 Wis., 167; *Knoll v. Harvey*, 19 Id., 99.) An agreement will not be enforced which is not certain, mutual, and reasonable, or which is tainted with fraud, surprise, improper concealment or misrepresentation. (3 Wait's Act. and Def., 188; *Flight v. Bolland*, 4 Russ., 298; *Cathcart v. Robinson*, 5 Pet. [U. S.], 264; *German v. Machin*, 6 Paige, 288; *Bruck v. Tucker*, 42 Cal. 346; *Waring v. Ayres*, 40 N. Y., 357; *Blanchard v. Ry. Co.*, 31 Mich., 43.) A party cannot compel the performance of a contract by another which he is not himself bound to perform. (Pomeroy, Eq. Jur.,

Vol. 3, Sec. 1,405, N. 1, 2; *Cordova v. Smith*, 9 Tex., 129; 58 Am. Dec., 136; *Bodine v. Glading*, 21 Pa. St., 50; 59 Am. Dec., 749; 5 Wait's Act. and Def., 778.)

H. C. Brome, and *James Britton*, for appellee:

The claim of misrepresentation is refuted by the evidence. A verbal contract for the sale of real estate, where there is possession and part performance, will be specifically enforced. (*Haines v. Spanogle*, 17 Neb., 637.) The possession of English was under the contract of purchase, and coupled with payment would avail as part performance. (*Blanchard v. McDougal*, 6 Wis., 165.)

REESE, CH. J.

Prior to the commencement of the two suits which are now before us, the principal parties Milligan, and English, were partners doing business in Wayne, in this state, as J. O. Milligan & Company; the business being that of buying and selling lumber, agricultural implements, grain, and coal.

On the 14th day of October, 1887, English, as plaintiff, filed his petition in the district court, in which the fact of the partnership was alleged, and that on the 16th day of May, 1887, the firm owned one elevator building, on the right of way of the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, also lots 7, 8, 9, 10, 11, and 14, in block 20, in the town of Wayne, also a house and lot known as the Woodruff house, described as lot 3, and the south half of lot 2 in block 7, in Crawford & Brown's addition to said town; also obligations and accounts amounting to a large sum, and grain in the crib. The legal title to lot 13, block 20, was in the name of plaintiff and defendant as tenants in common. The title to the house known as the Woodruff house was in the firm name of J. O. Milligan & Company. The title to lots

7, 8, 9, 10, 11, and 14, was in the name of defendant John O. Milligan. The corn cribs were located on the land, the title to which was in Milligan, the said title being held in trust for the firm. On lots 7 and 8 in block 20, the firm had constructed a brick block of great value with partnership funds. It was alleged that on or about the said 16th day of May, 1887, defendant entered into an agreement with plaintiff, and thereby sold and agreed to deed to plaintiff all of defendant's right, title, and interest in all of the property described, and including the business of the firm, for the sum of twenty-nine thousand dollars, which plaintiff agreed to pay; that by the terms of said agreement defendant was to take as part payment of said account the elevator building at five thousand dollars; the house and lot known as the Woodruff house at eleven hundred dollars, the balance to be paid in notes, demands, and accounts due the firm; that in case the proceeds to be collected were insufficient to pay the remainder, plaintiff should pay the deficiency in money; and in case any claims should be lost the loss should fall equally on both parties; that plaintiff should collect the outstanding claims without charge to defendant, and that defendant should have all the profits of the elevator business after January 1st, 1887; that in pursuance of said agreement and sale the partnership was dissolved and defendant took possession of the elevator building and had occupied the same ever since, dealing in grain therein, and had also taken possession of the property known as the Woodruff house, and received the rents and profits thereof; that at the same time plaintiff took possession of all the other property formerly owned by the firm and had ever since occupied the same; that on the 1st day of June, 1887, defendant bought of plaintiff the contracts for grain and the grain in the elevator, amounting to four thousand five hundred and sixty-four dollars and thirty-two cents; and the corn in the crib of the value of four hundred and

eighty-four dollars, which by the sale had become the property of the plaintiff, and had agreed to apply the same as part payment of the twenty-nine thousand dollars; that on the 4th day of the same month, at the request of defendant, plaintiff paid ninety-one dollars and ninety cents on checks issued by defendant; that since the said 1st day of June plaintiff had proceeded with due diligence to collect the note and accounts due the firm, which exceeded the liabilities of the firm, and the amount due defendant, and was still so engaged; that on the 20th day of June, 1887, he executed the necessary conveyances to be made by him to defendant and offered the same to defendant, who refused to accept them, and that he demanded the proper conveyances from defendant, which defendant also refused to make; that after the making of the agreement referred to, and in violation thereof, defendant executed to defendant Gardenier a mortgage on his interest in lots 7 and 8 in block 20, upon which the brick building had been erected, but at the time of the execution thereof the property mortgaged was in the possession of plaintiff, and that Gardenier well knew of his rights under his purchase, and that the mortgage was in fraud of plaintiff's rights. A specific performance of the contract was prayed.

To this petition defendant Milligan filed his answer, admitting the existence of the partnership, to ownership of the accounts and notes, the grain, elevator, and property known as the Woodruff house, that the legal title in lots 7, 8, 9, 10, 11, 14, block 20, was in him, and that the firm had constructed the brick house on lot 7 with partnership funds and by so doing the firm had obtained an equitable interest in said lot which he was willing to convey to it upon being paid its value; and denying that plaintiff or said firm had any interest whatever in the title to the other lots in said block. The execution of a mortgage for two thousand dollars to Gardenier was admitted, but all fraud was denied in connection therewith, and it was alleged that it

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was executed in good faith and for value. It was alleged that about the first day of January, 1887, it was agreed by plaintiff and defendant that the partnership business should be closed up and discontinued as soon as practicable thereafter; that plaintiff, who had had charge of the business of the firm, should cease buying, excepting such articles as might be of immediate use, and collect all accounts and notes due the firm as fast as possible, and should reduce the liabilities as rapidly as practicable; and that he should endeavor to find a purchaser for the property and business of the firm; that about the 27th of April, 1887, plaintiff came to the residence of the defendant at Scribner and represented to defendant that he had found a purchaser for the whole firm property in Wayne; that the liabilities of the firm did not exceed five hundred dollars, and that the accounts due to the firm held by him for collection had, by collection, been reduced to six thousand dollars, and desired defendant to state what he would take for his interest; that relying upon the representations of plaintiff, as to the amount of the assets and liabilities of the firm, defendant agreed, if the sale of the entire property and business of said firm could be made, to take twenty-nine thousand dollars for his interest; and for the purpose of aiding in effecting a sale, that if the elevator and Woodruff house and lot could not be included in such sale, he would take the elevator at five thousand dollars, and the house and lot at eleven hundred dollars; that for the purpose of having a complete settlement of the partnership affairs, and relying on the statements of plaintiff as to the assets and liabilities of the firm, he agreed to take the notes and accounts, which would amount to \$5,500, and which would leave about \$1,700 due him in case the sale should be made; that no purchaser was ever found, and no person had ever paid, or offered to pay, the defendant the purchase price of said property; that on the 28th day of April, 1887, the liabilities of the firm were \$22,741.29 and that notes and accounts due said firm

on that day amounted to \$26,841.55 ; all of which was well known to plaintiff ; that he never offered to sell plaintiff lots 7, 8, 9, 10, 11, and 14, in block 20, in the town of Wayne, or to contract with him in relation thereto ; that for more than a year prior to June 1, 1887, one Stephen B. Russell had been employed by the firm in and about the elevator and grain business at Wayne, and that about that time plaintiff notified Russell that he (plaintiff) would have nothing more to do with that part of the partnership property consisting of the elevator, grain therein, corn in the cribs, and contracts for the purchase of grain, and that he abandoned the same ; that upon defendant being informed of the fact, he directed Russell to continue in charge and preserve the property, and dispose of the grain then on hand for the benefit of the firm, and defendant sent to Russell money of his own personal funds to enable him to do so ; that Russell did as directed, and remitted the proceeds—\$2,854.60—to defendant, who applied \$1,471 thereof to the payment of a debt due him from the firm, \$990 thereof to the payment of a debt due W. F. McCrary & Company from the firm, leaving a balance of \$393.20 which he held for the benefit of the firm, and for which he was ready to account ; that his possession of the elevator was made necessary by the abandonment thereof by plaintiff and was alone for the benefit of the firm. All averments of the petition not admitted were denied.

Plaintiff's reply consisted of a general denial of all the new matter contained in the answer.

On the 19th day of November, 1887, Milligan, as plaintiff, instituted an action against English, as defendant. In his petition he set out at length the formation and contract of the partnership, the accumulation by it of a large amount of property at Wayne and Winside, the amount of the capital placed in the firm by himself, the undertaking of defendant English to carry on the business and pay the debts and expenses of the business ; his failure to do so ;

that the partnership was dissolved ; the sale of the property and business at Winside ; that defendant had failed and refused to keep an exact and correct account of moneys received and expended by him ; that he had wrongfully applied the partnership funds to his own use, and refused to account for the same ; had excluded plaintiff from access to the property, and had set up a claim of ownership adverse to him. The terms of the partnership, as alleged in the first paragraph of the petition, were, that the defendant English should be at all the expense of carrying on said business and pay all the said expenses out of his share of the profits, to-wit, one half, and that one-half of the gross profits of the business should be credited to plaintiff Milligan at the end of each year.

English filed his answer to this petition ; *First*, denying all the allegations thereof except such as were expressly admitted ; *Second*, admitting the formation of the partnership as stated in the first paragraph of the petition of the plaintiff, but alleging that the contract of partnership was modified on the 1st day of March, 1888, so that all earnings made by the partnership profits due, and accruing to defendant and reinvested in the partnership business by him, were to inure to his exclusive benefit, and that plaintiff should have no right to participate therein during the existence of the partnership ; that the modification was assented to, acted upon, and fully ratified, and became a part of the original article of the partnership ; that the partnership fund was reduced to \$22,157.54, of which sum the parties respectively were to contribute one-half, and in addition to the share of the partnership fund which he, the defendant, was to receive, he was to devote his whole time to the care and control of the business, and as compensation for his personal services, was to receive the sum of \$75.00 per month, to be paid him by the firm ; that plaintiff Milligan should withdraw from the capital invested in the partnership business at that time such

sum as exceeded the amount that plaintiff was bound to contribute to the business under the modification; but that the withdrawal was to be at such time and for such amounts as not to endanger the financial standing of the firm; that all sums paid over between the first day of January and the first day of June, 1886, on such excess, were to draw interest at the rate of ten per cent per annum from January, 1887; interest to be paid by Milligan and Company to Milligan, and that all sums remaining due and unpaid from and after June 1, 1886, were to yield to Milligan the same percentage as his half interest in the partnership business; that the copartnership relation as then existing and as modified was continued until about the 16th day of May, 1887, plaintiff at all times assenting to, knowing of, and ratifying the partnership as modified, and that on that date the partnership was dissolved; that on that date plaintiff Milligan submitted a written proposition for a dissolution and settlement of the business, which is set out in full in the answer, and will be hereafter noticed but need not be now copied; that defendant English accepted the proposition so made by plaintiff and the partnership affairs were settled; the plaintiff Milligan had taken possession and exclusive control of the elevator building, and also of the Woodruff house and lot, and had used both for his exclusive use and benefit and in his own name since that time; that in pursuance of the agreement defendant took possession of the business at Winside, also the brick store building referred to; that defendant had tendered the plaintiff proper conveyances for the property received and occupied by him, and also the notes and accounts of the firm of J. O. Milligan & Company; that there had been paid to the plaintiff in the elevator building, the Woodruff house, grain and contracts for grain, and corn cribs, the sum of \$11,548.52, they having been previously purchased of the plaintiff by the defendant, and were applied on the payment of \$29,000; that at the time of the contract the

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liabilities of the firm were about \$16,000, and that the accounts and bills receivable of the firm aggregated about \$30,000; that since that time defendant had collected about \$10,500 of the same, which had been applied to the payment of the liabilities of the firm; and at the request of plaintiff, defendant had made statements to the man Russell in charge of the elevator of the amount collected and paid out.

The reply consisted of a general denial of all new matter alleged in the answer.

When the causes came on for trial in the district court they were consolidated, so far as the trial was concerned, and tried as one case; but different findings were made by the court in each case. In the suit of English against Milligan, the court found that the plaintiff was entitled to the specific performance of the contract set out in his petition; that lots 7, 8, 9, 10, 11, and 14, in block 20, in the town of Wayne were, at the time of the commencement of the suit, partnership property, and that the plaintiff, as one of the partners, was in possession of said property at the time the mortgage was given to Gardenier, and that the said mortgage was void and of no effect. A decree was entered in the usual form, requiring the execution of the contract on the part of Milligan and setting aside the mortgage executed by Milligan and wife to Gardenier. In the case of Milligan against English there was a general finding in favor of the defendant and a decree that the action be dismissed. From these two decrees Milligan appeals to this court and presents the cases as one, and they are so treated in the arguments and briefs.

No appearance was made in the district court by Gardenier.

The evidence submitted upon the trial was conflicting in a high degree upon every material point in the case; and it would be impossible for us to separate the true from the untrue, or to say which of the witnesses testified truthfully and which falsely.

The proposition of sale made by Milligan was in writing, and as follows:

“April 28th, 1887.

“I propose to sell and deed the lots on north side of track, used for lumber, lots on south side of track not included, and my interest in the business at Wayne, for twenty-nine thousand dollars, I agreeing to take the elevator at five thousand dollars, and the property known as the Woodruff house in Wayne, for eleven hundred dollars as part payment on the twenty-nine thousand dollars. I am to have all the profits on the elevator business from January 1, 1887, and to have the interest on all notes and accounts from February 1. I am to take the notes and accounts due the company, all over and above the liabilities of said company, as part pay, with this condition: Paul English is to collect them free of any charge, and any notes or accounts that we lose, he, Paul English, is to lose half, together with the interest that would be due on the same; balance due me after taking out the items mentioned above to be paid in cash, or if any time beyond May 1, 1887, is given, to draw ten per cent until paid.

“J. O. MILLIGAN.”

It is shown by unquestioned proof that the parties were not satisfied with their business relations, and that each desired to be relieved from the partnership. Milligan resided at Scribner, English at Wayne. The correspondence and proof of conversation show the fact of the existing dissatisfaction. The testimony of English, is in substance, that he represented to Milligan that if he could find a purchaser for all or any part of the business he would try to purchase from Milligan; that he was about selling the lumber and implement business to Conner and Philleo; and by the agreement on the part of Milligan to retain the grain elevator and the Woodruff house, he was then able to make the purchase; that he at all times, talked with Milligan of the probability of the purchase by

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himself, and with that understanding between them, the written proposition was given; that the contract was subsequently consummated, and the possession of the Woodruff house and elevator taken by Milligan, and of the other property by himself, with the full consent of both. This finds some support in letters written by Milligan, in which the subject of leasing the elevator property to English is referred to in such a way as to indicate ownership on his part. The questions of fact must be taken as settled by the district court, and that part of the case cannot be molested. This also must dispose of the contention of Milligan that the contract in itself is insufficient to sustain a decree for specific performance. The case cannot be disposed of upon the language of the contract alone. If it were true (as the court must have found) that the parties under its provisions went so far as to strike the balance, ascertain the condition of the accounts, exchanging possession of real property, and thus ratifying the written contract and executing its provisions, it would be too late to question it upon the ground that no purchaser was named, and that by its terms no one was designated as the buyer, or who could take under it.

But it is claimed that the contract was obtained by a suppression of fact as to the assets and liabilities of the firm. This is denied by English in his testimony, and there was some proof submitted by which the court could find that Milligan did not refuse to deliver the conveyances which he had signed until long after he had full opportunity to examine the books of the firm, and perhaps did know its exact financial condition.

But we are unable to find from the record any proof as to the exact amount of the liabilities of the firm, or how much the collectable notes and accounts are. This would be necessary in order to carry out the terms of the contract, for by it the residue of the \$29,000, after deducting the price of the elevator and Woodruff property, and the

amount which could be realized by collections, was to be paid in money.

While English may insist upon a full execution of the agreement by Milligan, he must as fully comply on his part. To this end it is necessary that he deposit in court, for the use of Milligan, all deeds and transfers to be made by him, make a complete exhibit of the financial condition of the firm at Wayne, collect the collectible accounts and pay over the money collected, and when this is done, he cannot yet hope to have a complete specific performance until he has paid the money to be paid to Milligan by him.

The decree in the case of Milligan against English will be affirmed, and that in the case of English against Milligan will be set aside and the cause remanded to the district court with directions to retain it until all the conditions to be performed on the part of English are complied with and the purchase price paid according to the terms of the agreement; and, when this is done, to enter the order and decree necessary for its final disposition, fixing a reasonable time within which such conditions are to be performed and payments made.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

27	338
38	903
27	338
45	355
27	338
54	62

FANNIE C. STEVENSON, EXECUTOR, ETC., v. E. K. VAL-
ENTINE, ADMINISTRATOR, ETC.

[FILED SEPTEMBER 17, 1889.]

1. **Conversion.** "A person who aids in the conversion of personal property is responsible to the owner for its value." *McCormick v. Stevenson*, 13 Neb., 70.
2. **Agent: ADMINISTRATOR DE SON TORT.** When an attorney at law or other person acting as agent for another, known to him

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to be without authority or right, takes possession of the personal property of a deceased person and converts it into money without administration, he will be liable to the lawful administrator for the value of the property so converted and appropriated, without reference to whether he accounts to the person for whom he acts or not.

3. The Evidence examined, and held competent and sufficient to support the findings of the court as set out in the opinion.

ERROR to the district court for Cuming county. Tried below before POWERS, J.

M. McLaughlin, for plaintiff in error :

There is no proof that R. F. Stevenson acted with knowledge, and in this respect the case differs from *Peckinbaugh v. Quillin*, 12 Neb., 586, and *McCormick v. Stevenson*, 13 Id., 70. The witness Angeline Bromley is disqualified by sec. 329 of the Code. A degree of interest no greater has frequently been held sufficient to exclude. (*Ransom v. Schmela*, 13 Neb., 73; *Wamsley v. Crook*, 3 Id., 344; 1 Green. Ev., 386-430; *McCartney v. Spencer*, 26 Kas., 65; *Heydrick's appeal*, 1 Atl. Rep., 31; *Smith v. James*, 34 N. W. Rep., 309; *Witthaus v. Schack*, 11 N. E. Rep., 649; *Conklin v. Snider*, 9 Id., 880; *Forgerson v. Smith*, 3 Id., 869; *Ivers v. Ivers*, 61 Ia., 721.) The testimony of witness Fetter was inadmissible to prove value. (1 Sutherland on Damages, 795, 802.)

E. K. Valentine, for defendant in error :

One who meddles with personal property not his own, even by command of a principal, is liable for injury to third parties as if no command had been given. (*Wright v. Eaton*, 7 Wis., 595; *Richardson v. Kimball*, 28 Me., 463; *Elmore v. Brooks*, 6 Heisk. (Tenn.), 45; *Ford v. Williams*, 24 N. Y., 359; *Burnap v. Marsh*, 13 Ill., 535; *Perminter v. Kelley*, 18 Ala., 716; *Gaines v. Briggs*, 4 Eng. (Ark.), 46; *Josseyln v. McAllister*, 22 Mich., 300; *Thorpe*

v. Burling, 11 Johns., 285; *Sprights v. Hawley*, 39 N. Y., 441.) The remedy provided by sec. 185, ch. 28, Comp. Stats., is not exclusive. (*Jahns v. Nolting*, 29 Cal., 507; *Cooley v. Brown*, 30 Ia., 470.) One not an executor nor administrator, by meddling with the goods of decedent, or otherwise personating the executor, becomes an executor *de son tort*. (Schouler, Ex'rs. and Adm'rs., sec. 190; Herrick & Doxsee's Probate Law, 423-4; *Foster v. Nowlin*, 4 Mo., 18; *Graves v. Poage*, 17 Id., 91; *Magner v. Ryan*, 19 Id., 196; *Blake v. Hawkins*, 98 U. S., 315.) If R. F. Stevenson, in his lifetime, was liable as an executor *de son tort*, his estate is now liable. (*Swift v. Martin*, 2 West. Rep. (Mo.), 146.) A meddler with a decedent's goods is estopped to deny his executorship. (Hilliard on Torts, 329.) He must account to the legal representative for all property coming into his hands (*Crispin v. Winkleman*, 57 Ia., 523); has all the liabilities but none of the privileges of an administrator. (*Johns v. Wooling*, 29 Cal., 507.) The testimony of witness Bromley was competent and corroborated. Only a direct legal interest can exclude. (1 Green. Ev., sec. 389; *Evans v. Eaton*, 7 Wheat. [U. S.], 356.) Declarations of an intestate, against interest, are admissible in suit against his administrator. (*Lide v. Lide*, 32 Ala., 449; 1 Green. Ev., 147, 153, 171, 172, 189.)

REESE, CH. J.

This is a proceeding in error to the district court of Cuming county.

It was alleged in the petition that defendant in error was the duly appointed and qualified administrator of the estate of B. M. Gay, late of Cuming county, deceased, and that said Gay, at the time of his death, was possessed of personal property of the value of \$4,284.40, the property being described as one drug store of the value of \$2,400; one horse, phaeton, and harness of the value of \$130; one

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gun of the value of \$35; cash on hand of the value of \$1,156, and books of account of the value of \$563.40; and that soon after the death of said Gay, one R. F. Stevenson obtained possession of said goods, chattels, money, and book accounts, and unlawfully converted the same to his own use, to the damage of plaintiff in the sum named; that afterwards, on the 9th day of March, 1885, the said R. F. Stevenson died testate, and by his will left plaintiff in error as his executrix, who duly qualified and entered upon the duties of said office; that the claims named in the petition had been duly filed in the county court of Cuming county against the estate of said Stevenson, and had been rejected by said court, from which plaintiff in error had duly appealed. There was a prayer for judgment for the sum of \$4,265.91, and interest thereon from July 1, 1883.

The answer of plaintiff in error consisted of a general denial.

The cause was tried to the court without the intervention of a jury, and the trial resulted in the following findings and judgment:

"Now on this 25th day of January, 1888, this cause comes on for decision, the same having been heretofore tried, argued, and taken under advisement, and the court, after hearing all the evidence, and arguments of counsel, and being fully advised in the premises, finds upon the issue joined, and evidence as follows:

"*First.* That the said B. M. Gay died intestate in Cuming county, Nebraska, on or about the 20th day of June, 1883, leaving an estate therein consisting of real and personal property, and also left surviving him a widow and three children living in the state of Connecticut, who were entitled to said property as the heirs of said Gay.

"*Second.* That in about the month of July, 1883, the said R. F. Stevenson was the attorney for one Augustine Bromley, who claimed the property as her own, took

possession of, sold and converted certain of the property of said estate of the value of \$4,055.

"Third. That said Stevenson was an attorney at law, and the only relation he sustained to said property, was that of attorney for said Bromley, to whom he accounted for the same.

"Fourth. That the time he so acted for said Bromley, the said Stevenson was advised of the fact that said Gay left surviving him the widow and children as aforesaid, and that they were entitled to the property of said estate.

"Fifth. That the said Valentine is the duly appointed and acting administrator of the estate of said Gay, and that Fannie C. Stevenson is the executrix of the estate of said Stevenson.

"And as a conclusion of law, that the acts of said Stevenson in taking possession of, and selling said property, made him a wrong doer, and liable for the conversion of said property to the estate of Gay.

"And that the plaintiff is entitled to recover from defendant the sum of \$4,055, together with interest from August, 1883, at the rate of seven per cent per annum.

"Whereupon defendant submitted a motion for a new trial herein, which was by the court overruled, to which ruling of the court defendant then and there duly excepted, and forty days given said defendant to prepare bill of exceptions.

"It is therefore considered, ordered, and adjudged that the plaintiff have and recover of the defendant the said sum of \$5,316.53 damages so as aforesaid found due, to draw interest from this date. And plaintiff recover his costs, taxed at \$——."

A number of errors are assigned, which will be noticed in the order in which they are presented in the brief of plaintiff in error.

It is insisted that the evidence is insufficient to sustain

the findings. This contention is in the main based upon the fact that the principal witness who testified to the material facts was the woman Bromley, with whom Gay unlawfully lived and cohabited for a number of years in West Point, and that her character is such that the estate represented by plaintiff in error should not be invaded upon her evidence. It must be conceded that if the testimony of this witness stood alone, unsupported by other evidence and circumstances, it could scarcely be deemed sufficient to sustain the case of defendant in error. But there is not only sufficient corroboration, but from the testimony of substantially all the witnesses, it is certain that after the death of Gay, plaintiff's testator, with full knowledge that the woman Bromley was not entitled to any part of the estate by reason of any marital relation existing between her and Gay, sold the property and collected the money and paid the same to her as well as the money on hand at the time of Gay's death. There is no suspicion but that he acted in the best of faith toward his client, and that he paid over to her all he received, less his reasonable fees and charges. But that could not exonerate him if he acted with full knowledge of the rights of the representative of the estate of the deceased Gay—and of the absence of right on the part of his client.

It was shown by a number of witnesses on the part of defendant in error, that soon after Gay's death plaintiff's testator took possession of the store, took the money from the safe, and has not accounted for it to the estate, also that he sold the store and the other property and converted them into money, and that he has not accounted for any of the proceeds. The witness Gibbert also testified to the fact of his accompanying the woman Bromley to the state of Connecticut at the request of plaintiff's testator, and receiving from her the sum of \$700 which he returned to Mr. Stevenson.

None of these witnesses had any direct legal interest in

the result of the action, and could not be excluded under the provisions of section 329 of the Civil Code.

Under the usually adopted principle of law, that he who intermeddles with personal property which is not his own, must see to it that he is protected by the authority of one who is the owner or has authority to act, or that he will be himself liable; and that if he do an unlawful act, even by the command of another acting as principal and without right, a liability will attach (See *Peckinbaugh v. Quillin*, 12 Neb., 586); we are convinced that a right of action is shown as against Mr. Stevenson and in favor of Gay at the time of the conversion of the property. And had it not been for the death of Mr. Stevenson we are unable to see why he could not have been cited to appear before the county court under the provisions of Sec. 203 of chapter 23 of the Compiled Statutes, as having "disposed of money, goods, and chattels of the deceased," and the fact that in so doing he acted for another known to be without authority would probably afford no justification for his act. Finding no error in the judgment of the district court, it is affirmed.*

JUDGMENT AFFIRMED.

THE other Judges concur.

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42 222

OLDS WAGON COMPANY V. D. M. BENEDICT.

[FILED SEPTEMBER 17, 1889.]

The former decision in this case, reported in 25 Neb., at page 372, adhered to.

REESE, CH. J., dissenting.

REHEARING of the case reported in 25 Neb., 372.

* Upon the application of plaintiff in error the cause was subsequently remanded to the district court for an accounting.

Atkinson & Doty, for plaintiff in error.

W. S. Morlan, for defendant in error.

REESE, CH. J.

This cause was decided at the January, 1889, term of this court, and is reported in 25 Neb., page 372. A motion for a rehearing was subsequently filed, and sustained, and the cause has been resubmitted on oral and printed arguments.

It is contended by defendant in error: *First*, That even were it true that the district court erred in the order of hearing argument by giving defendant the opening and closing, yet such error would be without prejudice, and hence no ground for reversal; and *Second*, That defendant being the moving party in his effort to have the attachment discharged, he was entitled to the opening and closing, and that the decision of the district court was correct.

These questions have been ably discussed in the briefs and arguments of counsel, but the time at our disposal will not permit, nor does the case seem to require, a review of the cases cited.

While it is the opinion of the writer that the law upon both points is with defendant in error, yet this view is not entertained by the majority of the court, and the former decision will be adhered to, by which the rule is established in this court, that where a motion to discharge an attachment is based upon affidavits to be used as evidence, the allegations of fact in the affidavit for the attachment being denied, the burden is on the party holding the affirmative, which would be the plaintiff in the action, and therefore he should be permitted to have the opening and closing, both in the order of proof and argument.

REVERSED AND REMANDED.

RICHARD D. BOOKER ET AL. V. PHILIP PUYEAR

[FILED SEPTEMBER 17, 1889.]

1. The Petition *held* to state a cause of action against each of the defendants.
2. The Evidence considered, and *held*, that upon it, and under the law of the case, the verdict and judgment must be upheld.

ERROR to the district court for York county. Tried below before NORVAL, J.

Scott & Gilbert, and *Breckenridge & Breckenridge*, for plaintiffs in error Allen Brothers:

The petition is insufficient, and the verdict contrary to law. Something must be done which would give the right of action independent of the conspiracy, to make the latter the subject of a civil action. (Cooley on Torts, 125, and cases cited; Bailey, Onus Probandi, 49.) And the plaintiff must show actual damage as a result thereof. (*Kimball v. Harman*, 34 Md., 407; 6 Am. Rep., 340.)

France & Harlan, for defendants in error:

The petition states the essential elements of a cause of action as required by the Code. (*Neudecker v. Kohlberg*, 81 N. Y., 296; *Moore v. Tracy*, 7 Wend., 229.) Conspiracy may be inferred from circumstances. (*Jones v. Baker*, 7 Cowen, 445; *Forsyth v. Edminston*, 11 How. Pr., 408.) The foundation of the action is the damage done, not the conspiracy. (*Place v. Minster*, 65 N. Y., 89, 95, 97; *Hutchins v. Hutchins*, 7 Hill [N. Y.], 104; Cooley on Torts, 126 and cases cited.) The act of one conspirator is the act of all. (*Hamilton v. Smith*, 39 Mich., 223; *Beebe v. Knapp*, 28 Id., 53, 66.) Participation in a conspiracy may be only as to plan, etc., and all are participants, if the act is

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in their interest. (Cooley on Torts, 127.) The only feasible mode of proof is to show such concert of action as would imply a common arrangement. (*Dayton v. Monroe*, 47 Mich., 193); and the evidence required is necessarily circumstantial (3 Green. Ev., sec. 93, p. 96).

COBB, J.

This action is brought on error from the district court of York county.

Philip Puyear, the plaintiff below, brought his action for conspiracy against John W. Hinckley, Richard D. Booker, and Arthur A. Allen and Edgar H. Allen, partners in trade as Allen Bros., doing business at Omaha, alleging that on January 1, 1887, and prior thereto, the defendant Booker and the plaintiff were partners in the retail grocery business at York, doing a prosperous business, in which plaintiff had invested \$1,000, and the good-will of the business was valued at \$500; that on said day the defendants unlawfully entered into a conspiracy to break up his said business and defraud the plaintiff of his money invested, and of the good-will of the business, in pursuance of which they agreed together that Booker should buy of plaintiff a one-half interest in said business under the pretense of a fair and *bona fide* purchase, but intending not to pay for the same, and that the half interest should be delivered to Booker before payment, and that he should then declare himself insolvent, dispose of his property, and refuse to pay any of the indebtedness of the business, and inform Allen Bros., to whom the business of plaintiff and Booker owed \$267 for groceries, that they should come and superinduce plaintiff to give a bill of sale to them of his half interest in said business, and that at the time of making and securing the bill of sale the defendant Hinckley should come forward and claim that he owned a half interest in the grocery business which he had purchased of

Booker; and to induce plaintiff to make the bill of sale to Allen Brothers that they should falsely promise the plaintiff and agree to take out of said business only groceries sufficient, at the market price, to pay them their debt of \$267, and turn over the balance to plaintiff, and to furnish plaintiff sufficient groceries, in addition thereto, to carry on a grocery business at the place and in the building in which the business was then situate; and that they should falsely represent to the plaintiff that if he would sign such bill of sale Hinckley would also sign it; and that they should further represent that said business should be turned back to plaintiff in a few hours after the bill of sale should be given to them, and that the plaintiff, in the interval, should stand on the sidewalk in front of his store and tell his customers that his business would be opened up in a short time and he would go on with the business, and that Allen Brothers should put upon the store door the notice: "Invoicing; will be open soon;" and that they should, after obtaining such bill of sale and possession of the groceries and store room, sell or pretend to sell all of the groceries for sufficient only to pay said indebtedness to them — \$267 — and costs and expenses of sale; that Booker and Hinckley should thus come into the possession, and thus become the owners of said groceries, although, in fact, the same, and the good-will, were of the value of \$1,500; and that each of said representations, promises, and agreements was fraudulent and false.

That, in pursuance of said conspiracy, the defendant Booker, on the 29th of December, 1886, under pretence of a *bona fide* purchase, obtained from plaintiff the one-half interest of said grocery business, and took possession of it, and declared himself insolvent, disposed of all his property, refused to pay any indebtedness of the grocery business, and so informed Allen Brothers, who then came and promised and superinduced the plaintiff to give them a bill of sale of his half interest in the grocery business, and to induce

plaintiff to make such bill of sale they falsely and fraudulently agreed to take out of said business, groceries sufficient to pay their debt of \$267, and no more, and to turn the balance back to plaintiff, and to furnish him sufficient groceries to carry on a business at the place, and in the building at which the same then were; and that Hinckley would also sign the bill of sale, and that the grocery business should be turned back to plaintiff within a few hours after signing the bill of sale; and the plaintiff stood in front of the store building, in which the business had been carried on, and told his customers that his business would be opened up in a short time and be carried on in his own name; and Allen Brothers put on the door of the store building the words, "Invoicing; will be open soon." And after getting possession of the groceries and the store room, Allen Brothers sold and disposed of, or pretended to sell and dispose of, all of said groceries, and Booker and Hinckley became or pretended to become the owners thereof, and thus the defendants, by fraud and conspiracy, defrauded the plaintiff of all of his groceries, and the business, and of the money the plaintiff had then invested, and his goodwill therein, valued at \$1,500, whereby the same is lost to the plaintiff, to his damage in that amount, no part of which has been paid, wherefore he prays judgment, etc. The defendants Booker and Hinckley answered separately, denying the allegations of the plaintiff. The defendants Allen answered specially, objecting to the jurisdiction of the court; that the petition does not show that they are jointly liable with the other defendants, or either of them, on the cause of action set up; and that they are residents of Douglas county; that service on them was not made in York county; and that the petition which charges a conspiracy against them and the other defendants does not state facts sufficient to give the court jurisdiction of the persons of defendants. This plea was argued by counsel and was overruled by the court; the defendants on leave answered, generally, deny-

ing every allegation of the plaintiff. There was a trial to a jury, with verdict for the plaintiff, assessing his damages at \$311.20. The defendants' motion for a new trial having been overruled, judgment for the plaintiff was entered upon the verdict.

The case is now brought to this court on numerous exceptions to the proceedings and judgment of the court below. The evidence, preserved in the bill of exceptions, is voluminous and conflicting. The testimony of the plaintiff, who was examined as a witness on his own behalf, was evidently believed by the jury, and, so far as this court of review is concerned, must be taken as credible and true if not found to be inconsistent in itself. From his testimony it appears that in November and December, 1886, the plaintiff was carrying on a small grocery business in the town of York. Looking at his testimony alone, and without making allowance for the peculiar manner of his examination by counsel, it would appear upon the first reading that he was in the business by himself; but on examining it by the light of other testimony it appears, without discrediting any of his statements, that at the time he was in partnership with one Kempton. The plaintiff had invested in his business about \$1,000; Kempton had invested really nothing except his note to the plaintiff for \$400. On December 27, 1886, the defendant Booker succeeded to the partnership of Kempton, by purchase from Kempton, or the plaintiff, or from both; the fact is not clear, but it is shown that Kempton's note was given up, and Booker's for a like amount was substituted. The plaintiff testifies that it was his understanding and argument with Booker, when he came into the business, that he was to pay plaintiff this \$400; that he then represented to plaintiff that he had the money in the bank to pay it, and that he was also to pay one-half of the bills then to be paid by the partnership, for which he represented that he had the money. On the next day he came into the store, and, upon looking over the book

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accounts, said that there was not as much on the books as Kempton had represented; and he then declared, in emphatic and bad language, that he would not put any money into the concern. Plaintiff then talked to him in a friendly manner, telling him that he would not be able to carry him, and that he would be obliged to sue him if he didn't pay; Booker replied that plaintiff couldn't make it out of him, and that he wouldn't pay a cent. Plaintiff then appealed to F. J. Ferguson, the agent and travelling man of defendants Allen, who lived in York, and he said that he would see Booker, and talk with him, and see that the matter was fixed up. Ferguson afterwards did see Booker, as he stated, but Booker would do nothing, and Ferguson promised to write to Allen Brothers, at Omaha, and told the plaintiff not to be uneasy, that they wouldn't hurt him; that he would write for one of them to come up; that afterwards, on January 19, 1887, in the afternoon, Booker came into the store and proposed to plaintiff to buy his remaining half interest in the business. The language of the plaintiff's testimony is:

"Well, I thought about it, and told him to pay me \$700 cash, and I would do it. I thought it was better to get out than to be there in the way, and if he would pay me I would get out; and he wanted me to wait on him for the money; I told him I didn't want to wait, that I wanted to go into business again and would have to have the money; and then he and Hinckley stepped out and were gone a few minutes and then came back, and it wasn't over ten or fifteen minutes before Mr. Allen and his attorney came in. Mr. Allen began to talk and I looked over the account books and said to him, 'I just owe you two dollars on your bills, that is, back payments;' and he said to me, 'that is just exactly what you owe me;' well, I told him that I didn't know, that Ferguson said he would send down for you, what for, I didn't know; I didn't know what good he could do me, and wanted to know 'if he was going to shut

me up?' He said no, not to be uneasy about what I owed him, that I had always paid promptly; he said not to be uneasy, that the trouble would all be fixed up; that he would try and straighten up with Booker and get him out of there and have things running all right again." The witness also testified: "I told him Booker was here, and Mr. Allen stepped down to talk with Hinckley a minute or two, and came back and informed me that 'Hinckley was a member of the firm, and owned half the store.' I told him that was the first I knew of it, that Hinckley was a man that didn't own anything; that he had been working all winter for his board, and so he and the attorney went to where Hinckley was standing and talked with him, and I went about the store attending to my business, and then went to supper and came back, and Allen sent for Booker who came in and they spent the evening talking with others there at the other end of the store."

Q. Who did they spend the evening with?

A. Allen, and his attorney, and Booker, and Hinckley.

Q. Talking together at the other end of the store?

A. Yes.

Q. What were you doing?

A. I was attending to my business. I never heard anything that was said at all. About half past eight o'clock Mr. Allen came and took me to the lower end of the store and said: "Puyear, I see how this trouble is, Booker has sold out and turned the whole thing over; there is but one way to get out and save trouble; that is, in the evening I want you to come forward,—my attorney will make a bill of sale out,—we want to get Hinckley into it, and you just step forward and sign the bill of sale first, and then we will go ahead and take an invoice of the store, and when we get through we will keep so much for ourselves, kick Hinckley out, he has not paid but \$50 anyhow, pay him up his \$50, and kick him out, and turn it over to you, and just furnish you goods right along." And then Allen went

down, and was gone ten or fifteen minutes; and then his attorney took me aside and told me just the same thing over again.

Q. Who was the attorney?

A. I think they called him Fitz.

Q. Is this the gentleman here?

A. Yes, sir; I think so.

The witness answered to the

Q. Well, what occurred then?

A. The attorney told me the same thing, and I said to him, Look here, I have thought of another thing: suppose after I go and sign the bill of sale you should sell out the whole stock at forced sale; it wouldn't bring \$400, and it would leave me in a bad place; all I have got is right here; and he said he wouldn't think of the like. Well, they talked so fair, that I agreed to sign the bill of sale; so we adjourned that night and I gave up the key, and Hinckley stepped forward and handed over, as well as I remember, \$34.10 that was in the drawer. * * *

Q. What key was that—key to the business?

A. I went out and took it to Mr. Allen's attorney; he and Allen were standing in front of the store, and the attorney said: "Booker wants me to take the keys until to-morrow morning." I thought he wanted to keep the keys from Booker, and so I told my son to lock the door and give the key to Mr. Allen, and he did so. Then the next morning I came up and went into store to see about the invoicing; when I got in Mr. Allen took me to the lower end of the store and said, "Whenever we bring forth the bill of sale," he says, "you step forward and sign it, and then we will go ahead and have everything ready." So I had no more than got back before his attorney took me off again and told me the very same thing, and I told him I would sign the bill of sale; and then Mr. Allen took me back and showed me a statement they had drawn up,—they had looked over the goods, and the items I don't remember, but there

was in the store for me about \$366 coming to Hinckley and me apiece, and \$267 for them.

Q. He said there was that amount of goods?

A. Yes, sir; they were satisfied there was that amount of goods then.

Q. What occurred then?

A. Well, I went out and my son came out and told me they wanted to see me, and I went in, and the attorney holloed to me "to come around and sign the bill of sale, sign it quick, quick! quick!" he says, "we want to get Hinckley into it." "Now," he says, "Mr. Hinckley, you come in and sign it, and he can go to hell," that's all.

Q. Then what?

A. They had put on the door, "*Invoicing: will be open soon.*"

Q. Who put it there?

A. I suppose Allen, or the attorney; they appeared to be running things.

Q. Then what occurred?

A. He came up and peeped out over the door, Allen did, and spoke to me, and said, "you are going back in business now;" again he said, "now you go out and tell people we are invoicing, and will be open soon, and you are going back in business." So, I went out and told them when any one asked me, there was a little trouble between myself and Booker, and we should commence again that evening. I stood out for some time and then went in at the back door; they wanted me to go home, but I stood around; I wanted to keep Hinckley away from there, but they wanted him to stay, and me to go, and so I went home, and left Hinckley in the store. I staid till noon and came back and it was closed yet, and the sign was there yet. I went in at the south door, and Hinckley was there still; they spoke and said they had concluded to send the goods around to different stores, and I could get them together after I commenced business. So I went on

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about my business, thinking it would be all right. I thought they would do what was right by me, and I went home and laid down. After about nine o'clock I went to the store and called him [Allen] out, and said, "I understand you are going ahead to sell the whole thing out; I will never give my consent to that; everything I have is in that store." "Oh, no," he said, "we are going ahead and selling these goods; it is paying us enough; there will be some \$700 of goods left; we have got a bill of sale of these goods; Hinckley has signed it, and we have got to do it, as a turn, I suppose, and then we will turn them over to you, and look you out a location, a good one, where business is not so much overdone; we will get Ferguson to look you up a good location. * * *

Q. At that time did you see the attorney of Allen Brothers?

A. Yes, sir; after Allen left he came up to me, and told me the very same thing, word for word.

Q. What next occurred?

A. He told me to take the books home, that Hinckley had no right to them, that he had nothing in the store; and so I just took the books on home, and went to bed, and slept sound, and thought everything was going on nice. I didn't see anything more of them until next morning, between nine and ten o'clock, I met Allen on the street corner near the First National Bank, and asked him how the thing was going along? He said, "Smoothly; they got out about \$75 worth of goods the night before, and a few that morning," and he said, "I'll bet this morning there is more than \$500 worth there now; and we are holding them goods up to get all out there is in them. I told him that was what I wanted. The next thing I saw of him was at half past three o'clock, he and his attorney came to me and said "that there wouldn't be anything left; it would take everything to pay Allen's bill;" and Mr. Allen made some remarks—that was the first I knew I was

robbed. I never said a word, I knew it wasn't any use to talk to them; I would have to go to a higher authority to get anything out of them.

Q. State whether you ever saw any of those goods afterwards, and if so, where?

A. The next I saw of them was here, on the west side of the square, in the possession of Hinckley & Booker.

Q. In a store there, were they?

A. Yes, sir.

Q. Were those the goods you had in your store?

A. They were.

Q. How many did you see there?

A. It looked like there might have been \$500 worth or more. * * *

Q. After you saw those goods in Hinckley & Booker's possession was there anything said by you to them, and if so, what was the conversation?

A. I had a conversation with Hinckley, he said the agreement with Allen Brothers was that they should turn the goods over to him; Booker said that Hinckley had passed into the possession of the goods.

In reply to counsel the plaintiff stated that there was about \$1,000 worth of goods when defendants took possession, and about \$115 worth of fixtures; that Hinckley & Booker took the fixtures, he understood, and they were over there in their store. This is the pith and strength of the plaintiff's testimony, as given in his own behalf, on his examination in chief. There was a cross-examination at length, but, as it appears, without material difference or effect as to the credibility and value of his evidence. There was also called a number of witnesses who testified in his behalf and corroborated his statements generally as to the value of the goods, and in some other respects.

The defendants also called and examined a number of witnesses, including Arthur Allen, the defendant T. J. Ferguson, the traveling man, Booker and Hinckley, and

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others. It may be said, in general terms, that some one, or more, of these witnesses contradicted the plaintiff's testimony in every material particular. Nevertheless, as before stated, it is significant that the jury believed the candid story of the plaintiff, and disbelieved that of the defendants, and the witnesses who contradicted him. As has been often laid down in the highest courts, the preponderance of evidence does not necessarily consist in the number of witnesses testifying to particular facts, but in characteristics which shed light on the controversy, and inspire confidence in the truth of the evidence. The consistency of testimony with other acknowledged facts, the candor and ingenuous demeanor of witnesses or the subtlety and artifice with which they testify, their interest in the issue, and their self defenses, their readiness to correct misrepresentations, or the pertinacity with which they adhere to doubtful statements, are elements in determining the weight of evidence.

It was doubtless considerations of like nature that induced the jury to believe the plaintiff's evidence, when in some important particulars he was "withstood to the face" by more than one of the defendants.

The law of the case was given to the jury in eleven impartial and well considered instructions, neither party taking exceptions to any. The errors relied upon by counsel in the brief are :

1. In admitting any evidence against Allen Brothers, the petition not stating a sufficient cause of action against them.

2. The verdict is not supported by evidence.

3. That the verdict is contrary to law.

By the initial statement it will be seen that a considerable part of the petition alleges conspiracy against all the defendants. In this the pleader followed a prevailing custom in like cases. It was probably drawn from the precedent of *Neudecker v. Kohlberg*, 81 N. Y., 296, cited by

counsel for defendant in error, in which the action was lost for want of evidence, and not for want of a skillfully drawn petition. The plaintiff's counsel, in brief, fails to point out specifically where and how the petition has failed to allege a sufficient cause of action against either, or all, of the defendants.

The real cause of action presented by the petition is, that the plaintiff, who was in possession of the one-half interest of a stock of groceries, valued at \$1,000, was induced to sign a bill of sale of his interest for the ostensible purpose of enabling the defendants Allen to take from the whole stock \$267, the indebtedness of the plaintiff and his partner to them, under their promise that, after taking out the amount due, they would return the balance of his interest to him; and that, instead of returning the balance to him, after deducting the indebtedness, they delivered it over to their co-defendants, one of whom was the owner of the other half-interest only. This allegation, if true, was a wrong for which the plaintiff was entitled to a remedy, and not only against the defendants Booker and Hinckley, but also against Allen Brothers, who, through the false representations alleged to have been made by Arthur Allen, a copartner of the firm, controlled the conversion of the property in the manner stated, and defrauded the plaintiff thereof, and it was not error for the court to receive evidence tending to prove such allegations.

The second and third objections may be considered together. The supreme court of Vermont, in case of *Sheple v. Page et al.*, 12 Vt. 519, held that "in an action on the case in the nature of a conspiracy, the gist of the action is the damage to the plaintiff and not the conspiracy. (2.) Where conspiracy is charged in a declaration between two or more, the acts of one, in pursuance of the conspiracy, are the acts of all in legal contemplation, and may be alleged in such case in the declaration as the individual acts of the one."

The case of *Jones v. Baker*, 7 Cowen, 445, was an action for a conspiracy. In the opinion the court, by C. J. Savage, said: "A writ of conspiracy, properly so called, did not lie at the common law in any case, but where the conspiracy was to indict the party either of treason or capital felony, * * * and such writ must be brought against two at least. All the other cases of conspiracy in the books were but actions on the case, though it was usual in such actions to charge a conspiracy. Yet they might be brought against one. (1 Saunders, 230, note 4; *Savill v. Roberts*, 1 Ld. Raym., 378, 379.) *Savill v. Roberts* was an action against one only, for procuring the plaintiff to be indicted of a riot. It was an action on the case and was held to lie. The case of *Subley v. Mott* and another (1 Wils., 210), was a special action on the case for a malicious prosecution. After verdict against one only a motion was made in arrest, in answer to which it was argued that this was an action on the case founded on a wrong, where, if any one be found guilty, the plaintiff should have judgment, and of that opinion was the whole court; and they considered such to be the settled law since the case of *Skinner v. Gunton and others* (1 Saunders, 230.)

* * *

"An actual conspiracy can seldom be proved unless by circumstances; but if there be no evidence of conspiracy, the plaintiff may recover against one alone where there is sufficient evidence against him though not enough against the other. This being an action founded in tort, one defendant may be found guilty and the other have a verdict in his favor. The damage here is the gist of the action, not the conspiracy; the plaintiff showed damage, and if it resulted from the wrongful acts of the defendants, or either of them, the plaintiff was entitled to recover."

From these examples I conclude that although the plaintiff in the petition charged a conspiracy against Booker and Hinckley and the Allen Brothers, yet it was not neces-

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sary to his recovery that there should be actual evidence that the defendants conspired together, nor that any of the peculiar rules governing the trial of an indictment for criminal conspiracy prevail on the the trial of the case at bar. It was therefore competent, if the jury believed from the evidence that the plaintiff suffered a wrong from the fraudulent acts of the defendants Allen Brothers, perpetrated through Arthur Allen and their attorney, Fitz, in taking possession of his store, fraudulently inducing him to sign a bill of sale, and converting his goods and turning them over to their co-defendants, Booker and Hinckley, or either of them, or to other parties—it was competent for the jury to return their verdict for the plaintiff for the amount of his damages so sustained, though there might have been no proof that any two of the defendants actually conspired together for the purpose of perpetrating such wrong upon the plaintiff.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

LUCIUS J. CAPPS v. THE COUNTY OF ADAMS.

[FILED SEPTEMBER 17, 1889.]

Implied Contract: COUNTIES: ATTORNEY: COMPENSATION. Under the act of 1879, C. was employed by the county board of A. county as its attorney "to prosecute and defend all actions in which the county was a party or might be interested, and to advise such board upon any matter pending before them," for and during the year 1885; and for such services agreed to pay, and did pay him, the sum of \$400, besides certain extra allowances, for necessary expenses when away from the county.

At the first meeting of the board, in 1886, by public vote, C. was designated for employment for like services during that

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year without either resolution or agreement as to the rate of his compensation. Afterwards C. stated, in the presence of the chairman and the members of the board, "that he would not do all this work for four hundred dollars," but he did perform the services contemplated, during said year, and did receive the sum of \$400 therefor.

In an action by C. against A. county for additional compensation for his services, upon *quantum meruit*, held, that the rate of compensation having been fixed and acted upon for the year 1885, the offer by the board of its continuation, or a renewal of the employment for 1886, by designating C. as the person to be employed, was a proposition by the county to continue the employment of C. for another year at the same rate of pay, and that the performance of the service by him was an acceptance of the proposition upon such terms, and gave C. no cause of action against the county for a greater or additional rate of compensation.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Tibbetts & Morey, and *Cornish & Tibbetts*, for plaintiff in error :

A county is a *quasi*-corporation and through its board may employ necessary counsel. (*Platte Co. v. Gerrard*, 12 Neb., 251; *Hammond v. Meadville*, 6 Id., 227.) There may be implied contracts with corporations as with individuals. (Bishop on Contracts, sec. 316; *Board v. Greenbaum*, 39 Ill., 609; *Ross v. Madison*, 2 Ind., 281; *Merrick v. Plank Road*, 11 Ia., 74; Ang. and A., Corp., secs. 227, 280, 423.) As to implied contracts in general, see 2 Wait's Act. and Def., 72-3.) Where evidence to prove the proposal is direct, positive, and satisfactory, and that offered to disprove it is purely negative, the former must prevail. (*Ralph v. Ry. Co.*, 82 Wis., 177; *Cook v. Racine*, 49 Id., 243.)

John A. Casto, for defendant in error :

The findings of the court have the same weight as the verdict of a jury. (*Seymour v. Street*, 5 Neb., 89; *Cheney*

v. *Eberhardt*, 8 Id., 426; *Hartley v. Dorr*, Id., 452); and are final upon all questions of fact unless manifestly wrong. (*Rolfe v. Pilloud*, 16 Neb., 14; *Lane v. Starkey*, 20 Id., 588); will not be set aside if there is evidence to support them (*R. Co. v. Jones*, 9 Neb., 71; *Jones v. Edwards*, 1 Id., 170); nor unless clearly against the weight of evidence. (*Hedman v. Anderson*, 6 Neb., 401; *Cook v. Powell*, 7 Id., 284.) In this case the evidence supports the finding.

COBB, J.

This cause comes to this court on error from the district court of Adams county.

The plaintiff in error alleged in the court below that during the year 1886, and prior, and hitherto, defendant was and is a duly organized county of this state and governed accordingly.

II. That on January 12, 1886, the board of supervisors of said county employed the plaintiff, as an attorney at law, to prosecute and defend all actions in which the county was or might be a party, or interested, and to advise said board upon matters pending before it.

III. That it was agreed that plaintiff was to receive as compensation for his services the reasonable and full value thereof, not to exceed for the year 1886, \$1,000.

IV. That he entered upon the performance of the services and discharged all the duties therein during the whole of the year 1886.

V. That the reasonable value of the services was upwards of \$1,000.

VI. That he has received in part compensation therefor \$400, and no more, and that there is still due him \$600.

For a second cause of action it is alleged that the plaintiff, at the request of said board, paid out and expended the sum of \$16 on behalf of defendant in a case in which it

was a party; and that no part of said sum has been repaid to him, and the whole is due and owing from the defendant.

And the plaintiff alleges that he duly presented to said board his claim for \$616 for his services, which was allowed as to \$16, and disallowed as to \$600, from which decision, as provided by statute, he brought his appeal to the district court, and prays, etc.

The defendant answered, and admitted that it was a duly organized county as stated; that on January 12, 1886, its board of supervisors employed plaintiff as stated; but that such services were agreed to be rendered by plaintiff for the same amount paid to him for like services by plaintiff for the year 1885, to-wit, \$400, payable quarterly, with such necessary expenses as the county board might deem just and equitable, which amounts have been fully allowed and paid.

Defendant admits that plaintiff has performed services for the defendant for the year 1886, as stated, and, while so employed, that he paid out \$16 for necessary expenses for defendant, as stated, which sum the defendant now tenders him in open court, and offers to confess judgment therefor and costs to date.

Defendant admits that the plaintiff has duly presented to the county board his claim for \$616, as stated, and denies each and every other allegation of the plaintiff, etc.

The plaintiff replied, denying each and every allegation of the defendant.

There was a trial to the court, a jury being waived, with special findings for the defendant as to \$600, fees and compensation for the year 1886, and for the plaintiff for \$16, expenses for the year, with \$2 interest thereon, and judgment for the plaintiff for \$18 and costs of suit.

The plaintiff's motion for a new trial having been overruled, the case is brought to this court on the following assignments of error:

1. The court erred in the assessment of plaintiff's damages.
2. The judgment is not sustained by sufficient evidence.
3. The court erred in overruling the motion for a new trial.

Section 47 of the act of legislature, entitled, "An act concerning counties and county officers," approved March 1, 1879, provided that "the county board may, when they deem it necessary, employ an attorney to prosecute and defend all actions in which the county is a party or may be interested, and to advise such board upon any matter pending before them, but the compensation allowed such attorney shall not, in any one year, exceed the sum of one thousand dollars."

This remained the law until it was repealed by implication by the act of March 10, 1885, providing for the election of county attorneys, whose duties as officers were to be undertaken in 1887, and was the law of the plaintiff's employment, as county attorney, by the defendant. Under this act it was doubtless competent for the county board of any county to employ an attorney and lend it the nature and character of an appointment to office; to employ him yearly to do all the public litigation of the county, and to advise the board on matters falling within the scope and practice of his profession, and to pay him such stipend as might be agreed upon within the limit of \$1,000 per annum, as provided in the section; and this seems to have been the view of the law and of their powers and duties under it taken by the county board of Adams county.

It appears from a certified copy of their proceedings of January 12, 1886, attached to the bill of exceptions, that a proposition was made in the session of the board to proceed to the selection of a county attorney, and that the plaintiff and another were put in nomination, and that the plaintiff having received a majority of the votes cast was declared duly elected county attorney for the ensuing year. This election, under the law, amounted only to a designa-

tion by the board of an attorney whom they preferred to employ under the terms of the statute. The evidence is clear that there was no vote, resolution, or verbal agreement, by the board, to fix the compensation of the attorney thus employed.

It also appears from the deposition of Amos Shuttuck, chairman of the board at the time of the election, taken by the plaintiff and read in evidence on the trial, that there was no agreement or understanding as to the compensation of the plaintiff as county attorney for that year; that there "was no official action taken by the board in reference to the salary of the plaintiff for the year 1886." Yet he also states that the plaintiff stated in the presence of the members of the board and the chairman at the time they ordered him to proceed in the prosecution of certain cases that, in doing all this work, he would not do it for four hundred dollars.

It is in evidence that the plaintiff was employed by the same board, in the same capacity, during the year 1885, and a copy of the record of the county board was produced in evidence by the defendant, on the trial, from which it appears that the salary of county attorney was definitely fixed by resolution of the board at \$400 per annum, payable quarterly, and that the actual necessary expenses of the attorney when away from the county upon its business be allowed and paid to the extent that the board may deem just and equitable. Under this appointment the record shows that the plaintiff for the first quarter of 1885 was paid for such services \$100; for the second quarter the sum of \$104.50; for the third quarter the sum of \$104; and for the fourth quarter the sum of \$119.

It thus appears that the compensation of the county attorney was definitely fixed by the county board, during the year 1885, at the sum of \$400, without mentioning the agreement to pay some portion of the expenses when the attorney was so employed.

With due consideration for the argument of counsel in the brief, to the effect that the fixing of the salary during the year 1885 could have no influence as a criterion or precedent for the question in controversy, it will be observed that, although the members of the county board under the township system of government are elected annually, the board itself is a permanent continuing body; and that if the office of county attorney had been, at that time, a salaried office, the salary to be fixed by the county board, the salary fixed at \$400 in 1885 would have remained the fixed salary of the office during 1886, and probably even up to the repeal of the law, in 1887, unless the board had seen fit to modify or supersede their former resolution.

While it was not a salaried office, it was a public employment under special contract, within the provisions of the statute. In 1885 the board established the compensation at a rate deemed expedient for the services required. At the expiration of the year, and at the commencement of a new one, the board signified its reemployment of the plaintiff, for the ensuing year, without any new resolution or special contract as to compensation. But upon the recognized rules of logic the offer of continued employment carried also the rate of compensation already established and existing. Now, it was competent for the plaintiff to have declined, or to have refused to accept the employment, except upon terms of additional compensation definitely proposed. He probably spoke to members of the board to that effect, without influencing the action of the board; and did accept the employment and rendered the services required, as he formerly had done, without a special contract, or the promise of a higher rate of compensation.

Without conceding that a county, under an act of the legislature as that we have considered, could be sued, on a *quantum meruit*, for services rendered, I will say that in a case like the one considered, were the defendant a private corporation, or mercantile firm, and the plaintiff an em-

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ploye of either, the law applicable in that instance would be the same as that expressed in this case.

The judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

MAX MEYER ET AL. V. F. B. EVANS.

[FILED SEPTEMBER 17, 1889.]

Attachment: DISSOLUTION FOR MISJOINDER OF CAUSES. A cause of action in a petition upon a debt not fraudulently contracted, if coupled with a cause of action upon a debt which was fraudulently contracted, and an order of attachment covering both counts issued upon an affidavit alleging that "said defendant fraudulently contracted the debt and incurred the obligation for which this suit is brought," *held*, to vitiate such order of attachment and justify its discharge. (*Meyer v. Zingre*, 18 Neb., 458.)

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Charles Ogden, for plaintiffs in error.

W. S. Shoemaker, for defendant in error.

COBB, J.

This cause is brought by Max Meyer and others, plaintiffs in error, to review the judgment of the district court of Douglas county, rendered August 13, 1887, discharging certain attachments against F. B. Evans, defendant in error.

It appears that the plaintiffs were wholesale dealers in Omaha, and the defendant a retail purchaser on credit. On

February 1, 1887, the defendant purchased of plaintiffs a bill of goods amounting to \$8.50 on credit, without question or representation of any kind. On February 2, following, he purchased a larger bill amounting to \$245.70 on fraudulent representations, it is claimed by plaintiffs and denied by the defendant, and, on the following day, a third bill of \$8.50; total, \$262.70. One-half of this bill, the firm of Max Meyer and Bro. transferred to Simon J. Fisher, as "the credit man" of the firm, who, on April 4, 1887, sued out an attachment before G. Anderson, a justice of the peace, upon an account for goods sold defendant by Max Meyer & Bro., and assigned to plaintiff, to recover the sum of \$131.35, stating upon oath "that the said defendant is about to convert his property into money, for the purpose of placing it beyond the reach of his creditors; has disposed of part of his property with intent to defraud his creditors; fraudulently contracted the debt, or incurred the obligation for which suit is brought."

On the same day Max Meyer & Bro. brought a like action, in the same court, for the same amount, for goods, wares and merchandise sold by plaintiffs to defendant, and upon a like statement under oath, laid an attachment against the defendant. Subsequently in the county court of Douglas county, on May 2, 1887, on motion of defendant to discharge the attachments mentioned, and upon evidence and argument, the court found "that the defendant had fraudulently contracted a portion of the debt for which the attachment had issued; but that a part of said debt, to-wit, \$8.45 had been contracted prior to the time that any fraudulent representations had been made, and therefore the attachment could not obtain, and the same was thereafter discharged;" to which exceptions were taken, a bill of exceptions allowed and signed by the county judge, and the cause taken to the district court on the bill of exceptions and the record of the proceedings in error.

In the district court the judgment of the county court

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was affirmed with costs, to which the plaintiffs in error duly excepted on the record, and the cause is brought to this court and submitted on the record and briefs of counsel.

As nearly as can be gathered from the record and papers in this case, as well as from the brief of counsel for plaintiffs in error, the defendant was indebted to the firm of Max Meyer & Bro. for goods purchased prior to February 2, 1887, amounting to \$8.50, to obtain credit for which, it is admitted, there was no fraudulent representation. On February 2, the defendant purchased goods of the same firm amounting to \$245.70, and in answer to inquiries as to his solvency, and for the purpose of enhancing his credit, stated that he was not indebted to any one, and especially that a certain chattel mortgage, known to have been given by him, against his stock in trade, had been arranged. On the day following, he bought of the same firm additional goods, amounting to \$8.50, on credit, for which no additional representations were made, but to which the former ones would probably apply. These three debts amounted to \$262.70. This sum was equally divided, and one-half sold to Simon J. Fisher, "the credit man" in the employ of the firm, and, in point of fact, the one who had extended the credit of the defendant. Two suits in attachment were then commenced by the separate plaintiffs, and attachments sworn out in each, alleging all the grounds provided by statute; and subsequently they appear to have been entertained and considered in the county court of Douglas county as a single proceeding. By what due process or doubtful method they reached the county court and became merged in a single suit does not appear; and what is also singular, the plaintiff Fisher, who bought into one of the attachments, drops down from that altitude and reappears in the original character of credit man to the firm, and real plaintiffs, Max Meyer & Bro. In the county court, and in this unified condition, the causes were subjected to the motion of the defendant to discharge the attachment on all

grounds of traverse; and especially that a portion of the accounts sued on was not contracted under the alleged fraudulent representations of defendant. The question to the court, on this motion, was tried on the affidavits of the parties, and those of employees, bystanders and friends. Simon J. Fisher, one of the original plaintiffs, testified that he was the credit man of Max Meyer & Brother; that on February 2, 1887, he held a conversation with defendant in the plaintiff's store, in Omaha, as to the purchase of watches from the plaintiffs; that affiant asked defendant as to his financial condition, and in reply to the inquiry as to his being in debt, answered that he was not in debt to any person whatever; that there had been a mortgage on his stock, but that that was now all arranged, and that, if the representations of defendant had not been thus made, the plaintiffs would not have allowed him the credit, but, on the contrary, would have refused to sell him the goods; and in extending his credit on that day, and on the next day, the plaintiffs relied wholly on the representations of defendant; also that at the time defendant made such representations he was largely indebted to various persons and firms in the city of Omaha, among them West & Fritscher, the Robinson Notion Company, and Vinyard & Schneider. This evidence was corroborated by Max Meyer and Adolph Meyer, the plaintiffs, and by Arthur J. Smith and Max J. Baehr, their clerks, employed as salesmen in their store.

The grounds of attachment were controverted by the defendant, who denied circumstantially the substance of the plaintiffs' affidavits on which attachments were procured, and denied that on February 2, 1887, when he purchased the bill of goods amounting to \$245.70, on credit, or at any other time, or place, he represented that the mortgage on his stock in trade had been settled, or fixed up, or arranged; and denied representing to Simon J. Fisher that he did not owe, or was not in debt to any one; but that, on the

contrary, he represented that the balance due on the mortgage on his stock had been renewed to S. L. Andrews, who assumed the liability to A. W. Cowing & Co. by indorsing defendant's notes to West & Fritscher, successors to A. W. Cowing & Co.; and that his indebtedness to the Notion Company was less than \$100, and to Vinyard and Schneider less than \$20.

The defendant's affidavit, in some important particulars, was corroborated by those of J. B. West, merchant, of the firm of West & Fritscher, and Nelson J. Edholm, of the firm of Edholm & Aiken. From this evidence, the county court found that the defendant had fraudulently contracted a portion of the debt on which the attachments had been issued, but that another portion, \$8.45, was contracted prior to the time that any fraudulent representations had been made by defendant, and therefore the attachment did not obtain, according to law, and was discharged. The district court affirmed this decision.

The case, in this court, presents the same question as that of *Mayer v. Zingre*, 18 Neb., 458, in which the attachment was discharged for want of grounds covering the whole debt. Counsel for plaintiffs in error seek to distinguish it from that case from the fact that that attachment was for \$381.20, while the grounds of attachment set up in the affidavit of the plaintiffs, only applied to \$51.09 of the debt; and in the case at bar it is argued that out of \$262.70, the grounds of attachment found by the county court, and affirmed by the district court, apply to all but \$8.45, and counsel claims that this comparatively insignificant item falls within the rule of the maxim *de minimis non curat lex*, "the law takes no notice of extreme trifles."

While it is not impossible that a case might arise in which it would be so apparent that an insignificant item had unintentionally been added to the amount sued for, which did not fall within the grounds of attachment, that it might

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properly be rejected, and the claim purged by the plaintiff to that which should have been the initial claim, it does not seem apparent that proceedings can be sustained for any sum, however insignificant, for which no grounds of attachment are claimed, simply on account of its being merged and found in another claim for which sufficient grounds of attachment do exist. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

37 372
37 564

LORTON & Co. v. RUSSELL & HOLMES.

[FILED SEPTEMBER 17, 1889.]

Principal and Agent. A principal is bound by the acts of his agent to the extent of the apparent authority conferred on him. *Webster v. Wray*, 17 Neb., 579.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

John C. Watson, for plaintiff in error:

Agency to receive a check payable to order, implies no authority to endorse it in the principal's name. (*Dodge v. Bank*, 20 O. S., 234 [30 O. S., 1].) To justify a refusal to pay money on the ground of former payment, bank must show that its payee was authorized to receive payment. (*Citizens' Bank v. Importers', etc., Bank, Ry. & Corp.*, Law Journal, Vol. IV, No. 23, p. 540.) The depositions were immaterial and irrelevant.

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S. P. Davidson, for defendant in error:

The case of *Dodge v. Bank* (*supra*) is not in point, as the pretended payee there had no business relations with the real payee. When the agent's acts affect innocent third parties, the principal will be bound to the extent of the apparent authority conferred. (*Webster v. Wray*, 17 Neb., 579, 581.) Where one of two innocent parties must suffer, and one of them has enabled an injurious act to be done, it should be the latter. (*Kasson v. Noltner*, 43 Wis., 650-1; *Story on Agency*, sec. 127.) The principal may be bound by a mere holding out of authority, even though proved by circumstantial evidence. (*Bouck v. Enos*, 61 Wis., 663-4.) As to the question of general agency, *Story on Agency*, sec. 17; *Edwards on Bills and Notes*, sec. 81; *Lumber Co. v. Stone*, 19 Neb., 402-5-6.)

COBB, J.

This cause is brought on error for review of the adverse decision of the district court of Johnson county.

The original action was by Lorton & Co., merchants at Nebraska City, against Russell & Holmes, bankers at Tecumseh, to recover from defendants the amount of three separate bank checks payable to plaintiffs, or order, of \$217.39, and interest at ten per cent per annum from January 26, 1886. It is alleged that the checks were received into the hands of a traveling salesman of the plaintiffs, from their customers, in the line of his employment, fraudulently indorsed and cashed by him, and wrongfully paid by the defendants; that without the knowledge or consent of the plaintiffs, the defendants, on the 30th of December, 1885, out of the funds of the drawers of the checks, wrongfully paid to William Bancroft, a clerk of the plaintiffs, who had received the checks in payment of bills of merchandise entrusted to him for collection against the drawers of the checks; that Bancroft was not entitled to collect the

money on the checks, but forged the plaintiffs' name thereon for that purpose, of all which the defendants had due notice at the time of payment to Bancroft; and that on the 26th of January, 1886, payment of the checks was demanded by plaintiffs and refused by the defendants.

In their answer the defendants deny that there is due the plaintiffs on any or all of said checks any sum whatever; and further deny that they paid either of the checks without the consent of the plaintiffs, or that the plaintiffs' name was forged upon the checks, or that defendants had any notice of such forgery, or that defendants wrongfully paid the checks to Bancroft.

The defendants set up that at all the times mentioned by the plaintiffs, and for more than one year prior thereto, plaintiffs were wholesale merchants, that they sold merchandise to the merchants of Tecumseh and those of other towns in Johnson and other counties in Nebraska; that the drawers of the checks were merchants of Tecumseh who had large dealings with, and bought large quantities of goods from, the plaintiffs; that William Bancroft during all that time was the agent of the plaintiffs, through whom they sold the goods to the merchants, and who was authorized to collect the bills for the goods so sold, and as such agent had before the times mentioned collected for the plaintiffs a large number of such bills; that it was the plaintiffs' custom to collect bills through such agent; that in pursuance of such custom the agent repeatedly received checks payable to the plaintiffs' order, in payment of such bills upon defendants' and other banks, and then indorsed the plaintiffs' name thereon, and thus collected and received payment of checks for the plaintiffs, all of which was repeatedly ratified by the plaintiffs; and that by such conduct and custom of the plaintiff, defendants were led and induced to believe, and did believe, that Bancroft was authorized to endorse and collect the checks; that during all of said time the plaintiffs employed no other means of

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collecting such checks than through the agency of, and indorsement of the same by, Bancroft; that the three checks mentioned were presented and indorsed by Bancroft in accordance with said custom and in pursuance of said authority, and without defendants having any notice or knowledge to the contrary; and for these reasons defendants paid the checks.

The reply of the plaintiffs is a general denial of the answer.

There was a trial to the court, a jury being waived, and a finding in favor of the defendants.

The plaintiffs moved for a new trial on the grounds:

1. The finding of the court is contrary to the law and evidence.

2. The court erred in admitting in evidence the depositions excepted to by the plaintiffs.

This motion was overruled and judgment entered on the finding in favor of defendants. The plaintiffs prosecute their petition in error on the same grounds of their motion for a new trial in the court below.

The plaintiffs were wholesale merchants doing business at Nebraska City, and the defendants were bankers at Tecumseh. These places are about forty or forty-five miles distant from each other by the country roads and about sixty miles by the railroad.

One Bancroft was employed by the plaintiffs as a salesman, in the capacity of traveling man, in their business. He had been in their employment as such for a year and a half. His usual traveling territory comprised Tecumseh, and all the towns from Nebraska City to Valley on the Burlington & Missouri River railroad line, including all the towns, with several on the Missouri Pacific line, including Howe, Stella, and Crab Orchard. He was accustomed to go over this route on an average trip of once in two weeks, soliciting orders, and collecting bills of sales to customers on each trip. He exercised general authority in

the collection of bills for the plaintiffs in their business at Tecumseh and elsewhere on the route; and was accustomed in the collection of bills to take checks on the banks at Tecumseh and at other points. Such checks payable to the plaintiffs, or order, he habitually indorsed in the plaintiffs' name, presented them for payment at the bank, sometimes receiving cash in payment, and sometimes exchange payable to plaintiffs, but at other times remitting the checks directly to his employers without cashing them.

From the testimony of Robert Payne, of the plaintiffs' firm, it would seem that the authority of Bancroft, as an agent and collector, rested in the custom and circumstances of their business, without having been expressed and defined by the plaintiffs to their salesmen; and no notice was ever given by the plaintiffs to defendants, or to other business men, on Bancroft's route, as to the extent or limit of his authority to bind the plaintiffs as an agent and representative in the transaction of their mercantile sales and collections other than that indicated by the character of his employment, and the manner in which he conducted it.

On the 29th and 30th of December, 1885, Bancroft was at Tecumseh, in pursuance of his employment as salesman and collector for plaintiffs, and had with him, which he was authorized to collect, accounts for merchandise against Wilson and Ellsworth, L. S. Parker, and Kyle & Parker, merchants of that place. Upon these accounts he collected of Wilson and Ellsworth, \$25.97; of L. S. Parker, \$160.69; and of Kyle & Parker, \$30.83.

These sums were paid to him by the parties respectively by checks on the defendants, payable to the plaintiffs. The checks he took to the banking house of defendants, indorsed them severally with the names of the plaintiffs, presented them for payment, and they were severally paid in money by the defendants. The money was embezzled by Bancroft; and for the amount the plaintiffs bring suit.

It is the plaintiffs' contention that, while Bancroft had

implied authority to collect accounts from their customers, and to receive payment in money or checks, yet, having received checks, he had no authority to cash the checks or convert them into money.

It will be observed that Payne, a member of the plaintiffs' firm, on the stand as a witness, admitted, while claiming that no express authority had been given Bancroft to convert the checks, given him in payment of accounts, into money, that no expressed limit had ever been placed upon his authority as agent, even as between the plaintiffs and Bancroft; and certainly no such limitation appears to have been brought to the knowledge of the defendants, or of any merchant or banker with whom the plaintiffs' business was transacted by Bancroft. I extract, from the cross-examination of Payne, his evidence as to the agency of the collector:

Q. During all the time he was traveling salesman for your house, he was authorized to collect bills due, was he not?

A. Yes, from our customers.

Q. And that was his usual custom?

A. Yes, he was authorized; that was our mode then, and is now, of collecting bills from customers.

Q. And he had that authority from your house to collect bills from customers?

A. Yes.

Q. Did he have any authority to receipt the bills he collected; to receipt to merchants the bills he collected?

A. Well, sir, he had the same authority that any merchant—he had no direct authority, in words to him, he had none.

Q. He did have authority to receipt the bills that you sent him out to collect?

A. He had authority by reason of our recognizing that; in other words, we never said to receipt for these bills.

Q. Did you ever inform the defendants or any other bank what limit you would put on his authority?

A. We never informed anybody at all.

Q. Whatever limit you claimed to put on his authority, was simply between yourselves and Bancroft?

A. That was the custom, yes.

Q. State whether or not on this last trip he made, in December, 1885, he was not authorized to collect the bill from Parker?

A. He had the same general thing.

Q. The same general authority?

A. Yes.

Q. As to the collection of all claims at Tecumseh and elsewhere?

A. Yes.

Q. Parker was a customer of your house at that time?

A. Yes.

Q. And also Wilson & Ellsworth?

A. Yes.

It thus fully appears that Bancroft had authority to collect the bills receivable of plaintiffs on his route, and to receipt them, if paid, in the name of plaintiffs, and to receive the proceeds in money. Having such authority, he had also the apparent authority to receive payments from responsible customers in checks on their bankers, drawn payable to his employers and principal, and to endorse them in their name, and convert them into money at the bank.

[In support of this view may be cited the authority of the most acceptable American commentator (Parsons on Contracts, vol. I, chap. III., p. 44) as to the distinction between general and special agencies, in which he says: "Of late years, courts seem more disposed to regard this distinction and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency; namely, that a principal is

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responsible, either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to this agent this authority.]

"Where the agency is implied from general employment, it may survive this employment, and will be still implied in favor of those who knew this general employment, but have not had notice of the cessation of the employment, and cannot be supposed to have had knowledge thereof."

The case cited by counsel for defendant in error, of *Kasson v. Noltner*, from 43 Wis., 646, is quite in point of exact illustration of this distinction, and is an instructive case. This point also arose, and these views of the law of agency were expressed as controlling the decision in the case of *Webster v. Wray*, 17 Neb., 579, and also in that of the *White Lake Lumber Co. v. Stone*, 19 Id., 402.

The plaintiffs in error further urge, as their second point, the error of the court below in admitting in evidence a certain deposition objected to. As to this objection we have heretofore held, repeatedly (on the authority of 1 Greenleaf, sec. 49), that in an action tried to the court without a jury, except in rare and extraordinary cases, a reviewing court will not consider an alleged error of the court below in the admission of evidence; since whatever be the grounds of objection, the court must, of necessity, hear or read the evidence to determine its character and value. Alleged error of this nature is not deemed to have prejudiced the issues of either party, or to have influenced the judgment of the court; and while I incline strongly to the opinion that the deposition admitted and complained of was admissible evidence, that question will not be further considered.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

The other Judges concur.

27	380
46	817
27	380
48	913
27	380
56	249
27	380
58	641
58	668

GEORGE J. McDUFFIE V. MATTHEW R. BENTLEY.

[FILED SEPTEMBER 17, 1889.]

1. **Pleading.** In an action by M. against B., the petition alleged that defendant sold and endorsed, without recourse, to plaintiff a promissory note, past due, secured by mortgage on land and chattels; that upon suit to collect said note, the makers answered, proving that, except as to an insignificant portion of the consideration, the note was given for usurious interest in which the plaintiff lost the amount thereof, etc. The defendant answered that at the time of the sale and endorsement of the note by him to plaintiff, he informed the plaintiff of each and every defect therein, etc. The plaintiff moved for an order requiring the defendant to make his answer specific; that he state in what manner he informed the plaintiff of the defects in said note, and of the defenses thereto, and for a further order requiring him to separate his second paragraph, and show what portion thereof is relied upon as a defense, and what portion is intended as affirmative relief, set-off, or counter claim against the plaintiff; which motion was overruled; *Held*, not reversible error.
2. **Trial: CROSS-EXAMINATION.** *Held*, That when a party on cross-examination asks a witness an immaterial or irrelevant question, he is concluded by the answer, and will not be permitted to call a witness to contradict it.
3. —: **FAILURE TO READ INSTRUCTIONS TO JURY.** The statute provides that the court must read over all instructions which it intends to give, and none others, to the jury, etc. *Held*, That the refusal or failure by the court to read to the jury an instruction which it announces as given, and writes thereon as given, and files as such, is reversible error.

ERROR to the district court for Webster county. Tried below before GASLIN, J.

G. R. Chaney, and *C. E. Davis*, for plaintiff in error.

Case & McNeny, for defendant in error.

COBB, J.

This cause is brought on error from the district court of Webster county.

The plaintiff in his petition alleges that on June 1, 1886, he purchased of the defendant, for the consideration of \$650, a promissory note, here set out.

"\$700. RED CLOUD, NEB., April 27, 1885.

"One year after date we or either of us promise to pay to Matthew R. Bentley, or order, seven hundred dollars for value received, negotiable and payable without defalcation or discount at Red Cloud, Neb., with interest at the rate of ten per cent per annum from date until paid. In case this note is not paid at maturity, and an action is commenced thereon, we agree to pay an attorney's fee of ten per cent on the amount due, the same to be allowed by the court and included in the judgment.

"Due April 27, 1886.

JOSHUA BRUBAKER

"SARAH R. BRUBAKER.

"May 15, 1886, received on the within note, \$120."

Endorsed, "without recourse, M. R. Bentley."

That the defendant delivered the same to the plaintiff as a valid obligation, when in fact all of said note, except the sum of \$7.75, was usurious, contracted for by defendant with one of the makers, Joshua Brubaker, and which the defendant knew was only good for \$7.75 at the time he sold the same to the plaintiff; that plaintiff notified the makers and requested them to pay the note, which they refused to do, but tendered the sum of \$22 in payment, which plaintiff refused to accept, and on March 27, 1887, brought suit thereon in the county court of said county against the makers, who kept their tender good, and on April 7, following, a trial was had and judgment was recovered for \$7.75 only against the makers, and against the plaintiff for \$3 for cost of suit; that the plaintiff expended

\$25 as attorney's fees in endeavoring to collect the note, which was secured by both real estate and chattel mortgages, and which would have been worth its face, with interest, less the credit of \$120, had it not been usurious; that after the makers had joined issue on a plea of usury the plaintiff notified the defendant, at the Hot Springs of Arkansas, of the defense set up, requesting that his testimony be taken to meet the plea of usury if he so desired, to which request the defendant paid no attention; wherefore the plaintiff prays judgment for the amount of money paid and expended, with interest at ten per cent from May 15, 1886, on the consideration paid for the note.

I. The defendant answered that at the time of the endorsement and delivery of the note set forth, he informed the plaintiff, who was fully apprised of each and every defect therein and defense thereto, and took and received the note with full knowledge of its character, kind, and quality, and at his own risk, and without any warranty, implied or otherwise, on the part of defendant; and denied all allegations not specifically admitted.

II. The defendant further says that the note, with others belonging to him, was endorsed and delivered to plaintiff to the amount of \$1,883 in exchange for the N. W. $\frac{1}{4}$ of sec. 35, town 1, R. 11 in Smith county, Kansas, mortgaged for \$300, assumed by defendant, and falsely represented by the plaintiff to be land of good quality, free of breaks and smooth, with forty acres under cultivation, worth \$2,500, the plaintiff well knowing such were not the facts, and that it was rough broken land with little or none of it under cultivation, and was worth not more than \$1,000. Relying upon the representations of the plaintiff as to the condition and value of said land, the defendant exchanged said notes, including the note set forth, for said land, and enclosed and delivered them to the plaintiff and assumed the payment of the \$300 mortgage on the land. At the time of such exchange the land was in a condition adverse

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and contrary to the plaintiff's representations and warranty, and was not worth more than \$1,000, wherefore the defendant asks judgment against the plaintiff in damages for the sum of \$1,483 and cost of suit.

The plaintiff's motion for an order requiring the defendant to make the first paragraph of his answer more specific; that he state in what *manner* he informed the plaintiff of the defects in said note, and the defenses thereto, and what particular defects and defenses were made known to him by defendant, and in what manner the defendant was relieved from his warranty in the sale of said notes; and for a further order requiring him to separate his second paragraph so as to show what portion thereof is relied upon as a defense to the plaintiff's cause of action, and what portion is intended as affirmative relief, set-off, or counter claim against the plaintiff, was argued by counsel, and was overruled by the court, to which ruling the plaintiff took exceptions in due form.

The plaintiff's reply admits that he exchanged the land described with the defendant for various notes, in various amounts, in all about \$2,250, and denies each and every other allegation of the defendant's answer.

There was a trial to a jury with a finding for the defendant, and also special findings of fact that at the time of the delivery of the note in question, or prior thereto, the plaintiff was informed by the defendant that said note was usurious; and that the plaintiff fraudulently represented the value of the land he traded for the notes to the defendant.

The plaintiff's motion to set aside the verdict and for a new trial was overruled, with judgment for defendant's costs, to which exceptions were taken, and the following errors assigned:

1. The court erred in overruling the motion to make the first paragraph of defendant's answer more specific, and to separate his second paragraph, as asked for in the motion.
2. In excluding the testimony of Shirey on recall, and

excluding the answer to the last question asked defendant on cross-examination.

3. In giving instructions one and three, and the latter clause of instruction two of its own motion.

4. In marking the instructions one and two, asked for by plaintiff, "*given*," and handing them to the jury without reading them to the jury with the other instructions.

5. In submitting the special findings to the jury, because there were no sufficient pleadings or evidence upon which to base them.

6. In overruling the motion for a new trial.

As to the first error here assigned, my understanding of the law to be applied to this class of motions is, that unless the motion can be allowed in the exact form presented to the court it will be denied. This motion first requires the defendant to make the first paragraph of his answer more specific, and to state in what *manner* he informed the plaintiff of the defects of the note transferred and of the defenses thereto.

It does not appear to be important to disclose in what manner this information was conveyed. The plaintiff's cause of action, if he had one, consisted in the fact that he bought the note of defendant in good faith, believing it to be a binding obligation on the makers, unaffected by usury, and that it turned out in fact, coming to his knowledge after the purchase, and parting with the consideration therefor, that it was affected with the vice of usury. Now if the defendant had informed him before the purchase and delivery that the note was usurious, either personally or by another, directly or indirectly, orally or in writing, that would make him a purchaser with notice of the defect. Had the motion been limited to a rule requiring the defendant to state in his answer, definitely, that he informed the plaintiff, before the purchase and delivery of the note, of the identical defect charged against the note in the plaintiff's petition, I would be inclined to hold that the

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motion should have been allowed, although not aware that it has been held in this state to be a reversible error on the part of a trial court to refuse to compel parties in an action to make their pleadings definite and certain. I am far from certain, however, that the first paragraph of the defendant's answer was not open to demurrer for not meeting the issue as tendered by the petition.

The motion also asked for an order requiring the defendant to separate the second paragraph of his answer, to show what portion he relied on as a defence to the action, and what portion he intended as a foundation for affirmative relief, set-off or counter claim. Under correct rules of pleading this portion of the answer should have been entitled counter claim, though I think there was no necessity of separating it into several parts. But taking the motion as a whole I am not prepared to say that the court below committed an abuse of its discretion in overruling it.

The second error is the exclusion of the testimony of the witness Shirey. It appears that when the defendant was on the stand as a witness in his own behalf, upon his cross-examination the following testimony was given:

Q. You have been selling off quite a number of notes?

A. Yes, sir.

Q. They were all about the same quality?

A. Well, Shirey thought not.

Q. Did you tell every man that you sold to that there was *bonus* in them?

A. Yes, sir.

Q. Tell Shirey so?

A. Yes, sir, and he knew it without my telling him so.

Q. Shirey had the first pick of the notes?

A. Yes, sir.

The defendant being afterwards recalled for further cross-examination, the counsel for plaintiff asked the question: At the time you sold that batch of notes you testi-

fied to selling to the Red Cloud National Bank did you tell Shirey that the notes contained usury or *bonus*, or say anything to lead him to believe they were usurious notes?

To this question the defense objected as immaterial, irrelevant, and improper cross-examination; calling for the witness' conclusions, and because the witness had been once examined and excused from further testimony. These objections the court sustained. R. V. Shirey, who had been previously examined as a witness, was recalled by the plaintiff, who offered to prove by the witness that the defendant did not, at the time he sold the notes referred to as having been sold to the Red Cloud National Bank, tell him that the notes contained *bonus*, or usury, or use any words that would lead him to believe that they were usurious notes.

The same objections, last made, were interposed by defense.

By the court: You may ask that question.

Q. Did he tell you the notes were usurious, or that they contained *bonus*?

Objection was now sustained, and the plaintiff excepted to the ruling of the court.

The question whether the defendant told the president of the Red Cloud National Bank that certain notes were usurious, or not, was immaterial to the issues to be tried; and I understand the rule to be inflexible that where a party pursuing a cross-examination asks the witness an immaterial question, he is bound by the answer given, and will not be permitted to call a witness in contradiction. This rule is elementary, and does not require to be resolved.

The third and fourth errors will be considered together, and are founded upon the refusal of the court to read to the jury certain instructions asked to be given by the plaintiff, and marked *given* by the court, that "every person who transfers a chose in action impliedly warrants at

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least that there is no legal defense to its collection arising out of his own connection with its origin; hence if you find from the evidence that the defendant traded the note described in the plaintiff's petition with other notes to plaintiff for a tract of land, and that it was put into the trade at \$650, and that the defendant endorsed said note without recourse, and delivered it to the plaintiff, he thereby warranted it to be just what it purported to be, a binding obligation of the makers for its full face, less the amount endorsed thereon; and if you further find that said note was all usurious except \$7.75, you should find for the plaintiff."

2. "The vendor of a bill or note, notwithstanding he transfers the same by an endorsement without recourse, impliedly warrants by the very act of transferring that the prior signatures to the paper are genuine and, so far at least as affected by his dealings with and relation to the paper, that it expressed upon its face the exact legal obligation of all such prior parties."

The statute of this state, entitled Instructions to Juries, sec. 54, chap. 19, provides that "The court must read over all the instructions which it intends to give, and none others, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the word 'given' or 'refused,' as the case may be, on the margin of each instruction."

From the language of this section it is clear that it was the intention of the legislature to make it the duty of the trial court to read to the jury all instructions given to them on the trial of a cause; or in other words, to make the method of giving instructions that of reading them to the jury. The statute not only imposes upon the court the duty of reading the instructions to the jury, but insures to every suitor the right to have all instructions which he shall present, and which shall be deemed proper to be given to the jury, read to them, at length, by the court.

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A refusal or neglect to discharge this duty, and a denial of this right to a suitor, in any cause, are administrations without that "due process of law" required by the constitution of this state, and must be held to be reversible error.

The judgment of the court below is reversed, and the cause will be remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other Judges concur.

JOHN L. AVERY ET AL., APPELLANTS., v. L. B. BAKER
ET AL., APPELLEES.

[FILED OCTOBER 1, 1889.]

1. **Religious Societies: SALE OF PROPERTY: INJUNCTION: JOINDER OF PARTIES.** Where a number of persons contribute to the erection of a church edifice upon the agreement that it is to be used by a certain religious society, and when not in use by it, by other denominations, and for "lectures, concerts," etc., *held*, that it was not necessary for all the persons contributing to the erection of the building to join in an action to restrain a sale and transfer of the property to be used for mercantile purposes.
2. ———: **USE OF CHURCH PROPERTY: INJUNCTION.** Where a church edifice has been erected by voluntary contributions and upon the promise and agreement that the building is to be used for certain specified purposes, the contributors to the fund have a right to insist that the property be used for the purposes named, and may enjoin a sale of the building where no adequate cause is shown and the effect would be to divert the funds from the use intended and apply them elsewhere.

APPEAL from the district court for Madison county from a judgment sustaining a demurrer to the plaintiff's petition. Heard below before NORRIS, J.

The petition is as follows :

“That on or about the —— day of April, A. D. 1881, the above named J. R. Morris, a regular authorized and licensed minister of the Baptist faith, together with the other plaintiffs above named and numerous other parties, all residents of the village of Battle Creek, being desirous of having a place of religious worship erected in the village of Battle Creek, entered into an agreement whereby a church building was to be erected for the benefit of the residents of Battle Creek and vicinity, there being at that time no church building in which those of protestant faith could worship.

“ That according to the terms of said agreement, said J. R. Morris was to receive subscriptions from the plaintiffs and other residents of said village of Battle creek, to purchase a lot and proceed to and superintend the erection of a church building in the said village of Battle Creek, and it was further understood and agreed that said church building so to be erected was to be for the use and religious benefit of the residents of said village and should always continue so to be used for church purposes, and it was further understood and agreed that those persons professing the Baptist faith should have the preference right to conduct religious services therein, but that members of any other evangelical protestant church might have and exercise the privilege of holding religious services therein, providing that the same were held at such times as to cause no interference with the right of those professing the Baptist faith ; and it was further understood that the residents of Battle Creek were to have the privilege of using said building for the purpose of having lectures and concerts of a religious nature held therein, providing as aforesaid that the same should not interfere with the stated times of holding the usual devotional services. That subsequent to the date last aforesaid, and after the plaintiff and many others of Battle

Creek had subscribed towards the erection of the church building upon the conditions above named, the said plaintiff J. R. Morris procured a deed for lot eight in block fifteen in the original town of Battle Creek, from Blair & Kimball, which said lot was donated upon the conditions that the same should always be used for church purposes; that there was no object or purpose in having the legal title to said property taken in the name of the trustees of the Baptist church of Battle Creek; that these plaintiffs, other than said Morris, at the time of the deeding of said lot, were not present, and after being informed thereof made no objection, but acquiesced in the action of the plaintiff Morris, on his suggestion that it would be a more convenient method to have the title of the property taken in the name of some religious society, and the preference right of worship was given those professing the Baptist faith out of deference to and on account of the esteem and gratitude felt toward the plaintiff J. R. Morris, a minister of the Baptist church, but at no time did your petitioners entertain any thought, nor was it understood or agreed, that the ownership and right to said property was to rest in the Baptist church of Battle Creek as a religious society. That on or about the 12th day of June, 1888, subsequent to the time subscriptions were solicited from the plaintiffs for the erection of said church building, a religious society called the Baptist church of Battle Creek was organized, at which meeting J. R. Morris, W. B. Jordan, and Charles Pratt were elected trustees.

"That soon after the subscriptions subscribed toward the building of said church by the plaintiffs were paid in, the plaintiff J. R. Morris caused to be erected a church building upon the lot aforesaid at a cost of \$522, of which amount the plaintiff

J. R. Morris subscribed and paid.....	\$50 00
George S. Hurford " "	32 00
R. H. Maxwell " "	20 00

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John D. Hoover subscribed and paid.....	\$20 00
R. P. Avery " "	20 00
J. L. Avery " "	5 00
J. T. Hale " "	25 00
John D. Hoover, Sr. " "	25 00
Thomas Ross " "	20 00
D. M. Logan " "	20 00
Jacob Cleveland " "	20 00
William Pales " "	5 00
F. J. Hale " "	25 00
William Wigg " "	5 00
Lida Wigg " "	5 00

and afterwards, and when said church was dedicated, the plaintiff J. R. Morris advanced the further sum of \$270 to help pay off the indebtedness of said church and the other liabilities, plaintiffs above named and many others with like interests contributed sums ranging from one dollar to twenty-five dollars for the same purpose; that said society of the Baptist church of Battle Creek was an unincorporated body with no power or authority to act as a religious corporation under the laws of the state of Nebraska, and all business of any kind or nature transacted by the said society was done through the said J. R. Morris and his son-in-law, one W. B. Jordan; that of the amount paid toward the erection of the said church building, aside from the amount contributed by J. R. Morris, there was not over forty dollars by those professing the Baptist faith, but all of said amount was paid in by these plaintiffs and other residents of the village of Battle Creek, who were not members of said Baptist church, and many who were not members of said Baptist church, and many who were in no wise connected with any orthodox protestant church.

"That after the erection of said church building the plaintiffs furnished and advanced money at different times and divers times for the purpose of furnishing said building and rendering the same suitable for the purpose of

holding services therein, and have advanced money for repairs and to pay the necessary current expenses of maintaining said services, and from and after the time of building said church religious services were had therein for the benefit of the residents of the said village of Battle Creek under the direction of the plaintiff J. R. Morris, the pastor in charge, in conformity with the doctrine, faith, and tenets of the Baptist sect, for the period of about two years, and during said time religious services were held therein every Sunday, and on various occasions when said church was not in use by said plaintiff J. R. Morris for the benefit of those professing the Baptist faith, preaching of the gospel was had therein under the auspices of orthodox ministers of different protestant denominations, and said building has at all times been opened and used for the purpose of giving public concerts and lectures of a religious nature for the entertainment of the residents of the said village of Battle Creek; that about two years after the said building was erected the said plaintiff Morris moved from said village, and since his removal has resided elsewhere; but before leaving, the key to said building was left by said Morris with one Warner Hale, a resident of said village, but not a member of any orthodox society, with instructions to allow any protestant clergyman in good standing, without reference to denominational affiliations, to hold services therein for the benefit of the residents of said village, and thereafter, up to the — day of March, 1888, religious services were held in said church for the benefit of the people of said village whenever the services of an authorized minister, without reference to denomination or religious creed, could be obtained, and at various times lectures and concerts of a religious nature have been held therein.

“That the plaintiffs and many other residents of the said village, on whose behalf this action is brought, would never have subscribed and paid the amounts so contributed by them toward the erection of the said church, nor would

they have contributed or assisted in maintaining the same as a place of worship upon any other condition than those embodied in the agreement and understanding hereinbefore set forth.

"That afterwards, and on or about the — day of July, 1887, the said Blair & Kimball made and executed a quit-claim deed for the premises hereinbefore described to the trustees of the Baptist church of Battle Creek, Nebraska, and at the solicitation of W. W. Wigg, George Pratt, and J. D. Hoover, Sr., who pretended to be the duly elected and qualified trustees of the Baptist church of Battle Creek, said deed was delivered to them, they pretending to be the proper custodians of the muniments of title to said church property.

"That on or about the 14th day of September, 1887, the said W. W. Wigg, George Pratt, and J. D. Hoover, Sr., made, executed, and delivered to the defendant L. B. Baker a deed to the said church property without the consent of these plaintiffs, claiming to act in and about the making of said deed as trustees of the said Baptist church society; but your petitioners allege that after the departure of said Morris from the said village of Battle Creek the Baptist church society of Battle Creek has never been an organization such as is recognized by the laws of this state, or by the rules and regulations governing religious societies of the Baptist church, and the said Wigg, Pratt, and Hoover were never chosen trustees of the society in any manner provided by law or by the usages, rules, and customs of the Baptist church; nor were they authorized to make a conveyance of said church property, nor were said parties or said Baptist church of Battle Creek authorized by the district court of Madison county to make a conveyance to said property to the defendant Baker; that the quit-claim deed above referred to was obtained by said Wigg, Pratt and Hoover at the instance and request of the defendant Baker for the purpose of avoiding the conditions recited in

the deed running to the trustees of the Baptist church in 1881, to the effect that said lot should always be used for church purposes, that the same might be conveyed by them to said Baker; that said parties have never accounted for the proceeds of said church building and lot, which is of about the value of one thousand dollars, but these plaintiffs aver and charge that the consideration of said property was lumber to the amount of about three hundred dollars, which said Wigg, Pratt, and Hoover propose to use in the erection of a building about eight miles south of Battle Creek, in Fair View precinct. That said defendant Baker has pretended to sell and convey by deed said church property to Barnard Langhoff and Michael Warneke, also defendants in this case, who were about to destroy, deface, and tear out the interior of said church building, and so arrange the inside thereof as to render the same suitable to occupy as a hardware store, thereby leaving said building utterly unfit for church purposes, and refuse to allow the plaintiffs or any of the residents of Battle Creek to worship therein; that said defendant purchased said premises with full knowledge of the rights of plaintiffs therein, and the said plaintiffs further say that the deed running from Wigg, Pratt, and Hoover, purporting to convey said premises to said defendant Baker, and the deed from the latter to said Langhoff and Warneke, cast a cloud upon the title of said premises.

"That those persons who formerly constituted the Baptist church society of Battle Creek are now no longer connected therewith, but most of them have become identified with other denominations or joined other or different Baptist societies; that said church building is the only one within twelve miles of Battle Creek where people adhering to the protestant religion may meet and worship."

The prayer is for an injunction to restrain the defendants from obstructing and destroying the building in question for church purposes, and to remove a cloud from the title to said property.

H. C. Brome, for appellants:

There is no defect of parties plaintiff, as the case comes under sec. 43 of the Code. It differs from a simple subscription to erect a church edifice, as there was in this case a purchase of property for a specific purpose by contributors of the purchase price. A conveyance, at the time of payment, to another than the one paying the consideration raises a resulting trust in favor of the grantor. (*Botsford v. Burr*, 2 Johns. Ch., 405; *Wray v. Steele*, 2 Vesey & Beames, 388; *Latham v. Henderson*, 47 Ill., 185; *Irvine v. Marshall*, 7 Minn., 286.) If a trust relation existed between plaintiffs and the church trustees, the former are entitled to an injunction to restrain the improper exercise of power by the trustees. A purchaser from a trustee, with notice, has the same liabilities as the trustee. (2 Perry on Trusts, sec. 816.)

Wigton & Whitham, for appellees:

The statement of who are plaintiffs can only include the subscribers to the building fund (*Quinlan v. Myers*, 29 O. S., 500, 508); but the members and trustees of the church are interested, and therefore necessary parties. (1 Pom. Eq. Jur., sec. 114; *Kellogg v. Lavender*, 9 Neb., 418, 429; *Cassidy v. Shinimin*, 122 Mass., 409; 1 Daniell's Chan. Pl. & Pr. (4 Ed.) 190 and N. 247; *Burke v. Perry*, 26 Neb., 414.) The court, of its own motion, will require necessary parties, who are omitted, to be joined, or will dismiss the action. (*Schwoerer v. Market Ass'n*, 99 Mass., 295.) There is no resulting trust under the facts. It was necessary to show that the amount paid by each was an aliquot part of the consideration. (*McGowen v. McGowen*, 14 Gray, 121, and cases cited.) The case is analogous to *Tigard v. Moffitt*, 13 Neb., 565, where an injunction was refused.

MAXWELL, J.

The demurrer is upon two grounds: first, that there is a defect of parties plaintiff; and second, that the petition does not state a cause of action. The action is brought, primarily to restrain the defendants, in behalf of certain contributors to the erection of the church edifice, in which case, while it is proper to bring all who have contributed to that purpose before the court to prevent a multiplicity of suits, yet in a case like that set forth in the petition, a person who, in pursuance of an agreement set forth in the subscription list, has furnished funds to aid in the construction of a building for a public purpose, and which funds have been applied to that purpose, has a right to insist that such building shall not without good cause be converted to other uses; and he may maintain an action either in his own name or on behalf of all the subscribers, to prevent a violation of the contract. In such case all the parties in interest are not required to join as plaintiffs. Where one of the primary objects of the suit is to quiet title, it is necessary that all parties in interest be made parties either as plaintiffs or defendants, unless they are so numerous that it is impracticable to bring them all before the court. This is not the case here, and it is probable that the plaintiffs cannot maintain an action to quiet title. There is a defect of parties defendant, however, as the trustees should have been joined; but that objection is not raised by the demurrer. If the allegations of the petition are true, the plaintiffs were residents of the village of Battle Creek, and there being no church of the protestant faith in that village or vicinity, they contributed to the erection of the building in question. It was "further understood and agreed that said church building so to be erected was to be for the use and religious benefit of the residents of said village, and should always continue to be so, to be used for church purposes."

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"It was further understood that the residents of Battle Creek were to have the privilege of using said building for the purpose of having lectures and concerts of a religious nature held therein," etc. That a church edifice was erected and used for the purpose for which it was built for two years, when it was attempted to be sold to the defendants, and no building to be erected in its place or within eight miles of Battle Creek. These facts, on their face, would seem to entitle the plaintiffs to relief. If the allegations of the petition are true, the money contributed by the plaintiffs was paid in pursuance of a specific agreement that it was to be applied in the erection of the building in question. Such a building in a small village like Battle Creek no doubt enhanced the value of every piece of property in the village, and thus, aside from its use for the Baptist society, lectures, concerts, etc., was a direct benefit to the property owners. A church organization, like any other, must act in good faith with those contributing to the erection of an edifice for its use. A church edifice is the result, ordinarily, of many voluntary subscriptions. It would be the property of those who contributed to its erection, but for the fact that it was made as a donation to a particular society. The donation, however, is for a particular purpose—the erection of a church edifice. The money so contributed cannot be diverted and applied to another use without the donors' consent—as the erection of a building for a college, however much the latter might be needed. If good faith requires the application of the money to the uses for which it was designed, the same rule would seem to apply after the building was erected. If without adequate cause a religious society may sell a church building erected by voluntary contributors for that purpose, to carry on the mercantile or other business therein, and the persons who furnished the funds to erect the building be without remedy, the power would be liable to great abuse. But no society possesses such power. Justice and right

between individuals lie at the foundation of the Christian religion, and this rule is as binding upon the various religious organizations as upon individuals. No sufficient cause being shown for the attempted sale of the building in question, the plaintiffs had a right, so far as appears, to enjoin the sale and transfer to the defendant.

The judgment of the district court is reversed, and the cause remanded, with leave to answer, and for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

A. B. BEACH v. THE STATE OF NEBRASKA, EX REL.
JAMES A. EMMONS.

[FILED OCTOBER 1, 1889.]

Constables: FEES: CANNOT BE REQUIRED IN ADVANCE. In cases of misdemeanor the statute authorizes the magistrate to require the complaining witness to give security for costs. This security is designed as a protection to all persons entitled to fees in the case in the event that the complaint is dismissed; but the law does not authorize a constable to demand his fees in advance in such cases as a condition precedent to performing his duty in the county, as by summoning a jury.

ERROR to the district court for Lancaster county. Tried below before CHAPMAN, J.

J. L. Caldwell, for plaintiff in error:

The constable's return showing no service because of non-payment of fees was sufficient and justifiable. (*Murfree on Sheriffs*, sec. 1072; *Jones v. Gupton*, 65 N. C., 48; *Carlisle v. Soule*, 44 Vt., 265; *Adams v. Dinkgrave*, 26 La. Ann., 626; *Atkinson v. Hulse*, 30 Ark., 760.) There is a

Beach v. State, ex rel. Emmons.

plain distinction between felonies and misdemeanors. The latter are not covered by the Criminal Code in providing for payment of costs. (*Boggs v. Washington Co.*, 10 Neb., 299; *Dodge Co. v. Gregg*, 14 Neb., 307.) The constable has a right to demand his fees in advance in misdemeanors; and it is necessary that there be some check upon mere malicious complaints. (*State, ex rel. Thomas, v. McCutcheon*, 20 Neb., 304.) The complainant is a party within the meaning of the statute. He is not liable for costs unless there is malice or no probable cause. (*Cobbey v. Berger*, 13 Neb., 463.)

Cassiday & Wolfe, and *Talbot & Bryan*, for defendant in error :

The exaction of costs from a complaining witness under any circumstances is severely criticized in *Sovereign v. State*, 4 O. S., 491. There is no authority for a constable demanding money in advance; none is given for demanding even security. The distinction between felonies and misdemeanors is one of degree only. The complaining witness is not a party in either case. (*Hansard v. State*, 5 Humph. [Tenn.], 114; *State v. Menhart*, 9 Kas., 98.) Sec. 541 of the Criminal Code provides a fund for the payment of costs in misdemeanors. (*Dodge Co. v. Gregg*, 14 Neb., 305; *Boggs v. Washington Co.*, 10 Neb., 297.) It would be the officer's duty to serve process in criminal cases, whether or not the state paid the costs. (*Board v. Blake*, 21 Ind., 34; *Rawley v. Board*, 2 Blackf. [Id.], 234; *Jefferson County v. Wollard*, 1 G. Greene [Ia.], 438; *Andrews v. U. S.*, 2 Story [U. S. C. C.], 208.) Fees cannot be demanded in advance unless the specific right is given by statute. (*Com. v. Bagley*, 7 Pick. [Mass.], 281; *Bradford v. Jackson Co.*, Morris [Ia.], 219; *State v. Vassel*, 47 Mo., 417; *Williams v. State*, 2 Sneed [Tenn.], 161.) A constable is a ministerial officer under the statute. Mandamus is the proper remedy. (4 Wait's Act. & Def., 364; *People, ex rel. Dobson, v. McClay*, 2 Neb., 7.)

MAXWELL, J.

In November, 1888, one James A. Emmons filed a complaint against Alva Pound, Joseph Mitchell, and Frank McClelland, before W. H. Snelling, Esq., a justice of the peace, charging them with assault and battery upon said Emmons. The justice thereupon issued a warrant for the arrest of said parties, and they were duly arrested. On the day set for the hearing the complaining witness demanded a jury, which was duly selected, and a *venire* was thereupon issued by said justice and delivered to the plaintiff in error, commanding him to summon the jurors so selected. This he refused to do unless his fees therefor were paid in advance. Emmons thereupon instituted proceedings in the district court to compel said plaintiff in error to summon said jury, and on the hearing a peremptory writ of mandamus was awarded. The question presented in this court is, Had the officer a right to refuse to summon the jury unless his fees were paid in advance? No case has been cited holding that he could make the payment of fees in a case like that under consideration a condition precedent to his performing his duty by summoning the jurors, and, in the absence of authorities to the contrary, we think the rules applicable in civil cases do not apply in a criminal case. It is true that in cases of misdemeanor the justice may, and where there is doubt of his solvency should, require the complaining witness to give security for costs. This security is designed for the protection of all persons entitled to costs in the case in the event that the complaint shall be dismissed; but there is no provision authorizing the officer to demand his fees in advance. The peremptory writ therefore was properly granted, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

P. D. CHENEY, EXECUTOR, ETC., APPELLANT, V. A. J.
DUNLAP ET AL., APPELLEES.

[FILED OCTOBER 1, 1889.]

1. **Usury: PERSONAL DEFENSE.** The defense of usury is personal to the borrower and his sureties and privies.
2. ———: **STRANGER TO CONTRACT.** A mere purchaser of the equity of redemption, being neither surety nor privy, cannot avail himself of the usurious contract of his grantor to which he is a stranger and plead usury in such contract.
3. **Pleading: PRESUMPTION.** Where there is a failure in an answer to state a material fact—one necessary to show that the defendant is entitled to make a certain defense—the presumption is that such fact does not exist. (*B. & M. R. Co. v. Lancaster Co.*, 4 Neb., 307; *B. & M. R. Co. v. York Co.*, 7 Id., 487.)

APPEAL from the district court for Johnson county.
Heard below before APPELGET, J.

L. C. Chapman, for appellant:

Defendants Easterday and Pella are strangers to the contract and cannot plead usury. (*Sternberg v. Cullanan*, 14 Ia., 255; *Drake v. Chandler*, 18 Gratt. [Va.], 909; *Stephens v. Muir*, 8 Ind., 352; *Huston v. Stringham*, 21 Ia., 36; *Farmers', etc., Bank v. Kimmel*, 1 Mich., 84; *Loomis v. Eaton*, 32 Conn., 550; *Ransom v. Hays*, 39 Mo., 445.) Defendant Dunlap is estopped to set up usury as a defense. (*Mechanics' Bank v. Townsend*, 29 Barb. [N. Y.], 569. See also *Colebrooke, Collateral Securities*, sec. 138; *Horn v. Cole*, 51 N. H., 287; *Ashton's Appeal*, 73 Pa. St., 153; *Smyth v. Munroe*, 84 N. Y., 354; *Weyh v. Boylan*, 85 N. Y., 394.)

D. F. Osgood, for appellee Pella, and *S. P. Davidson*,
for appellee Easterday.

27	401
37	860
27	401
59	458
27	401
61	750

MAXWELL, J.

On January 9th, 1889, the plaintiff filed a petition in the district court of Johnson county stating his cause of action to be:

That on March 10, 1877, the defendant Andrew J. Dunlap made and delivered to Prentiss D. Cheney his five promissory notes, payable to the order of said Cheney, each for \$42, due respectively in one, two, three, four and five years after said date, with twelve per cent interest after maturity.

That before the maturity of any of said notes said Cheney, for a valuable consideration, sold and indorsed the same, without recourse, to Wm. G. Davis, now deceased, who ever since, to the time of his death, was the owner and holder of said notes.

That said Wm. G. Davis died December 25, 1879, leaving a will, wherein said P. D. Cheney was named as his executor; and that he was lawfully appointed executor and letters testamentary issued to him.

That no part of said notes has been paid.

That on March 10, 1877, the said defendant Andrew J. Dunlap and wife, for the purpose of securing the payment of said notes, made and delivered to said Cheney a mortgage on the northeast quarter of section 14, township 5, range 10 in Johnson county, which mortgage was duly recorded on March 27, 1877.

That W. S. Dunlap, Geo. A. Dunlap, M. V. Easterday, M. J. Easterday, and Wallentine Pella claimed some interest in said mortgaged land.

Plaintiff prays that said mortgage may be foreclosed, the land sold, and proceeds applied to payment of said indebtedness, and costs, with attorney's fee.

On February 4, 1889, the defendant Martin V. Easterday filed his separate answer, in which he alleges: That the

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only consideration for said notes was usurious interest on a loan of \$600, obtained by said A. J. Dunlap from Cheney and one Hankinson, whereon said Dunlap agreed to pay interest at the rate of seventeen per cent per annum; that said loan was made at Tecumseh, Nebraska, through B. F. Perkins, acting as agent for Cheney and Hankinson.

He denies that Davis became the owner of said notes before due, in the usual course of business without notice of usury.

He alleges that the defendant became the owner of said land and has since conveyed it to his co-defendant, Pella. As a second defense Easterday avers that said notes are barred by the statute of limitations, because the owner and holder thereof declared the whole debt due and demanded payment more than ten years prior to the commencement of this action.

On the same day defendants W. S. Dunlap, Geo. A. Dunlap, and M. J. Easterday each filed his separate answer, and disclaimed any interest in said land.

On February 11, 1889, the defendant Wallentine Pella filed his separate answer, setting up a defense as follows: Denies the allegations of petition; alleges that the mortgage sued on was given on a contract between P. D. Cheney and A. J. Dunlap, in which Dunlap applied to B. F. Perkins, agent for said Cheney, and one Hankinson for a loan of \$600. Dunlap agreed to pay interest at the rate of seventeen per cent per annum.

That Dunlap executed the mortgage sued on, and also executed a note for \$600 to Hankinson, and executed a mortgage on this land to secure the same; that said contract was usurious and unlawful.

As a further defense said Pella claims that said notes are barred by the statute of limitations, because the owner and holder thereof declared the whole debt due and demanded payment more than ten years prior to the commencement of this action.

He also alleges that he purchased the land described without notice of the claim sued on.

The testimony on the part of the plaintiff is directed to the single point of proving that Davis was a *bona fide* purchaser of the notes in question before maturity for a valuable consideration, and therefore was entitled to protection. On the part of the answering defendants, the proof is confined to a single question, viz.: That there was usury in the transaction. That these notes were given for usurious interest is clearly apparent from all the testimony—the plaintiffs' as well as defendants'; but whether the defendants, who have pleaded usury, have shown that they are entitled to make such defense is an important question in the case which both in their briefs and oral arguments they have ignored.

Easterday, in his answer, after stating all the facts relating to usury, alleges that "After the execution of said notes and mortgages, this defendant became the owner of said land and has since conveyed it by warranty deed to his co-defendant, Pella."

The answer of Pella is to the same effect, except that he is still the owner. The plea of usury as a defense is personal to the borrower and his sureties and privies. (*Cramer v. Lepper* 26 O. S., 59; *Pritchett v. Mitchell*, 17 Kas., 355; *Studabaker v. Marquardt*, 55 Ind., 341; *Carmichael v. Bodfish*, 32 Ia., 418; *Mordecai v. Stewart*, 37 Ga., 364; *Loomis v. Eaton*, 32 Conn., 550; *Ransom v. Hays*, 39 Mo., 445; *Stockton v. Coleman*, 39 Ind., 106.)

The answers of the parties named wholly fail to show that they stand in the relation of sureties or privies to the borrower, and therefore that they are entitled to avail themselves of the defense of usury. So far as appears they are mere purchasers of the equity of redemption. Where there is a failure to plead a material fact—one necessary to show a cause of action—the law presumes that it does not exist. (*B. & M. R. Co. v. Lancaster Co.*, 4 Neb., 307; *B. & M. R.*

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Co. v. York Co., 7 Id., 487.) Had the plaintiff demurred to each of said answers, therefore the demurrer should have been sustained. The defense, however, fails, not having been interposed by parties entitled to make the same. It is unnecessary to inquire whether or not Davis was a *bona fide* purchaser of the notes in question before due for a valuable consideration, as no one having the right to set up the defense of the usury has attempted to do so. The judgment of the district court is reversed and a decree of foreclosure and sale will be entered in this court.

DECREE ACCORDINGLY.

THE other Judges concur.

CITY OF FREMONT V. MARTIN BRENNER.

[FILED OCTOBER 1, 1889.]

Practice. Where there is no material error in the proceedings of the trial court, and the verdict is sustained by the evidence, the judgment will not be reversed.

ERROR to the district court for Dodge county. Tried below before MARSHALL, J.

N. H. Bell, for plaintiff in error:

The place was dangerous and defendant in error had knowledge of and could have avoided it. He was guilty of contributory negligence and cannot recover. (*City of Erie v. Magill*, 101 Pa. St., 616; *Wilson v. Charlestown*, 8 Allen [Mass.], 137; *Durkin v. Troy*, 61 Barb. [N. Y.], 437; *Schaefer v. Sandusky*, 33 O. S., 246; *City of Quincy v. Barker*, 81 Ill., 300; *Thomas v. Mayor*, 28 Hun [N. Y.], 110; *City of Centralia v. Krouse*, 64 Ill., 19; *Butterfield v. Forrester*, 11 East, 60.) The instructions are in-

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applicable and insufficient. Much of defendant in error's testimony is inadmissible and prejudicial.

Frick & Dolezal, for defendant in error :

The evidence proves the city's negligence. The change in the crossing soon after the injury shows the existence of a defect at the time of said injury. (*City of Emporia v. Schmidling*, 6 Pac. Rep., 893.) The negligence was actionable. (*Hill v. Fond du Lac*, 14 N. W. Rep., 25.) Contributory negligence is a question of fact. (*City of Platts-mouth v. Mitchell*, 20 Neb., 231; *Nebraska City v. Rathbone*, Id., 294; *O., etc., R. Co. v. O'Donnell*, 22 Id., 475; *City of Lincoln v. Gillilan*, 18 Id., 114.) The cases cited by plaintiff in error differ in their facts from the present one and are inapplicable. A party knowing of a defect is only held to ordinary care. (*Hubbard v. Mason City*, 20 N. W. Rep., 172; *Mackenzie v. Northfield*, 16 Id., 172; *Munger v. Marshalltown*, 13 Id., 642; *Delger v. St. Paul*, 14 Fed. Rep., 567; *Nichols v. Minneapolis*, 23 N. W. Rep., 868; *Bullock v. Mayor*, 2 N. E. Rep., 1; *Evans v. Utica*, 69 N. Y., 166.) The city is not excused by the fact that a young and healthy man could travel the walk at all seasons. (*Stewart v. Ripon*, 38 Wis., 591.) The instruction as to the measure of damages is correct. (*Louisville, etc., R. Co. v. Falvey*, 3 N. E. Rep., 389; *City of Indianapolis v. Scott*, 72 Ind., 196; *Same v. Gaston*, 58 Id., 196.)

MAXWELL, J.

This is an action to recover damages for personal injuries sustained by Brenner by reason of an alleged defect in a street crossing in the city of Fremont. After alleging the incorporation of the city, the cause of action is stated as follows:

"That Sixth street is, and at all times hereinafter mentioned was, a principal street and thoroughfare, within the

corporate limits of defendant, and is, and at said times, and for more than ten years prior thereto, was, used by the public generally for travel, and during all of said times said defendant exercised exclusive control and supervision over said street, and said defendant set apart a portion of said street along the north side thereof as a sidewalk to be used by foot travelers passing on and along said street, and among other crosswalks established a crosswalk across said street along the west side of F street for the use of persons traveling on foot across Sixth street at said place, and the same was generally used by persons traveling on said street at said place of travel; that the said defendant, disregarding its duty to keep said crosswalk reasonably safe for persons traveling on foot thereon, carelessly and negligently constructed said crosswalk and established the grade thereof and of said sidewalk along the north side of said Sixth street, and carelessly and negligently made the crosswalk join said sidewalk by a steep incline in said crosswalk so that said crosswalk at said place, and the incline thereof, by the ordinary storms and fall of snow, and the weather in the winter season, and by the ordinary accumulation of snow and ice thereon, became and was during the winter season slippery and dangerous to all persons traveling thereon with due diligence and care in the winter season.

"That thereafter, in the winter season, to-wit, on the 29th day of December, 1886, while the plaintiff was traveling on foot on and over said street and crosswalk and the incline thereof with due care, and without any fault or negligence on his part, the plaintiff, by said slippery and dangerous condition of said sidewalk and the incline thereof, and by the defective construction and grade thereof as aforesaid, was made to slip, and was made to violently fall to the ground, whereby the plaintiff was greatly bruised, and his left arm was thereby fractured and broken and plaintiff was thereby permanently injured in and about said arms and plaintiff thereby suffered great pain of body

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and mind, and plaintiff was put to great expense in securing medical treatment and the services of a physician in and about his said injuries."

There is also an allegation that the claim was rejected by the city council. The prayer is for judgment for \$2,000.

The answer consists of certain specific denials and a plea of contributory negligence on the part of Brenner.

On the trial of the cause the jury returned a verdict in favor of Brenner for \$500, upon which judgment was rendered. A number of errors are assigned, the principal objections being to certain instructions given, and to the refusal to give instructions asked. The instructions given, which are very long, seem to cover every point upon which there was evidence, and no particular error in them has been pointed out, and there was no error in refusing to give the instructions asked, as those previously given seem to have been full and complete. The questions of fact were fairly submitted to the jury, and in our view the verdict is fully supported by the evidence. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JAMES S. MILLER, APPELLEE, V. SEYMOUR B. EASTMAN ET AL., APPELLANTS.

[FILED OCTOBER 1, 1889.]

1. **Service by Publication: AFFIDAVIT: DEFECT.** Where the affidavit for an attachment of real estate and for service upon the defendant by publication shows the essential facts to confer jurisdiction, the court will look at both, and if a defect in the affidavit for publication is supplied in the affidavit for an attachment it will be sufficient.

Miller v. Eastman.

2. Bona Fide Purchaser. Plaintiff held not to be an innocent purchaser and not entitled to relief.

APPEAL from the district court for Otoe county. Heard below before CHAPMAN, J.

C. W. Seymour and *O. P. Mason*, for appellants :

Even if the affidavit is defective, objection to service of process cannot be considered after confirmation. (*Gilbert v. Brown*, 9 Neb., 94.) The same rules apply to an attachment sale as to an execution sale. (*Helmer v. Rehm*, 14 Neb., 220.) Confirmation of sale cures all irregularities in the proceedings. (*McKeighan v. Hopkins*, 19 Neb., 40; *O'Brien v. Gaslin*, 20 Neb., 350.) Order of confirmation is final and not subject to collateral attack. (*Berkley v. Lamb*, 8 Neb., 398; *Neligh v. Keene*, 16 Id., 410; *Phillips v. Darley*, 1 Id., 322; *McKeighan v. Hopkins*, 14 Id., 368; *Day v. Thompson*, 11 Id., 128.) The purchaser, upon payment and confirmation, becomes the equitable owner, and may compel issuance of sheriff's deed. (*Lamb v. Sherman*, 19 Neb., 687.) Power of court to compel issuance of such deed at execution sale is continuous and not exhausted by giving a defective deed. (Id.) Such deed dates from time lands became liable to satisfaction of judgment. (Id., 688.) The purchaser's title depends entirely upon final confirmation. (*State Bank v. Green*, 10 Neb., 134; *Miller v. Hall*, 1 Bush. [Ky.], 230.) Miller was not an innocent purchaser. (*Metz v. Bank*, 7 Neb., 172.)

Edwin F. Warren, for appellee :

A proper affidavit is a jurisdictional prerequisite. (*Blair v. Mfg. Co.*, 7 Neb., 146; *Atkins v. Atkins*, 9 Id., 191; *Frazier v. Miles*, 10 Id., 109; *Murphy v. Lyons*, 19 Id., 692.) Miller purchased from the apparent owner in good faith and must be protected in his title. (*Snowden v. Tyler*, 21 Neb., 216; *Shotwell v. Harrison*, 22 Mich., 410;

Pringle v. Dunn, 37 Wis., 449; *Coffin v. Ray*, 1 Metc. [Mass.], 212; *Glidden v. Hunt*, 24 Pick. [Id.], 221.) If McCann ever had a claim it was lost by the adverse possession of Miller's grantor, and color of title was not essential. (*Horbach v. Miller*, 4 Neb., 47; *Galling v. Lane*, 17 Id., 79; *Haywood v. Thomas*, Id., 240.) Uninterrupted possession for the required time is evidence of a fee. (*Stettinische v. Lamb*, 18 Neb., 626.)

MAXWELL, J.

On July 24, 1871, Dwight J. McCann commenced an action in the district court of Otoe county against Robert O. Old, on a promissory note, to recover the sum of two hundred and eighty dollars. Old was a non-resident, who at that time owned lots 1 and 2 in block 22, and lot 4 in block 17, in Belmont addition to Nebraska City.

Service was had by attachment levied on said lots 1 and 2, and notice by publication. December 22, 1871, judgment was rendered in said case in favor of the plaintiff for seventy-nine dollars and seventeen cents and costs, and a decree entered directing the sale of the lots attached to pay the same. The lots were duly advertised and sold. The sheriff made his report, and at the next term of said court, to-wit, on the 3d day of June, 1872, said sale was by the court confirmed, and the sheriff of said county directed to execute a deed for said lots to the purchaser at said sale—Dwight J. McCann. This deed was never executed, or if so, was not recorded. February 21, 1887, McCann, by an attorney in fact, conveyed said lots to Eastman, which deed was placed upon record February 22, 1887. On March 28, James S. Miller, the plaintiff, filed for record a deed of said lots purporting to have been executed February 24, 1887, by Robert O. Old, as grantor to said Miller. April 1, 1887, McCann made application to the district court of Otoe county for an order requiring the then sheriff of Otoe

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county to execute the sheriff's deed to said lots, under the sale on the order of attachment and confirmation thereof in 1871. On April 4, 1887, this suit was instituted by Miller, the object and prayer of the petition herein being to quiet the title of said Miller as against the claims of the defendants, and to enjoin McCann from further proceeding to secure said sheriff's deed. On the final hearing the court found that the title to said lots was in the plaintiff Miller, and the same was quieted and confirmed in him as against the claims of these defendants, Eastman and McCann, and they were perpetually enjoined from securing or placing on record any deed therefor from the sheriff of Otoe county, by reason of the said judgment and sale. Eastman and McCann appeal to this court.

The first question presented is, Did the district court of Otoe county have jurisdiction in the attachment proceeding? The first ground of attachment under section 198 of the Code is, "that the defendant, or one of several defendants, is a foreign corporation or a non-resident of the state." The affidavit for an attachment is in the following form, omitting the title of the case:

"STATE OF NEBRASKA, }
"COUNTY OF OTOE. }

"D. J. McCann, being duly sworn, says that he is the plaintiff named in the above entitled action; that said action is founded upon a promissory note dated at Nebraska City in said county, March 10, 1860, for thirty-seven dollars and twenty cents, due six months after said date, with interest at five per cent per month from maturity, executed and delivered by the said defendant to Julian Metcalf, trustee for Martha Ann Metcalf, and by her endorsed and delivered to this plaintiff. And deponent further says that said claim is just; that, as affiant verily believes, the plaintiff justly ought to recover of and from the said defendant the sum of thirty-seven and $\frac{2}{100}$ dollars, and interest thereon at the rate of five per cent per month from

the 10th day of September, 1860, amounting at the date of the commencement of this action to the sum of two hundred eighty dollars. And deponent further says, that the said defendant is a non-resident of the state of Nebraska, but is a resident of the territory of Colorado, and that affiant makes this affidavit for the purpose of procuring an order of attachment in said action. D. J. McCANN.

"Subscribed and sworn to before me this 22d day of July, 1871.

L. F. D'GETTE,

"Notary Public."

This was sufficient to authorize the issuing and levy of the attachment. The affidavit for publication, omitting the title of the cause, is as follows:

"STATE OF NEBRASKA, }
"COUNTY OF OTTOE. }

"D. J. McCann, being duly sworn, says that he is the plaintiff named in the above entitled action; that said action is brought to recover the sum of thirty-seven dollars and twenty cents, and interest thereon at the rate of five per cent per month from the 10th day of September, 1860, due plaintiff as indorsee of a certain promissory note for said sum, at interest as provided, from maturity, due six months after date thereof, to-wit, March 10, 1860; amounting at the date of the commencement of this action to the sum of \$280.

"And deponent further says that the said defendant is a non-resident of the state of Nebraska, and is a resident of the territory of Colorado, and that service of a summons cannot be made upon the said defendant within the state of Nebraska, and that affiant makes this affidavit for the purpose of procuring service upon said defendant by publication in manner prescribed by law.

"D. J. McCANN.

"Subscribed and sworn to before me this 22d day of July, 1871.

L. F. D'GETTE,

"Notary Public."

The third sub-division of section 77 of the Code authorizes service by publication "in actions brought against a non-resident of this state, or a foreign corporation having in this state property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way," and section 78 provides that before "service" can be made by publication an affidavit must be filed that service of a summons cannot be made within this state on the defendant, or defendants to be served by publication, and that the case is one of those mentioned in section 77. It will be observed that the affidavit complies substantially with the statute and is sufficient. And in a case of this kind the court will look at the entire record, and if it appear from all the affidavits before the court issuing the attachment that the essential facts to confer jurisdiction were duly sworn to therein, the judgment will not be declared void; therefore, even if the affidavit for publication was defective, the defect is supplied by the affidavit for the attachment, and is thereby cured. The court, therefore, in any view of the case, had jurisdiction and its judgment is not subject to collateral attack.

The testimony shows that Mr. Miller purchased with full notice of the defendant's rights and he is in no sense an innocent purchaser, and he merely took the interest of Mr. Old, which seems to have been sold to McCann. The judgment of the district court is reversed and the plaintiff's petition dismissed.

DECREE ACCORDINGLY.

THE other Judges concur.

ELLIS L. BIERBOWER ET AL. V. BERNARD SINGER.

[FILED OCTOBER 3, 1889.]

1. Evidence examined, and *held*, sufficient to sustain the verdict of the jury.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Bartlett & Cornish, for plaintiffs in error.

J. C. Cowin, for defendant in error.

REESE, CH. J.

This action was instituted in the district court of Douglas county by defendant in error against plaintiff in error upon his official bond as United States marshal, together with the other plaintiffs in error as his sureties thereon. In addition to the allegations as to the official capacity of plaintiff in error, and the execution of the bond with the other plaintiffs in error as sureties, it was alleged that about the 9th day of March, 1885, an order of attachment was issued out of the circuit court of the United States for the district of Nebraska in a cause therein pending wherein the Friend Brothers Clothing Company was plaintiff and Herman Gross, Joseph Gross, and Moritz Gross, partners doing business under the firm name of Gross Brothers, were defendants, directed to the said marshal commanding him to attach the property of the said defendants Gross Brothers within the district and not exempt from such seizure. The amount of the demand of the Friend Brothers Clothing Company was \$1,430.43, with the interest thereon from January, 1875, at 7 per cent, together with \$50—the probable cost of the action; also another attachment in favor of the

same parties for the sum of \$503.50, with interest, together with the sum of \$50—the probable cost of the action; that plaintiff in error, by virtue of the two writs of attachment, levied upon a large amount of property which is described in the petition, amounting to the alleged value of \$8,046; all of which said property was claimed by defendant in error as his property, and that no part thereof was the property of Gross Bros., who were the defendants in the action, and that defendant in error was damaged to the full amount of the value thereof. As a second cause of action it was alleged that plaintiff had been damaged in the sum of \$3,580 by the action of plaintiff in error in depriving him of the use of a farm upon which his property was situated, by reason of the removal of the personal property described in the petition, and which consisted of live stock, some of which were work horses used on the farm for the cultivation of the land; also, in the removal at improper times of a large number of hogs and cattle, which were being fed and prepared for the market, together with a large quantity of corn and other grain upon the farm.

To this petition plaintiff in error filed his amended answer, in which the fact of the levy upon the property was admitted but the ownership of defendant in error was denied, and it was alleged that it was the property of Gross Brothers, and upon that ground plaintiff in error justified the seizure. The official character of plaintiff in error and the fact of the attachment having been placed in his hands were admitted. It was averred that the alleged transfer of the property from Gross Brothers to defendant in error was fraudulent and was made in pursuance of a conspiracy entered into between defendant in error and his relatives to cause their property to be transferred to him in fraud of the many creditors of the firm of Gross Brothers and for the purpose of hindering and delaying them in the collection of their debts. The possession of said property by de-

defendant in error was denied and it was alleged that the transfer of the property to him was only colorable, and that he never had at any time assumed the possession or control thereof, but that it was allowed to remain upon the farm of one of the members of the firm of Gross Brothers the same as before, and that defendant in error had never claimed any ownership of the property until after the levy under the attachment referred to. All allegations of the petition, save those above noticed, were denied.

To this answer defendant in error filed a reply in which he admitted the suit in favor of the said Friend Brothers Clothing Company against Gross Brothers, the issuance of an attachment, the levy, etc., as set out in plaintiff's answer and the execution of the bill of sale, but denied all other allegations contained in the answer. He also alleged that if any fraud existed at the time of the transfer of the property to him he had no knowledge of the same; that he did not know of the great amount of indebtedness of the firm of Gross Brothers, and that the sale of property was made to him in good faith in payment of an amount due him from the said firm of Gross Brothers, and that before the signing of the bill of sale, which was executed by them to him, but upon the consummation of the sale, the property therein specified was turned over to him and placed in his possession; that he employed Moritz Gross, one of the firm of Gross Brothers, as his agent, to take charge of the property and keep it upon the farm referred to.

It is not deemed necessary to notice with any greater particularity the allegations of the pleadings, for the reason that the issues presented to this court are quite narrow and are fully covered by what we have already stated.

A jury trial was had which resulted in a general verdict in favor of defendant in error, assessing his damages at the sum of \$5,081.81. A motion for a new trial was filed, which was overruled and judgment rendered on the verdict. From such judgment plaintiff in error brings the case into

this court by proceedings in error. The assignment of error contained in the petition is, that the court erred in overruling the motion for a new trial, for the reason that the verdict was not sustained by sufficient evidence and was contrary to law, presenting thereby but one question in the case, and that is, the contention of plaintiff in error, that the verdict of the jury was not supported by sufficient evidence.

Prior to entering upon an examination of this question it may be remarked that a considerable portion of the briefs of both parties is given to the discussion of the instructions of the district court given to the jury upon the trial, and in the ruling of the court in excluding from the jury certain instructions asked by plaintiff in error.

While these questions cannot arise upon the assignment in the petition in error, yet we have carefully examined all the instructions referred to in the brief of plaintiff in error, and in fact all the instructions given and refused by the court upon the trial; and while, owing to their great length, it would extend this opinion beyond reasonable bounds to set them out in full, we deem it proper to say that in our view all the questions presented by counsel in the case upon the trial were fully and thoroughly submitted to the jury by the instructions given by the trial court; and that upon an examination of the whole of the instructions given we do not think they are open to the criticism made by plaintiff in error or that he has been prejudiced by any instructions given.

The question to which our attention has been particularly directed is the one presented by the petition in error, and upon this we have devoted the greater portion of the time given to the case. The bill of exceptions is quite voluminous and it would be wholly inexpedient for us to endeavor to set out the evidence of the witnesses who were examined upon the trial. We must therefore be content by giving very briefly our conclusions based upon an examination of

the evidence, without giving the evidence from which they are drawn.

The evidence as to the indebtedness of Gross Brothers to defendant in error is substantially all one way and we apprehend it cannot be disputed, but that so far as was shown by the testimony upon the trial, there was an actual *bona fide* indebtedness to defendant in error from them. But it is contended, first, that the fact of this indebtedness was kept secret and was not known by those with whom Gross Brothers were dealing, and that the fact of its existence being thus kept from public knowledge, that firm was thereby enabled to practice a fraud upon its creditors.

It seems to be quite clear that the alleged indebtedness of the firm of Gross Brothers to defendant in error was unknown except among themselves. Defendant in error was a resident of the state of Wisconsin; Gross Brothers were residents of this state, carrying on business in Columbus, and in Madison county as well as in the village of Madison. Whether or not defendant in error is chargeable with the action of Gross Brothers in suppressing the fact of their indebtedness to him is not very clear, but it is quite probable that he should not be so charged. Defendant in error is a brother-in-law of the members of the firm of Gross Brothers, having married their sister. It appears that while they were engaged in business in the city of Columbus, and managing the same in the year 1873 and up to 1885, it was agreed that he should purchase horses and cattle in the state of Wisconsin; that they should be shipped to this state to Gross Brothers and sold upon the market, the profits, after deducting all expenses, to be equally divided between them. In these transactions the indebtedness to defendant in error arose.

Assuming therefore that this indebtedness did actually exist, the question arises whether the fact of the relationship of the parties and the circumstances under which the bill of sale was given and the whole conduct of the parties in con-

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nection therewith would render the transfer of the property, described in the petition, to defendant in error by bill of sale fraudulent as against creditors, and whether the proof of such fraudulent intent on the part of Gross Brothers and defendant in error is so strong as to require a reversal of the judgment and a vacation of the verdict of the jury. The evidence upon which the case was submitted to the jury was conflicting in a high degree and it would seem impossible to harmonize the testimony of the various witnesses upon the different sides. The jury being the judges of the weight of the evidence and the degree of credibility which should be accorded to each witness, it is only deemed necessary to say that in our opinion there was sufficient evidence submitted to the jury to sustain a finding that soon after the firm of Gross Brothers commenced business in the city of Columbus defendant in error purchased in Wisconsin and shipped to them a number of horses and cattle and a quantity of lumber to be disposed of by them upon the terms hereinbefore mentioned; that shipments were made to them by defendant in error and remittances were made to him by them during the time of these transactions until some time prior to the transfer of the property in question to defendant in error, when the shipments and payments ceased; that defendant in error, hearing of the embarrassed condition of the firm of Gross Brothers, left the city of Milwaukee and came out to Madison county, to which place their business had been entirely removed, and which visit was unexpected by them, and demanded payment of the amount due him from them; that they informed him that they had not the money with which to meet the indebtedness and sought to persuade him that there was no immediate danger of a loss upon his part; but that he insisted upon receiving payment, or security, or that sufficient property should be transferred to him to make him whole; that after consulting an attorney as to their right to prefer defendant in error to the exclusion of other cred-

itors, the property was transferred to him and the farm which belonged to the firm of Gross Brothers was leased to him for the term of three years, upon which the stock was left in the care of Moritz Gross, a member of the firm, who resided upon the farm. At the time defendant left the city of Milwaukee to come to this state he was joined by one of the members of the firm of Gross Brothers of Milwaukee, composed of two other members of the Gross family, who represented not only indebtedness alleged to exist to the firm of Gross Brothers in Milwaukee, but to other parties who had placed their claims in his hands. Pending the negotiations for the transfer of the property in dispute in this case to defendant in error the firm of Gross Brothers confessed judgment in the United States circuit court for the district of Nebraska in favor of Jacob and Bernhard Gross and Laura Schrain, of Milwaukee, for the sum of \$10,311.25, and an execution was soon after issued thereon and placed in the hands of the United States marshal, who levied upon and sold the store in the village of Madison, which was purchased by defendant in error at such sale. These other transactions are unimportant in the investigation of this case except so far as they may throw light upon the conduct of the parties to this action. For that purpose it was competent to examine into them. Soon after the transfer of the property in question in this suit to defendant in error the Friend Brothers Clothing Company instituted attachment proceedings in the circuit court of the United States against the firm of Gross Brothers, and under the order of attachment the deputy United States marshal appeared in Madison county and levied upon the property in dispute as the property of the defendants in that action. It cannot be disputed but that if the testimony of the witnesses introduced on behalf of plaintiff in error is to be believed, many statements were made by the members of the firm of Gross Brothers in this state which would tend to confirm plaintiff's theory that the whole

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transaction between them and defendant in error, as well as between them and the firm of Gross Brothers, of Milwaukee, was fraudulent. But every statement of the kind testified to by the witnesses for plaintiff in error was contradicted by the testimony of Gross Brothers and Singer, thus rendering it the special province of the jury to decide upon the weight of the testimony of these various witnesses. Some of the circumstances tend strongly to support the theory contended for by plaintiff in error, whilst others are as strongly against it and in favor of that contended for by defendant in error. The whole case was submitted to the jury, as we have said, with proper instructions from the court for their guidance. We are unable to say that the verdict is so clearly against the weight of evidence as to require a reversal of the judgment.

It is contended that the delivery of the property to defendant in error was not sufficient under the provisions of section 11 of chapter 32 of the Compiled Statutes. Upon this question it is only necessary to say that if the delivery was as testified to by defendant in error and his witnesses—that the property was separated, counted, and delivered to him and that, without removing it from the farm which he had leased for three years, he employed Moritz Gross to take charge of it as his agent, paying him a fixed salary per month for so doing—this would be sufficient under that section, especially so since the questions of presumptions alone are to be affected thereby.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

STATE OF NEBRASKA, EX REL. M. B. MALLOY, v.
WILLIAM F. CLEVINGER.

[FILED OCTOBER 3, 1889.]

1. **Counties: DIVISION: TAXES: JURISDICTION OF OFFICERS.** The boundaries of B. county formerly included what is now B. and R. counties—R. county having been stricken off and organized into a new county. In an application for peremptory writ of mandamus against the county treasurer of B. county to require him to collect the taxes due from the taxpayers of R. county, but which were levied by B. county prior to the division, it was *held*, that, as the officers of B. county had no authority nor jurisdiction in R. county, there was no duty devolving upon such treasurer in connection with the collection of the taxes referred to.
2. ———: ———: ———. R. county not being a party to the action, the question as to who is entitled to the revenues levied prior to the division is not decided.

ORIGINAL application for mandamus.

M. B. Malloy, pro se.

W. F. Clevenger, pro se.

No briefs filed.

REESE, CH. J.

This is an original application for a mandamus to defendant, who is the county treasurer of Brown county, to require him to collect from the taxpayers of what is now Rock county the unpaid taxes for the years 1884, 1885, 1886, 1887, and 1888, levied while the territory which now comprises Rock county constituted a part of Brown county, which said taxes were levied by the taxing officers of Brown county.

It appears from the relation and stipulation of the parties that Brown county was duly organized on the 23d day of July, 1883, consisting of the territory now included in Brown and Rock counties; that the county boundaries continued as then established until the first day of January, 1889, when, by virtue of the elections held prior to that date, the new county of Rock was duly organized, and its permanent officers assumed charge of the county government; that during the years 1884 to 1888, inclusive, the taxing officers of Brown county levied the usual taxes on the property within the county boundaries, a part of which remains unpaid, and upon which the county of Brown issued its warrants to the extent of eighty-five per cent of the levy.

Practically two questions are presented, which are, first, Is Brown county entitled to these unpaid taxes? and second, If so, is it the duty of the treasurer of said county to make the collections?

The latter question would doubtless have to be answered in the negative, whatever might be the conclusion as to the first, as the duties and jurisdiction of the county treasurer would be limited to the territorial boundaries of his own county.

Since Rock county is not made a party to this action, no order or judgment can be rendered which would be binding upon it, and therefore the question as to who is entitled to the revenues, as between the two counties, cannot be decided.

In the stipulation filed we observe that it is agreed that the taxes in question are "due Brown county," and this suggestion is of frequent occurrence throughout the stipulation. For example, in the tenth paragraph of this paper, after showing the assessment and levy, it is said that "the greater part (of the taxes) has been delinquent and unpaid, and is due Brown county; that the respondent refuses to collect said taxes from the citizens of Rock county, or to

make an effort to collect the personal taxes from them, for the aforesaid years, that are due Brown county," etc. While we presume that nothing is claimed by this phraseology, and that it is used to convey the idea that the taxes were levied by the officers of Brown county prior to the division, yet should we conclude that it was the purpose to agree that the taxes were due Brown county, that could make no difference, as the question as to whom the taxes are due is one of law resulting from the existing facts and not one of fact to be proven or otherwise established. The question presented, while new in its application to this case, is not new in principle in many of its aspects. In *F., E. & M. V. R. R. Co. v. Brown County*, 18 Neb., 516, and in *Morse v. Hitchcock County*, 19 Id., 566, questions somewhat similar to these in point of fact were presented and it was decided, as it must be in this case, that upon the organization of a new county the jurisdiction and duties of the officers of the old county over the territory included in the new, cease, and the administration of the affairs of the new county should be conducted only by its own officers. But there appears to be a distinction made by our statutes between new counties formed out of unorganized territory and those created by the division of a county already organized. The law governing new counties of the former class is fully reviewed by Judge MAXWELL in *Railroad Company v. Brown County*, *supra*, and need not here be referred to. That governing those of the former class is to be found in sections 10 to 18 inclusive of the same chapter (18) of the Compiled Statutes. Section 16 provides for a division of property, personal and real, choses in action, debts, liabilities, etc., between the counties. But whether this applies to uncollected taxes cannot now be decided, for the reason above given, that the necessary parties are not before the court. It must be sufficient now to say that there is no duty devolving upon the defendant in

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connection with the collection of the taxes referred to, and therefore the writ cannot issue.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

B. F. ROBERTS v. B. L. SNOW.

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53	76
55	408

[FILED OCTOBER 3, 1889.]

1. **Negotiable Instruments: DATE OF PAYMENT OMITTED.**

An instrument in writing in the following form, to-wit:

"MARSHALLTOWN, IOWA, July 18, 1877.

"For value received I hereby promise to pay to Peter Housel, or order, four hundred dollars, with 10 per cent interest per annum, payable semi-annually in advance, and on default of prompt payment of the interest for thirty days after it is due, then this note, principal and interest, shall be due and collectible without defalcation or discount, together with an attorney fee of 10 per cent for collection."

Held, To be a negotiable promissory note, payable on demand.

2. ———: **INDORSEMENT FOR COLLECTION: SUIT BY INDORSEE.**

An indorsee of such a promissory note, where the indorsement was not made for value, nor in the due course of trade, but for the purpose of collection, can maintain an action in his own name for the collection of the note, but in such case the suit would be subject to any defenses the maker may have had as against the indorser of the plaintiff, such defenses not having been cut off by the indorsement.

ERROR to the district court for Holt county. Tried below before KINKAID, J.

Ulley & Benedict, for plaintiff in error, cited: Code, secs. 30, 45; *Rogers v. Hotel Co.*, 4 Neb., 54; *Mills v. Murry*, 1 Id., 327; *McWilliams v. Bridges*, 7 Id., 419; *Pomeroy*, Remedies, etc., 124-8, 185; *Allen v. Miller*, 11

O. S., 374; *Smith v. R. Co.*, 23 Wis., 267; 1 Randolph, Commercial Paper, secs. 111, 114; *Maupin v. McCormick*, 2 Bush [Ky.], 206; *Sea v. Glover*, 1 Bradw. [Ill. App.], 335; *People v. Bagnell*, 81 Cal., 409; *Gehr v. Hagerman*, 26 Ill., 438; *Coleman v. Roberts*, 1 Houck [Mo.], 97; *Hickey v. Ryan*, 15 Mo., 63; *Russ v. Steamboat*, 9 Iowa, 375; *Farquhar v. Dallas*, 20 Tex., 200; *Doe v. Thomason*, 11 B. Mon. [Ky.], 235.

M. F. Harrington, for defendant in error.

REESE, CH. J.

This action was instituted in the district court of Holt county, upon a written instrument of which the following is a copy :

"MARSHALLTOWN, IOWA, July 16, 1877.

"For value received I hereby promise to pay to Peter Housel, or order, four hundred dollars (\$400), with ten per cent interest per annum, payable semi-annually in advance, and on default of prompt payment of the interest for thirty days after it is due, then this note, principal and interest, shall be due and collectible without defalcation or discount, together with an attorney fee of ten per cent for collection. [Signed] B. L. SNOW.

"Attest: C. C. HOUSEL."

Upon the back of the instrument are the following indorsements :

"Interest to Jan'y 16, 1878.....	\$20
" " July 16, 1878.....	20
" " Jan'y 16, 1879.....	20
" " July 16, 1880.....	20
" " Jan'y 16, 1881.....	20
" " July 16, 1881.....	20
" " Jan'y 16, 1882.....	20
" " July 16, 1882.....	20

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"Interest to Jan'y 16, 1883..... \$20
 " " Dec. 17, 1883..... 40
 " " July 1, 1883..... 20
 "Pay to the order of C. C. Housel.

" PETER HOUSEL.

"By C. C. HOUSEL, *Executor of the Estate of Peter Housel, deceased.*

"Pay to the order of B. F. Roberts.

" C. C. HOUSEL."

Two defenses were pleaded in the answer, the second of which was as follows:

"This defendant further avers that this instrument is a mere chose in action and not a promissory note, as alleged by the plaintiff, and that B. F. Roberts, plaintiff herein, is not the owner of said chose in action and is not the real party in interest in this action.

"That said Roberts holds said chose in action for collection merely, * * * and defendant is not indebted to him on said instrument."

The reply was, in effect, a general denial. A jury trial was had which resulted in a verdict as follows:

"We, the jury in this case, being duly empaneled and sworn to well and truly try the issues in the above entitled case, do find for the plaintiff.

E. W. GOODRICH, *Foreman.*"

The following special findings were also returned by the jury:

"1. Q. Who do you find from the evidence to be the real party in interest in this action?

"C. C. Housel. E. W. GOODRICH, *Foreman.*"

"2. Q. What, if any, amount do you find from the evidence to be due and unpaid upon the instrument in suit?

"We, the jurors, find a verdict for plaintiff in the sum of \$400, and interest on the same to date."

" E. W. GOODRICH, *Foreman.*"

On request of defendant the following special findings were submitted, and answers returned thereto :

"1. Who is the owner of the instrument sued upon in this case?

"C. C. Housel. E. W. GOODRICH, *Foreman*."

"2. Has plaintiff B. F. Roberts ever become the owner of the instrument sued upon herein by purchase or otherwise?

"No. E. W. GOODRICH, *Foreman*."

"3. Has plaintiff B. F. Roberts any interest in the instrument sued upon in this action other than as an attorney for C. C. Housel ?

"No. E. W. GOODRICH, *Foreman*."

A motion for a new trial was then filed by plaintiff and thereafter, as shown by the transcript, the cause was heard upon the motion of plaintiff to be allowed to substitute the name of C. C. Housel for that of plaintiff B. F. Roberts, which motion the court overruled.

From the transcript it appears that the case was then heard upon the motion of defendant for judgment in his favor upon the verdict, although no such motion appears in the record before us. This motion was sustained and judgment rendered in favor of defendant. We quote from the transcript as follows:

"Thereupon this cause came on for hearing upon a motion of plaintiff for new trial of the cause and for leave to substitute the name of C. C. Housel for that of B. F. Roberts, and the court, after hearing the argument of counsel and being fully advised in the premises, overruled said motion; to which ruling plaintiff excepts. And the court does find if at law this court had jurisdiction after trial begun to allow substitution of C. C. Housel for plaintiff Roberts the court finds as fact that the substitution should have been made."

The cause is presented to this court by plaintiff by proceeding in error, presenting a large number of assignments, but it is not deemed necessary to examine all. It appears that the question underlying the whole controversy in this case is as to the character of the instrument on which the suit was founded. It is insisted by plaintiff in error that the writing is a negotiable promissory note, and is entitled to be treated as such, with all the incidents which attach to negotiable paper. While upon the other hand it is contended by defendant in error that it is not a negotiable instrument, and that therefore the action by plaintiff in error could not be maintained, he not being the actual owner thereof by assignment. This contention is based upon the fact that the instrument does not fix a time certain within which the money must be paid. It is our opinion that the instrument in question falls clearly within the definition of commercial paper, and that it was payable on demand, at any time after its execution, and should have been treated by the district court as a promissory note payable upon demand. In 1 Randolph on Commercial Paper, sec. 119, it is said: "If no time of payment is expressed, which is usually the case in checks, and frequently so in promissory notes and drafts, the instrument is, by intendment of law, payable on demand, and is as valid and negotiable as though the time of payment were fully expressed;" citing a large number of authorities, among which are *Jones v. Brown*, 11 O. S., 601; *Holmes v. West*, 17 Cal., 623; *Porter v. Porter*, 51 Me., 376; *Keyes v. Fenstermaker*, 24 Cal., 329; *Bank v. Price*, 52 Ia., 570; *Libby v. Mikelborg*, 28 Minn., 38.

The rule seems to be that in cases of this kind the legal intendment, that the notes are payable upon demand, cannot be changed by parol proof any more than could the express terms of a written instrument be changed. See *Thompson v. Ketcham*, 8 Johns., 192; *Keohring v. Muemminghoff*, 61 Mo., 403; *Self v. King*, 28 Texas, 552.

But it may be contended that it is shown upon the face of the note itself that such was not the intention of the parties at the time of its execution, for it is provided that the interest shall be payable semi-annually, and that the note shall become due and collectible on the expiration of thirty days after default of the payment of the interest; but this would make no difference as far as the note was concerned. As held in *Jones v. Brown*, *supra*, the fact that the parties provided for the payment of the interest in case the note should not be paid immediately, would not change the legal effect of the contract. Upon this subject see *Loring v. Gurney*, 5 Pick., 15; *Meador v. Bank*, 56 Ga., 605; *Holmes v. West*, 17 Cal., 623.

Aside from what would seem a rather inflexible rule of law, as applied to instruments of the kind under consideration, a careful examination of the note in question satisfies us that no other construction can be given to its language.

There is nothing upon the face of the instrument itself, nor pleaded by the answer, nor submitted in the evidence of the case, which shows that any relation existed between the parties to the instrument by which it could be presumed or supposed that it was their purpose that the note should never mature. If it cannot be treated as a promissory note payable upon demand, then the only event which could occur by which the note could be made to mature, according to its own language, would be a default of thirty days in the payment of the semi-annual interest; and if such default should never be made, the note would never mature, and therefore could never be collected except by the voluntary payment of the maker. This, evidently, was not the intention of the parties to the instrument.

The action having been founded upon a negotiable promissory note, the indorsement made by C. C. Housel to the plaintiff would be sufficient to authorize him to maintain the action in his own name for the amount due upon the note, but subject to any defenses which defendant in error

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might have had, had the suit been instituted in the name of his indorser, C. C. Housel, or of the payee, Peter Housel.

In Daniel on Negotiable Instruments, sec. 1191 *et seq.*, it is said that an action on a note may be brought in the name of the indorsee holding the note; he having thereby the legal title, it can make no difference to the defendant who is the equitable owner of such note. See also *Calhwell v. Lawrence*, 84 Ill., 161; *Demuth v. Cutler*, 50 Me., 298; *Patten v. Moses*, 49 Id., 255; *Craig v. Twomey*, 14 Gray, 486; *Palmer v. Bank*, 78 Ill., 380; *Scionneaux v. Waguespack*, 32 La. Ann., 283; *Klein v. Buckner*, 30 Id., 680; *Lovell v. Evertson*, 11 Johns., 52; *Wells v. Schoonover*, 9 Hiesk., 805; *King v. Fleece*, 7 Id., 273; *Boyd v. Corbitt*, 37 Mich., 52; *White v. Stanley*, 29 O. S., 423. In *Bank v. Hollister*, 21 Minn., 385, in which the note was indorsed "for collection," it was held that the provisions of the Code requiring the action to be brought in the name of the real party in interest would prevent the maintenance of the action by the indorsee. But in this case the indorsement is not conditional, and therefore the legal title was vested in the indorsee.

The judgment of the district court is reversed and the cause remanded with directions to that court to reinstate the cause and permit the defendant in error to amend his answer without costs if he so elect, and for further proceeding in accordance with law.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

27 432
57 685

TRUEMAN H. SHEPHERD V. CARLOS C. BURR.

[FILED OCTOBER 3, 1889.]

1. **Tax Title: LIMITATIONS.** "An action to foreclose a tax lien on real estate may be brought on a tax certificate when it is alleged in the petition that a deed would be invalid if issued. In such case a cause of action would accrue at the expiration of the time within which the land owner might redeem, and suit might be brought at any time within five years thereafter." (*Parker v. Matheson*, 21 Neb., 546.)
2. ———: ———: **CASE STATED.** A purchased real estate at tax sale on the 18th day of November, 1875; the property was not redeemed by the land owner within the two years allowed for redemption. No deed was taken by the purchaser at the tax sale. On the 18th day of April, 1883, and more than five years after the expiration of the time for redemption, plaintiff commenced this action to foreclose the tax lien. *Held*, That the cause of action was barred by limitation. (See *Parker v. Matheson*, *supra*.)

ERROR to the district court for Lancaster country. Tried below before FIELD, J.

Harwood, Ames & Kelly, for plaintiff in error.

W. W. Cotton, for defendant in error.

REESE, CH. J.

This action originated in the district court of Lancaster county, and was brought for the purpose of enforcing a tax lien against a tract of real estate in the city of Lincoln described as "commencing 62 feet north of the southeast corner of lot number 12 in block number 33, according to the original plat and survey of the town (now city) of Lincoln, Nebraska, thence north on Ninth street 40 feet, thence west 75 feet, thence south 40 feet, thence east 75

feet to the place of beginning." It was alleged in the petition that in the year 1874 the property was duly assessed by the precinct assessor of Lincoln precinct as "40 x 75 ft., lot No. 11 and 12, block No. 33," and opposite thereto on the same line "L. A. Scoggins;" that on the 18th day of November, 1875, the taxes being delinquent and unpaid, the plaintiff duly purchased the property at tax sale for the taxes for the year 1874, and that the same amounted to \$111.82; that the property has never been redeemed from the sale and that the amount paid by plaintiff has never been repaid nor refunded to him. It was further alleged that after the purchase by plaintiff, and in the year 1878, the said Scoggins, who still remained the owner in fee simple, sold and conveyed it by deed of general warranty, duly signed, witnessed, and acknowledged, to the state, the only exception to the warranty being "except taxes due and unpaid;" that the property was bought by the state for the use and benefit of the school fund thereof; that on the 23d day of October, 1880, the state by its proper officers sold the real estate in question to defendant C. C. Burr, and entered into a contract with him by which defendant paid in cash the sum of \$776.77 and agreed to pay at the end of twenty years the sum of \$4,410, with interest thereon at the rate of six per cent per annum, payable on the 1st day of January of each year; that immediately upon the completion of said purchase defendant took possession of said property and has retained the possession ever since, making valuable improvements thereon to the extent of \$5,000.

The prayer of the petition was that the purchase by plaintiff, as shown by his certificate of purchase, be declared a lien upon the property, the lien foreclosed, and for general relief.

To this petition a demurrer was interposed by the defendant on the ground "that the facts stated in the plaintiff's said petition do not constitute a cause of action in favor

of the plaintiff and against the defendant." The demurrer was sustained by the district court and, plaintiff electing to stand upon his petition without amendment, the suit was dismissed and judgment rendered in favor of defendant. Plaintiff brings the cause to this court by proceedings in error alleging as error, the decision of the district court in sustaining the demurrer. Plaintiff in error by his brief presents two questions: First, as to whether or not the transfer of the real estate back to the state was an extinguishment of the lien created by his purchase; and second, whether or not the description of the property upon the tax book as assessed and taxed was sufficient.

On the other hand defendant in error presents as another question the statute of limitations, which is not discussed in the brief of plaintiff in error. It was alleged in the petition that during the whole of the year 1875 Scoggins was the owner of personal property situated in Lancaster county from which the taxes could have been collected by the treasurer. Under the rule stated in *Pettit v. Black*, 8 Neb., 59, and *Wilhelm v. Russell*, Id., 123, the failure to collect the taxes from the personal property would, perhaps, avoid the sale. But this is not a material inquiry here, for the reason that no deed was ever taken by plaintiff in error, nor does it appear that he ever demanded any from the county treasurer. Therefore the question whether the title failed does not enter into the case. There having been no title conveyed to plaintiff by the treasurer we are unable to see wherein the case differs in any particular from *Parker v. Matheson*, 21 Neb., 546. The same statute must be applicable to this case as to that, and the facts are so nearly similar that it is clear to us that that case is decisive of this. From the petition it appears that from the 18th day of November, 1875, Scoggins had two years in which to redeem, which expired on the 18th day of November, 1877. No deed was taken, and at that time plaintiff could have instituted suit for the foreclosure of

his tax lien. This suit was commenced on the 18th day of April, 1883, more than five years after the time in which it might have been brought. By the rule stated in *Parker v. Matheson, supra*, the statute had run and the action was barred.

It becomes unnecessary, therefore, to examine the questions presented by the brief of plaintiff in error. The court did not err in sustaining the demurrer, as the petition fails to state facts sufficient to constitute a cause of action.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

AMY WILSON, APPELLANT, V. CITY OF AUBURN ET AL.,
APPELLEES.

[FILED OCTOBER 3, 1889.]

Municipal Corporations: SIDEWALKS: TAXES: INJUNCTION.

In the year 1886, the mayor and council of the city of A., under an ordinance previously passed, ordered the construction of a sidewalk along the line of a street upon which plaintiff's property abutted. Upon the walk not being constructed by her within the required time the city by its officers constructed it and imposed a tax therefor according to the benefits received, which tax was duly certified to the proper county officials, when it was placed upon the tax list for collection as other taxes. In a suit to enjoin its collection upon the ground that it was illegally levied, owing to the irregularities in the order requiring the construction of the sidewalk and the failure to give notice thereof, it was held, that the tax imposed not having been levied "for an illegal or unauthorized purpose," the action could not be maintained.

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38	741
27	435
451	141

APPEAL from the district court for Nemaha county.
Heard below before BROADY, J.

Stull & Edwards, for appellant:

Section 144, chapter 77, Compiled Statutes, is inapplicable here (1) because it refers to taxes, while this is a proceeding to restrain the collection of an assessment, and there is a plain distinction between taxes and assessments (*Hanscom v. Omaha*, 11 Neb., 41; Opinion of Judges, 58 Me., 591; *Hilbish v. Catherman*, 64 Pa. St., 154, 159; *Judd v. Driver*, 1 Kas., 455, 462); (2) even if the present case comes under the head of taxes, it falls within the express exception of the statute, being a tax for unauthorized purposes. (*Earl v. Duras*, 13 Neb., 235; *Thatcher v. Adams Co.*, 19 Neb., 486.) Cities of the second class have no power to construct sidewalks without enacting a valid ordinance, and the ordinance in this case was not drafted in the style required by the statute. The variance is fatal, because a corporation must act in the statutory mode. (*Hurford v. Omaha*, 4 Neb., 350; *Abbott v. Smelting Co.*, Id., 422.) Even if the ordinance is held valid, its provisions requiring notice to lot owners were not complied with. Notice is jurisdictional, for ordinances have the force of statutes (Dillon, Mun. Cor., 3d ed., sec. 308); and strict compliance with the statute is necessary. (Wade on Notice, sec. 1105.) Notice must describe material. (*Tufts v. Charlestown*, 98 Mass., 583.) However equitable it may be, a tax is void unless legally assessed. (*Joyner v. School District*, 3 Cush. [Mass.], 567, 572.)

W. H. Morrow, for appellees:

The tax was not illegal or unauthorized, being assessed by an ordinance passed in accordance with subdivision 4, section 52, chapter 14, Comp Stats, enabling cities of the second class and villages to construct sidewalks, etc.

Wilson v. Auburn.

Section 144, chapter 77, is applicable here. Equity will not enjoin the enforcement of a tax proceeding on the ground of irregularities in the assessment or in the execution of powers conferred upon tax officers, the remedy at law being deemed sufficient. (*Hallenbeck v. Hahn*, 2 Neb., 427, and cases cited.) If it is held that the court below had jurisdiction, appellant must show that the injury has been or may be done, before an officer will be enjoined from the performance of his duty. (*McLaughlin v. Sandusky*, 22 N. W. Rep., 241.) Mere irregularities in assessment do not defeat the tax unless they prejudice the person taxed. (*Stockle v. Silsbee*, 2 N. W. Rep., 900.) Under our laws a taxpayer feeling himself aggrieved by an assessment has an adequate remedy at law, and neglecting this cannot obtain relief in equity. (*B. & M. R. Co. v. Seward County*, 10 Neb., 211; *Hopkins v. Keller*, 16 Id., 569.) The notice was sufficient, and where there was authority to impose the tax, and the party must have known the facts, he cannot, after an improvement is made, enjoin the collection of a tax assessed to pay for it. (*Barker v. Omaha*, 16 Neb., 269.) The variance in the ordaining clause is immaterial, as even the entire omission of the statutory form of the clause does not avoid the ordinance without a provision of statute to that effect. (*People v. Murray*, 24 N. W. Rep., 118.)

REESE, CH. J.

This action was instituted in the district court of Nemaha county, and was for the purpose of enjoining the collection of certain taxes or special assessments levied upon the property of plaintiff for the construction of a sidewalk. Plaintiff was the owner and occupant of block three in Howe, Mixer and Wilson's addition to the city of Auburn, she having resided on the property for a number of years. The city council of Auburn made an order requiring the construction of a sidewalk along one side of

the block referred to. The sidewalk not having been constructed by plaintiff as required by the ordinances of the city, the street commissioner, after the expiration of the time in which she was permitted or required to construct it, constructed a walk and made his report to the city officers, who at a special meeting made a levy of taxes amounting to \$48.60 upon the block, and certified the same to the proper county officers. The treasurer is made a party defendant to this action. A trial was had to the district court which resulted in a general finding in favor of defendant, and a decree dismissing plaintiff's petition. From this decree plaintiff appeals to this court.

The first question presented requiring our attention is as to the jurisdiction of the district court in cases of this kind, under the provisions of section 144 of chapter 77 of the Compiled Statutes, entitled Revenue, which provides that "no injunction shall be granted by any court or judge in this state to restrain the collection of any tax or any part thereof hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax or the part thereof enjoined be levied for an illegal or unauthorized purpose."

If the assessment made by the city council could properly be denominated a tax, within the provisions of the section above quoted, and if the assessment were made for a *legal* and *authorized* purpose, the decision of the court was correct, and will have to be affirmed without further investigation. There is no doubt but that the provision above quoted includes ordinary city or village taxes levied for the purposes of general revenue for such city or village, and to be collected by the county treasurer, and they are included within the provisions of the chapter by sections 109, 144, 145, 146, and others, which it is not necessary to copy. It then becomes necessary to inquire whether special assessments of the kind made in this case can fall within the provisions of said sec. 144. Sec. 6 of

art. 9 of the constitution, entitled Revenue and Finance, is as follows: "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

In carrying out the provisions of this section the legislature has enacted art. 1 of chap. 14, Compiled Statutes, included in which is sec. 69, a part of which we here copy:

"Sec. 69. In addition to the powers hereinbefore granted cities and villages under the provisions of this chapter, each city and village may enact ordinances or by-laws for the following purposes:

* * * * *

"IV. To construct sidewalks, to curb, pave, gravel, macadamize, and gutter any highway or alley therein, and to levy a special tax on the lots and parcels of land fronting on such highway or alley to pay the expenses of such improvement. But unless a majority of the resident owners of the property subject to the assessment of such improvement petition the council or trustees to make the same, such improvement shall not be made until three-fourths of all the members of such council or trustees shall by vote assent to the making of the same.

* * * * *

"VII. Assessments made under the provisions of the last three preceding subdivisions of this section shall be made and assessed in the following manner:

"*First*—Such assessment shall be made by the council or board of trustees at a special meeting by a resolution fixing the valuation of such lot assessed, taking into account the benefits derived or injuries sustained in consequence of such contemplated improvements, and the amounts charged

against the same, which, with the vote thereon by yeas and nays, shall be spread at length upon the minutes. Notice of the time of holding such meeting, and the purpose for which it is to be held, shall be published in some newspaper, published or of a general circulation in said city or village, at least four weeks before the same shall be held, or in lieu thereof, personal service may be had upon persons owning or occupying property to be assessed.

"*Second*—All such assessments shall be known as 'special assessments for improvements,' and shall be levied and collected as a special tax in addition to the taxes for general revenue purposes, to be placed on the tax-roll for collection, subject to the same penalties, and collected in like manner as other city or village taxes."

It will be seen that the tax referred to, in so far as its collection is concerned, is simply an additional one levied upon the particular property and that it "shall be levied and collected as a separate tax in addition to the taxes for general revenue purposes, and placed on the tax-rolls for collection, *subject to the same penalties, and collected in like manner as other city or village taxes.*" In this particular it must be treated as any other tax.

In this connection our attention is called to *Hanscom v. The City of Omaha*, 11 Neb., 37, in which the then Chief Justice, MAXWELL, shows the distinction between taxes of this kind and those imposed for general revenue. While the distinction claimed clearly exists, yet it is only in the purpose or policy of the taxation, and not its method of enforcement. That it is a tax must be conceded, but instead of being imposed "for the enforcement of the law, and protection to life and property," it is for the public good, but owing to the direct benefit to be received by the abutting property it would be equitable to require the property so benefited to sustain the burden according to the "benefit derived or injury sustained" as the case may be. The authority to require the property specially benefited to bear

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the expenses of local improvement is a branch of the taxing power, or included in it, and whether they shall be paid out of the general treasury or by an assessment on the abutting and benefited property is simply a question of legislative expediency, unless especially excepted by constitutional provision. See 2 Dillon on Municipal Corporations, 3d ed., sec. 752 *et seq.*

Irregularities in making the assessment, if any existed, could not invalidate the tax (sec. 141, ch. 77, Comp. Stat.), and therefore the right to maintain this action could not be based upon that ground alone. The general authority to construct the sidewalk and impose a special tax existed. The power having been exercised only irregularly at most — the property being legally subject to the burden — the tax was not for “an illegal or unauthorized purpose.”

The decree of the district court was therefore correct and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

27	441
32	748

STATE OF NEBRASKA, EX REL. WILLIAM A. FULLER
ET AL., V. ELISHA L. MARTIN, MAYOR OF FAIRMONT.

[FILED OCTOBER 3, 1889.]

1. Municipal Corporations: POWER TO APPROPRIATE MONEY.

The provisions of section 86, article 1, chapter 14, Compiled Statutes, limiting the power of the city council to appropriate money to the annual appropriation bill and to such sums as in the aggregate shall not exceed the amount of tax authorized to be levied during that year, *held*, not to apply to money authorized to be borrowed by such city for a specific purpose and where a proposition to apply the same thereto has been sanctioned by a majority of the legal voters of such city, either by a petition

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signed by them, or at a general or special election duly called therefor.

2. ———: COMPROMISE OF CLAIMS. The power to compromise and settle claims of the nature and character of that involved in the case at bar, *held*, to exist in the mayor and city council of cities in their legislative capacity growing out of their general corporate powers, and the necessities of such cases.
3. ———: DUTIES OF MAYOR. The mayor is the chief executive officer of the city, and as such it is his duty to see to the execution of all active ordinances, resolutions, and votes of the mayor and council whether, as a matter of opinion or sentiment, the same meet his approval or not.

ORIGINAL application for mandamus.

C. E. Magoon, and Mason & Whedon, for relators.

Robert Ryan (J. H. Rushton with him), for respondent.

COBB, J.

This is an original application by the State, on the relation of William A. Fuller and others, partners under the firm name of Palmer, Fuller & Co.; Nathan H. Warren and others, partners under the firm name of N. H. Warren & Co.; William P. Fairbanks and others, partners under the firm name of Fairbanks & Co., and John Lanham, for a peremptory writ of mandamus to be issued to Elisha L. Martin, mayor of the city of Fairmont, Fillmore county, respondent.

On January 30, 1888, the relators served sufficient notice on the respondent that on February 17, following, at 9 A. M., the relators would move the court for the issuance of a peremptory writ of mandamus, compelling him as mayor of said city to sign a certain warrant for the sum of \$6,500, theretofore on September 5, 1887, voted by the common council of said city, and prepared and issued by the clerk of said city in full settlement of the claim of the relators against said city by reason of the construction of

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the water works in and for said city; in support of which motion there was presented the affidavit of Charles E. Magoon, Esq., one of the attorneys for the relators, that each one of the relators was absent from Lancaster county, Nebraska, and that affiant makes the affidavit for that reason, showing:

1. That the respondent is mayor of said city, duly elected and qualified and discharging the duties thereof.

2. That on July 22, 1885, said town was a village duly organized under the laws of this state; that there was duly submitted a proposition to the voters for the issuing of bonds of the village in the sum of \$10,000 for the construction of water works; that said proposition duly carried at a special election in conformity to law, and the bonds were issued, registered, and sold, and the proceeds deposited in the National Bank of Fairmont, where they now remain; that by reason of the increase of population said village became a city of the second class having less than 5,000 inhabitants. That on July 22, 1885, said village contracted with Ira E. Williams for the construction of its water works, in accordance with plans and specifications furnished by him, and in the custody of the clerk of said village, and in accordance with the proposition published in the *Fairmont Signal*.

* * * * *

5. That when the water works shall have been completed, and the contractor ready to turn them over to the village, the whole system should be tested by the chairman and board of trustees of the village, according to a test of capacity; provided: the whole system to be constructed in a good and workmanlike manner, to be completed by November 15, 1885.

In consideration of which the contractor should be paid by said village \$8,916, as soon as the system of water works should be tested and accepted by the chairman and board of trustees of the village.

On August 11, 1885, the contractor, for the consideration of \$2,000, sold and assigned his interest in the contract to James Peabody, who on March 4, 1886, sold and assigned his interest to the firm of N. H. Warren & Co. That on October 4, 1886, N. H. Warren & Co. sold and assigned their interest to Palmer, Fuller & Co., the relators, who now own the contract and who are entitled to all the rights and benefits arising therefrom; that said works were duly constructed by the various parties interested in the contract, each contributing large sums, amounting in all to \$17,200; that Ira E. Williams and James Peabody, by reason of their contributions, became bankrupt and insolvent; that N. H. Warren & Co. expended large sums, and that Palmer, Fuller & Co. furnished all the material used in the pipes, towers, tanks, and engine houses in said system; that Fairbanks & Co. furnished all the hydrants, engines, pumps, valves, etc., in the construction, and John Ianham dug the wells of the same; that the works were turned over to the city of Fairmont in September, 1886, and by the council duly tested, and have been in use hitherto, and the water sold to consumers by the city, which has received a large amount of money therefrom; that the city has expended large sums in improving and extending the system, and has never paid the contractor, or his assignees, any sum whatever for the construction of it; that on October 25, 1886, the relators proposed to the city council to turn over their contract to the city and save the city from all liability for the construction of the works and pay all existing liens for the sum of \$6,500, which proposition was accepted; and in pursuance of which, the city council on September 4, 1887, voted to allow the city warrant to be issued for said sum in payment of the water works, by a vote of three to one, or a majority of three-fourths of the city council; that the warrant was duly drawn, and signed by the city clerk, according to law, and presented to the respondent, the mayor of said city, for his

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signature as such on September 5, 1887; and said respondent failed and neglected, and still refuses, to sign the same, and that such refusal is without justification in law.

That the relators being without remedy, unless it be by the interposition of the supreme court, therefore pray that a peremptory writ of mandamus issue to the mayor of Fairmont commanding him to sign said warrant, etc.

The answer of Elisha L. Martin, respondent, denies each averment of the relators not specifically admitted to be true.

II. He admits that he is mayor of the city of Fairmont, duly elected, and qualified, and exercising the duties of the office, and admits that the city was a village under the laws of the state; that the proposition for bonds in \$10,000 for the construction of water works was carried at a special election, and as a part of the proposition the question of authority to levy a tax to pay the interest on the bonds, but not the principal, was carried, by reason of which the bonds were not duly issued.

He admits that the village of Fairmont has become a city of the second class of less than 5,000 inhabitants; that on July 22, 1885, the contract set out by the relators was entered into between Ira E. Williams and the village of Fairmont, but avers there was no compliance on the contractor's part with the terms and undertakings of his contract, nor was there of any person claiming under, by, or through him; that the works have never been tested or accepted by the village, now the city of Fairmont; that by reason of the failure to perform his undertakings under said contract, and of the failure of those undertaking on behalf of Ira E. Williams, there is nothing due the relators who claim as assignees of the contractor; that it was provided "that the whole of said sum of \$8,916 is to be paid as soon as the system of water works shall have been tested and accepted by the city of Fairmont," and nothing before; therefore respondent is under no obligation to sign the warrant mentioned, or to do any act by which the relators,

or those claiming under the contractor, shall receive said sum, or any other sum, from the city of Fairmont.

He admits that the city of Fairmont paid Joseph Burns \$1,200 for his efforts to secure an adequate supply of water, because the contractor, and the relators claiming under him, and his assignment of the contract, had failed to furnish the supply guaranteed by the contract, and had refused to comply with the terms of the contract; and that the expenditure to Burns has not produced an adequate supply and is entirely a loss.

He denies that the city of Fairmont in any way accepted the system of water works, or assumed control over it as upon full compliance with the terms of the contract, or in any other manner, or for any other purpose whatever.

He avers that the relators' application is insufficient in law, that it makes no averment of their compliance, or that of their assignor, with the requirements of the contract, nor does it aver that the city of Fairmont has in any manner accepted the water works.

He says, as to the proposition submitted to the city council, and the action thereon, there was no authority in law for the same; that the sole action of the city council in respect to the alleged arrangement, by which a mandamus is sought, was:

March 17, 1886, the adoption of the following:

"WHEREAS, I. E. Williams, contractor for the Fairmont water works, and James Peabody, assignee, are indebted to Palmer, Fuller & Co., of Chicago, Ill.; Fairbanks & Co., St. Louis, and John Barsby, of Fairmont, for material furnished in the construction of said water works, and labor performed as an attorney in connection therewith, and have given orders on the board for the several sums due: therefore, be it

"*Resolved*, That when the water works are completed and accepted, and the bonds sold and the money placed in the treasury, that the city treasurer is hereby instructed to

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reserve from the contract price of the water works the sums due said parties and charge the same against the contract of I. E. Williams and pay the same to the parties entitled thereto."

October 8, 1886, at a special meeting of the council, the following proceedings were had:

"A proposition was made by Attorney C. E. Magoon to transfer all the title to the city of Fairmont of the city water works as they now stand at \$7,000.

"Motion made and seconded that the proposition be received, the works examined, and that the council meet at 10 A. M., October 9, 1886, to finish the business now in hand, which was carried."

October 9, 1886, the council met, pursuant to adjournment, and the following proceedings were had:

"It is moved and seconded that the council accept the city water works, as they now stand, at \$6,500, which was agreed to."

"It was moved and seconded that the council give the companies two weeks from the following Monday (October 11th) to accept or reject the proposition of the council, which was agreed to, a majority voting in favor of the motion."

October 25, 1886, the following proceedings were had in the city council of Fairmont, to-wit:

"Charles E. Magoon then accepted the proposition made by the city council for the Fairmont water works at sixty-five hundred dollars (\$6,500) on October 9. This in writing as follows:

"*To the Honorable Mayor and City Council of the City of Fairmont, Nebraska*—GENTLEMEN: We hereby notify you of our acceptance of your proposition of October 9, '86, to accept the system of water works constructed under the contract of the town of Fairmont with Ira E. Williams of date July 22, 1885, at the sum and for the consideration of six thousand five hundred dollars (\$6,500).

Said works to be free and clear of all liens and incumbrances, including engine in west engine house and all extras and additional pipes and material for repairs now on hand.

"Dated at Fairmont, Nebraska, October 25, '86.

"WARREN & Co., "PALMER, FULLER & Co., "JOHN LANHAM, "FAIRBANKS & Co.,	}	Each by CHAS. E. MAGOON, their attorney."
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September 5, 1887, the following proceedings were had by the city council:

"It was moved and seconded that an order be drawn on the water fund for the sum of \$6,500, in favor of Charles E. Magoon, attorney, in payment for the system of city water works: said sum to be paid in pursuance of the agreement made October 9, 1886, which was agreed to."

September 24, 1887, there was drawn upon the respondent the following:

"Hon. E. L. Martin, mayor of Fairmont, Neb.: When the water works of the city are to be paid for please deduct from amount to be paid creditors the sum of \$500, which is my due as attorney for said creditors, and which is guaranteed by the city when said payment shall be made, and pay the same to Irwin B. Chase, and this shall be my receipt as against said creditors and the city.

"(Signed) JOHN BARSBY."

Upon the above facts, on which the relators' application rests, and other intrinsic facts known to respondent, respondent denies that he is under obligation to sign said warrant or order, and answers it would be in violation of his duty so to do, because at the time of the agreement entered into, October 25, 1886, between the city council and C. E. Magoon, as attorney, for the payment of \$6,500, the mayor, John Barsby, had an interest in the transaction to the amount of \$500, and that a member of the council who voted in the affirmative on the proposition to pay

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\$6,500 had an interest, on some account unknown to respondent, of \$100, and that another member who voted in the affirmative on the proposition was in the employ of a firm interested in the payment of said sum of \$6,500, and therefore, and particularly by reason of the interest of the mayor and the councilmen, contingent upon the payment of said amount, the contract to pay the same by the city of Fairmont was void, under sec. 68, chap. 14, Comp. Stats. of this state.

He further says that the proposition stated by the relators was to turn over the contract of July 22, 1885, to the city, relieving the city from all liability from construction and pay all existing claims and liens upon said works, but that the resolution adopted was that an order be drawn for \$6,500 in payment of the water works, therefore there was no binding force in the resolution, and no sufficient consideration for the city warrant or order ; that the city has no power under the statute to purchase contracts, therefore the relators' proposition, even if accepted, has no binding force against the city.

That the works are mortgaged to the amount of \$1,751 to one of the relators, and are subject to mechanics' and other liens, unknown to respondent, and not released.

That no appropriation was made by ordinance, or otherwise, for the payment of warrants or orders which, by *mandamus*, respondent is sought to be compelled to sign ; and that no appropriation for that purpose has ever been made or is now in existence, therefore no obligation devolves on respondent to sign warrants or orders for the payment of said sum of \$6,500 or any part thereof.

That the resolution by said council directed the issue of warrants or orders to C. E. Magoon, attorney, without requiring any delivery or conveyance of the water works system, and the application of the relators makes no showing why a warrant or order should issue to Chas. E. Magoon, attorney.

Respondent says that by the terms of the agreement of the city of Fairmont with I. E. Williams, his undertakings were to be completed November 15, 1885, which were not done, therefore the arrangement to pay \$6,500 under the proposition of October 25, 1886, nearly one year after the time for the full performance of the contract had elapsed, was wholly without consideration, and was void; that the bonds voted July 22, 1885, were voted to enable the village of Fairmont to perform its contract with I. E. Williams, and for the payment of nothing but the system of water works that day contracted for with said Williams, and that the proceeds are a fund to be devoted to no other use than the payment of water works fully constructed, tested, and accepted under said contract; that the attempt to pay \$6,500 for works not constructed, but which were to have been constructed, for which \$8,916 would have been due, is an attempt to make a new and different contract from that of July 22, 1885, and with respect to carrying out such attempt and such substituted contract respondent is vested with a judicial discretion, therefore his action cannot be controlled by *mandamus*.

That as shown by the averments of relators' application N. H. Warren & Co. sold and assigned their interest to Palmer, Fuller & Co., who are sole owners of the contract and all benefits thereunder by assignments of Ira E. Williams; that the interest of other relators is based upon the alleged fact that N. H. Warren & Co., Fairbanks & Co., and John Lanham have furnished materials, work, and labor to carry out the undertakings of the contractor Williams and his assignees, against whom, and not the city of Fairmont, their claims should be prosecuted; that the issue of city warrants for the payment of money to C. E. Magoon, as attorney for said last named relators, is wholly without warrant of law, and they have no right to prosecute this action, and as there is no distinguishing the amount due each relator respectively, the proceedings must fall.

That as to whether they, or any of them, have filed a claim for mechanic's or materialman's lien, and whether others claiming such liens had filed the same, respondent is not informed, nor does he know whether any claims for liens have been released against said water works.

That relators be adjudged to be entitled to no relief, and their cause of action be forever barred.

The stipulation of the parties to this application, filed April 8, 1889, as to certain issues of fact is as follows :

" It is hereby stipulated and agreed by and between the parties to this action that the warrant, on which this application is made to compel the mayor of the city of Fairmont to sign, was drawn in due form as provided by law, and was duly signed by the city clerk of the city of Fairmont ; that the same was presented to Elisha L. Martin, for his signature, and that he refused to sign the same.

" That the original contract entered into by the city of Fairmont for the erection of said water works herein involved has been duly assigned to the firm of Palmer, Fuller & Co., as one of the relators herein ; that there has been expended under said contract for the erection of said works the sum of \$17,500 ; that Elisha L. Martin was at the commencement of this action mayor of the city of Fairmont. This stipulation is made for the purposes of this action alone.

" CHAS. E. MAGOON, *Attorney for Relators.*

" ROBT. RYAN, *Attorney for Respondent.*"

The first objection argued by respondent's counsel, in the brief, is that there is no averment by the relators, or proof submitted with their application, that any appropriation had been made from which the warrant mentioned could be paid, even had it been signed by the mayor. To the support of this proposition is cited section 86, article 1, chapter 14, of Compiled Statutes, and the reported case of *City of Blair v. Lantry*, 21 Neb., 247.

The section cited provides that :

"The city council of cities, and board of trustees in villages, shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, not exceeding in the aggregate the amount of tax authorized to be levied during that year; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by a petition signed by them or at a general or special election duly called therefor; and all appropriations shall end with the fiscal year for which they were made."

The money which this section requires to be annually appropriated, as a condition precedent to its being drawn from the city treasury, is the money raised, or authorized to be raised, by taxes "to be levied during that year." This is obvious from the language of the first clause of the section, but were it doubtful as to its construction, and its being limited to such moneys, the doubts would be put to rest by the language of the second clause, "unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village."

Where a proposition to borrow money for any lawful purpose has been submitted to a vote of the people of a city or village, the proposition carried, the money borrowed and placed in the treasury, such money is appropriated for the purpose intended, and is subject to the control and disposal of the mayor and council of the city, or the president and board of trustees of the village, within

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the purview of the appropriation, without an ordinance such as is required to be passed in the section cited.

As further applicable to the question, I quote from the respondent's brief that :

"The proposition voted upon May 25, 1885, was this : 'Shall the chairman and the board of trustees of the village of Fairmont * * have power to borrow money and to pledge the property of said village of Fairmont upon its negotiable bonds to an amount not exceeding ten thousand (\$10,000) dollars for the purpose of constructing, maintaining, and operating a system of water works for the said village of Fairmont and to levy a tax on the taxable property of said village of Fairmont, in addition to all other taxes, sufficient to pay the interest on said bonds as they may become due and payable.'"

And also the following from the same brief, which is there stated to be section 4 of the proposition adopted by the electors of the village of Fairmont, to borrow money "for the purpose of constructing, maintaining, and operating a system of water works," submitted after the adoption of the plans of Ira E. Williams, which, so far as the record shows, is the only system of water works ever adopted or contemplated by said city :

"That the proceeds of the sale of said bonds shall be paid to the treasurer of the said village of Fairmont immediately on the sale thereof and shall be by said treasurer placed to the credit of the 'water fund.' Said bonds shall be denominated 'Water Bonds,' first series. The money obtained therefor shall be used for the purpose hereinbefore specified and the necessary expenses connected therewith, and for no other purpose."

The precedent cited by respondent, of the *City of Blair v. Lantry*, was an action involving an act of the mayor and council of that city in purchasing certain land for the enlargement of the cemetery and paying therefor out of the cemetery fund without an appropriation for that purpose.

It was there held that the money belonging to the cemetery fund could not be used by the city council in the purchase of additional grounds without an appropriation, or without a proposition for the expenditure having been sanctioned by a majority of the legal voters of the city. In the case at bar such sanction was given; the loan and the expenditure of the money involved having been approved by a majority of the legal votes of the city, it is not within the rule and authority of that case.

From the pleadings and evidence, and the stipulation of the parties, it sufficiently appears that the city of Fairmont, then village, on July 22, 1885, contracted with Ira E. Williams for the erection of the system of water works specified by his plans, previously adopted, for the sum of \$8,916; that the work was undertaken and prosecuted to some state of completion; that the contract, together with all rights and expenditures under it, and claims for compensation therefor, was assigned by Williams, and by *mesne* conveyance to the relators; that for the purpose of paying for the erection of water works and for the incidental expenses thereof the people of the village, now city, voted to borrow \$10,000 by the issuance and conversion of negotiable bonds to that amount; that in the erection of the water works the contractor and his assignees, the relators, expended the sum of \$17,500; that the works were not completed within the time provided; that two or more extensions of the time were made to the contractor or his successors, respectively, carrying on the work for the purpose of overcoming unexpected difficulties in completing it; that on October 8, 1886, a proposition was made by the relators, through their attorney, at a meeting of the mayor and city council, to "transfer all the titles to the city of Fairmont of the city water works as they now stand" at \$7,000. This proposition was received and considered at an adjourned meeting of the mayor and city council October 9, 1886, "to finish the business now in hand," and it

State, ex rel. Fuller, v. Martin.

was agreed to "accept the water works as they now stand" at the sum of \$6,500. This proposition was carried by a vote of three-fourths of the council affirmatively, and two weeks were allowed the companies (meaning the relators) to accept or reject the proposition. On October 25, following, at a regular meeting of the mayor and city council the relators, through their attorney, accepted the terms proposed in the formal writing herein set forth. The public contract of the parties to this proceeding was then complete. It was further resolved, by the council, "that due notice be given for proposals for the purchase of \$10,000 in water bonds, the time to receive the same to be limited to December 1, 1886, at 7 o'clock P. M., the proposals to be sealed and filed with the city clerk, and the council reserve the right to reject any or all bids, the bonds to be redeemable at the fiscal agency of Nebraska, in New York city, according to statute," also that a select committee of the mayor and two councilmen, named, attend to the same.

On September 15, 1887, at a regular meeting of the mayor and council it was resolved that an order be drawn on the water fund for \$6,500 in favor of Chas. E. Magoon, attorney, in payment for the system of city water works, said money to be paid in pursuance with the agreement made October 9, 1886.

These regular proceedings, in conformity to law, clearly show that the water works were accepted, and agreed to be paid for, by the mayor and council of the city of Fairmont, as a compromise of public indebtedness and obligation. The works were not completed, as to time, according to contract; whether in the manner contracted does not appear from the record.

While I am not aware that express authority is given to cities, or to the mayor and council, as legislators, to settle claims of this nature by compromise, yet the power of settlement and adjustment must be held to exist, and to grow out of their general corporate powers and the absolute necessities of the case.

In all questions of city legislation the mayor is co-equal with the council, with power to veto enactments; but necessarily content under an affirmative two-thirds vote of the council. If a measure passes the council by a majority of its members and the mayor fails to interpose an objection, he is held to concur. If he shall interpose, it is competent for the council, upon reconsideration, to pass it by a two-thirds vote of all, when it becomes an act, or ordinance, notwithstanding his disapproval. But in all executive duties the ordinances, resolutions, and votes of the mayor and council, whether passed with the concurrence of the mayor, or notwithstanding his objections, being the executive officer, he is obliged to execute the duties irrespective of his sanction or his disapproval.

The voters of Fairmont having taxed themselves and appropriated the money for a system of water works, and the city council having provided for the sale and conversion of the bonds issued in pursuance of such action and authority and for placing the proceeds in the water fund of the city treasury, and a year having elapsed, it must be presumed that the money was still in the treasury when the warrant, drawn in pursuance of the action of the mayor and council to pay the relators the sum of \$6,500 in full for the water works, was presented to the mayor for his signature.

It was therefore his imperative duty to have signed the warrant; but having neglected and refused to perform that duty, the state's writ of *mandamus* will issue to enforce it upon him.

WRIT ALLOWED.

THE other Judges concur.

 Watte v. Wickersham.

 JOSEPH M. WATTE ET AL. V. CHARLES WICKERSHAM
 ET AL.

[FILED OCTOBER 3, 1889.]

27	457
87	786
27	457
60	776

1. Evidence examined, and held, to sustain the verdict.
2. **Wagering Contract: GRAIN OPTIONS: EVIDENCE.** Evidence offered on the part of the defendants that they were unable to pay for grain and pork purchased; that they were not the owners of elevators or other means of receiving or storing grain in Nebraska; and that they did not own or have possession of any grain, and particularly of the grain sold, at the time they ordered the plaintiff to sell grain testified to, held, properly admitted in connection with evidence that such facts were known to the plaintiffs at the time.

ERROR to the district court for Lancaster county. Tried below before CHAPMAN, J.

Talbot & Bryan, for plaintiffs in error:

That construction of a contract is to be adopted which will support rather than avoid it. (*Bigelow v. Benedict*, 70 N. Y., 202; *Clay v. Allen*, 63 Miss., 426.) The burden of proving the contract illegal is upon defendants (*Irwin v. Williar*, 110 U. S., 499; *Cockrell v. Thompson*, 85 Mo., 510); and there must be more than a mere suspicion of illegality. (*Rumsey v. Berry*, 65 Me., 570; *Story v. Coleman*, 71 N. Y., 420.) Delivery by warehouse receipts does not make the contract illegal. (*Wall v. Schneider*, 59 Wis., 352; *Gregory v. Wendell*, 39 Mich., 337.) The testimony shows that the only option was as to the time of delivery, and such contracts are valid. (*Pizley v. Boynton*, 79 Ill., 351; *Logan v. Musick*, 81 Id., 415; *Harris v. Tumbridge*, 83 N. Y., 99.) Plaintiffs' testimony shows that no "puts" and "calls" transaction took place, and even if it had, some courts have held such deals not necessarily invalid. (*Thacker v. Hardy*, 18 Am. L. Reg. [N.

S.], 258; *In re Chandler*, 13 Id., 310; *Ex parte Young*, 6 Biss. [U. S. C. C.], 53.) The controlling element in all such transactions is the *intention* of the parties (Newmark on Sales, sec. 369; *Clark v. Foss*, 7 Biss., 740; *Gilbert v. Gauger*, 8 Id., 214; *Kirkpatrick v. Adams*, 20 Fed. Rep., 287; *Ward v. Vosburg*, 31 Id., 12; *Sawyer v. Taggart*, 14 Bush [Ky.], 727; *Kent v. Miltenberger*, 13 Mo. App., 503; *Tomblin v. Callen*, 69 Ia., 231; *Hutch v. Douglas*, 48 Conn., 116); and an illegal purpose of one party, not shared by the other, does not make the contract illegal. (*Cockrell v. Thompson*, 85 Mo., 510; *Williams v. Tiedemann*, 6 Mo. App., 269; *Murry v. Ocheltree*, 59 Ia., 435; *Whiteside v. Hunt*, 97 Ind., 191; *Earl v. Howell*, 14 Abb. N. C., 474; Benjamin on Sales, Bennett's 4th ed., sec. 542, Am. N.) Defendants have failed to prove that there was no intention of delivery. The broker has a right to commission. (*Roundtree v. Smith*, 108 U. S., 269, and cases *supra*.)

Lamb, Ricketts & Wilson, for defendants in error:

The fact that defendants never owned nor controlled the actual products in which they dealt, and that this was known to plaintiffs, goes far to determine the intention of the parties (*Melchert v. Telegraph Co.*, 3 McCrary [U. S. C. C.], 521, [S. C. 11 Fed. Rep., 193]; *Lyon v. Culbertson*, 83 Ill., 38); also the fact that the money received by plaintiffs was asked as margins only (*Maxton v. Gheen*, 75 Pa. St., 166; *Fareira v. Gabell*, 89 Id., 89; *North v. Phillips*, Id., 250; *Ruchizy v. DeHaven*, 97 Id., 202; *Dickson v. Thomas*, Id., 278; *Flagg v. Baldwin*, 38 N. J. Eq., 219; *Justh v. Holliday*, 11 Wash. L. Rep., 418); also the fact that defendants were known by plaintiffs to be unable financially to receive the produce represented in the transactions. (*Colderwood v. McCrea*, 11 Bradw. [Ill. App.], 543; *Beveridge v. Hewitt*, 8 Id., 467; *Patterson's Appeal*, 16 Rep., 59; *First National Bank v. Packing Co.*, 23 N. W. Rep., 255; *In re Green*, 7 Biss. [U. S. C. C.], 338;

Kirkpatrick v. Bonsall, 72 Pa. St., 155.) Another circumstance in determining the intention of parties is the prior course of dealing, and in this case settlements had always been made by adjustment of differences. (*Colderwood v. McCrea*, *supra*.) The fact that no grain was ever offered or demanded, strongly indicates that no delivery was intended. (*Whit-side v. Hunt*, 97 Ind., 191, and cases *supra*.)

COBB, J.

This cause was brought to this court on error from the district court of Lancaster county.

The plaintiffs in error, Joseph M. Watte, Frank H. Axtell, and Finley A. Forbes, partners by the firm name of Elmendorf, Watte & Co., alleged, in the court below, that they had been and were doing business as general commission merchants in grain and provisions in this state, and at Chicago, Illinois; and that Charles A. Wickersham and Henry B. Ware, defendants, were doing business at Lincoln, as partners; that the defendants had been engaged in buying and selling grain and provisions through plaintiffs as agents; that on October 12, 1886, the plaintiffs rendered their account current with defendants, by which there was due plaintiffs a balance of \$1,155.06, with interest at seven per cent, which the defendants promised to pay, but neglected and failed to do; with demand for judgment, etc.

The defendants answered denying every allegation; and for a second defense set up that the plaintiffs solicited them to embark in speculations in options in grain and pork on the Chicago market, and that by an agreement they put up in the hands of the plaintiffs certain sums of money as margins and guaranty to cover any decline and loss in the market value of such articles of produce as they ordered and purchased options upon; that it was agreed that they were to be liable to the plaintiffs only for the difference

between the options and privileges ordered and purchased for them, and the real market value of the articles subsequently, and that the plaintiff should hold such margins as security for any sums that might be found due them for decline and losses in the price and value of grain and produce on settlement of differences in the purchase and sale of the same on their account; that defendants never agreed to receive any produce bought, or to deliver any sold, and that all transactions by the plaintiffs on their account were speculations merely on the rise and fall of the market at the produce exchange in Chicago; and were wagers on that result and event, and were gambling transactions superinduced by the plaintiffs for their benefit and profit, and that they ought not to recover any part thereof, because all of such contracts, and option gains and losses, were illegal and void.

The plaintiffs replied denying all the allegations of defendants.

There was a trial to a jury with a verdict for the defendants and a judgment for the defendants' costs.

The plaintiffs' motion for a new trial was overruled, and exceptions duly entered on the record, and a bill of exceptions settled and allowed.

The action was brought as upon an account stated; but the plaintiffs did not rely upon their evidence, which they introduced to prove the delivery of the statement of the account to the defendants, and their admission of its correctness, either by express words or by its retention without objection, or offer to return it for sufficient length of time to raise by presumption an admission of its correctness, and a promise to pay it; but, on the contrary, virtually waived and abandoned any advantage which they may have possessed, by reason of their account having been stated; and introduced witnesses, as well as documentary evidence, to prove their claim without reference to the advantage of an account stated. In reviewing the case, there-

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fore, I will not deem it necessary to refer to those portions of the evidence, the instructions, or the brief of counsel, which relate exclusively to the subject of account stated, but will endeavor to treat the case as the parties did—as I conceive. But here I am met by a difficulty of considerable magnitude: Was it an action for money had and received by the defendants of and from the plaintiffs, money laid out and expended by the plaintiffs for the use and benefit of the defendants, at their request, or for work and labor performed by the plaintiffs for the defendants at their request?

The "Statement of Account," attached to the petition, fails to aid us at all in the matter. I here copy it:

Statement of Account.

CHICAGO, Oct. 12, 1886.

Messrs. WICKERSHAM AND WARE, *Lincoln, Neb.*,

In Account with ELMENDORF, WATTE & CO.

Dr.

Cr.

Date.		Days	Int.		Date.		Days	Int.	
Sep. 29	Ac. P&S			575	Aug. 31	Bal.			156 25
30				368 75	Sep. 2	P&S			62 50
				220	18	Cash			250
				181 25	23				400
Oct. 2				6 25		Bal.			1155
12				72 50					
				506 25					
				93 75					
				2023 75					2023 75
Oct. 11	Balance			1155 00					

E & O E

Exhibit A.

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On the trial the plaintiffs introduced in evidence eight duplicate statements of transactions between them and defendants with evidence that the originals were forwarded to the defendants on or about their respective dates. One of these statements I here reproduce:

No. 169 28.

CHICAGO, April 28, 1886.

Account Purchase and Sale of 5000 bu. May wheat,

ELMENDORF, WATTE & CO.

For account and risk of Messrs. WICKERSHAM AND WARE,

Folio 136.

Lincoln, Nebraska.

April 22	Bt 5000 Bu. May wheat	80½	4025	
	Commission		12 50	4039 50
April 27	Sold 5000 " " "	78½		3931 25
	Loss			106 25

ELMENDORF, WATTE & CO.

It will be observed that in neither of these accounts is there any charge for cash paid or advanced by the plaintiffs for or on account of the defendants, nor is there any such allegation in the petition. Yet the petition does contain an allegation that "the defendants were at the times herein mentioned, and for several months prior thereto had been, engaged in buying and selling grain and provisions through plaintiffs as agents, and plaintiffs from time to time rendered statements to the defendants, showing the business transactions between plaintiffs and defendants." The allegations that the plaintiffs as agents were the medium through which the defendants were engaged in buying and selling grain and provisions, and that they rendered statements to the defendants showing the business transactions between plaintiffs and defendants, are the only allegations of fact tending to state a cause of action on the part of the plaintiffs against the defendants, aside from the allegation of an account stated, which as we have seen was virtually waived and abandoned on the trial.

But it may be that the defendants by their answer supplied sufficient facts upon which to base the principal questions argued in the briefs.

William Dillon, a witness on the part of the plaintiffs, testified that the plaintiffs reside and have a place of business in Chicago, where they are heavy shippers and receivers of grain; that witness resides at present in Chicago, but that he lived in the city of Lincoln about nine years; and it appears from his testimony that he resided in the latter city during the time of most or all of the transactions between plaintiffs and defendants, during all of which time he was employed by the plaintiffs, soliciting consignments and getting parties through this country to do their business with the plaintiffs' firm; that while he lived in Lincoln the defendant, Ware, lived right across the street from him; that he also knew the defendant, Wickersham, for six or eight years. The balance of the testimony of this witness relates to the rendition of the account to the defendants, and conversations between witness and the defendants as to its payment; which, as above stated, in the view which I take of the case, as finally presented, it is unnecessary to set out or comment upon.

The plaintiffs then presented and read in evidence the depositions of Frank F. Axtell, Joseph M. Watte, and Finley A. Forbes, all members of the plaintiffs' firm, but as that of Mr. Axtell only is commented on by plaintiffs in the brief, and the others alleged to be the same in substance, I will confine my observations to the facts stated by him so far as the depositions are concerned. This deponent testified that the general character and nature of the business done by the defendants with his firm was buying and selling grain and pork for future delivery; that Dillon was in the employment of said firm to solicit business; that he had no authority to act for the plaintiffs in negotiating or making arrangements or arriving at understandings with the defendants on the board of trade in the

city of Chicago, or anywhere else, for the sale and purchase of grain, wherein the seller had the privilege of delivering or not delivering the grain, and the buyer the privilege of calling or not calling the grain; that he had no authority to act for said firm in negotiating or making arrangements or understandings with the defendants to make fictitious purchases or sales of grain for or on account of the defendants on the board of trade in Chicago, or anywhere else; or to speculate in differences for or on account of defendants as to the market value of grain; that he had no authority to represent or act for said firm in negotiating or arranging or arriving at understandings with the defendants, whereby said firm could make purchases or sales of grain for future delivery for or on account of the defendants on the board of trade in the city of Chicago or elsewhere; wherein it was understood, or to be understood, that no grain should be delivered by the seller or was to be received by the purchaser on account of such sales or purchases. He also testified that plaintiffs' firm had no understanding or agreement with the defendants, so far as he knew, concerning any dealings in options on the board of trade in Chicago or any place else, or buying or selling grain for future delivery; in which dealings, buying and selling, it was understood between plaintiffs and defendants that no actual grain should be dealt in, either bought or sold, received or delivered. The plaintiffs had no understanding, arrangement, or agreement with the defendants with respect to making fictitious sales of grain for future delivery, or otherwise, wherein no grain in fact was ever bought or sold; and that the plaintiffs had no agreement or understanding with the defendants with respect to speculating as to the market value of grain.

This deponent also testified that the business of the firm of plaintiffs with defendants was conducted by means of telegrams and letters; that it was the duty of deponent generally in plaintiffs' business to fill orders coming to them

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on the board of trade for the purchase or sale of grain for future delivery. In answer to the question as to how he did that work, he answered, that if he had an order from defendants to buy 5,000 bushels of wheat for future delivery, they naming the month, he went in the market and bought it at the market price and wired them immediately. The same as to sales; if he had an order to sell grain for future delivery for their account, he went in the market and sold it at the market price and notified them promptly; that the plaintiffs made no transactions with the defendants wherein said firm, in dealing with the defendants, or acting for them, or on their account, made any alleged purchase of grain for said defendants or on their account on the board of trade in the city of Chicago or elsewhere commonly known as *option* deals; wherein the seller had the privilege of not delivering the grain, or of delivering it, and the purchaser the privilege of calling, or not calling the grain, and wherein any such alleged purchases were merely fictitious, and whereby the defendants and plaintiffs were speculating in advances in the market value of grain and nothing else; that the plaintiffs had no transactions with the defendants, or on their account, in which grain purchased by them, or on their account, was not actually contracted for by the plaintiffs, for which they were liable, and for which they paid. The deponent then narrated specifically the date and manner of filling each of the orders of the defendants for the purchase and sale of grain and pork, which resulted in the several items of loss constituting the amount sued for. He also introduced telegrams from the defendants directing each of such transactions except the last sales, and letters between the parties in reference to them. He also explained the meaning of the word "margins" as used in the transactions and correspondence between plaintiffs and defendants; he also explained what is meant by "future delivery." I quote his testimony:

A. Future delivery is the purchase of grain for delivering

during a month named in the future, named at the time of the purchase.

Q. Mr. Axtell, when you go to the board of trade and purchase, say 5,000 bushels of May corn, what kind of a contract do you make at that purchase; what I mean to say is this, are there any conditions in that contract?

A. It is an absolute purchase, the only conditions are that the seller has the whole month in which to deliver the grain, but he must deliver it during the month named; *or settle for the same.* (The italics are mine.)

Q. Now, Mr. Axtell, in all these purchases and sales that the plaintiffs had with the defendants in this case, were the purchases and sales so made, and were they settled for and delivered according to the terms of the purchase and sale?

A. Yes, sir.

The deponent also testified that it was the intention of the plaintiffs in this case to actually deliver the grain sold, or settle for the same, and to actually receive the grain bought under the orders from the defendants; he also testified that the plaintiffs were never notified by the defendants that they considered their transactions with the plaintiffs to be illegal, being optional deals and based upon gambling contracts; and that deponent first learned that the defendants considered these transactions as growing out of illegal contracts after "we had sued them;" that the plaintiffs never knew that the defendants did not own, or could not deliver, any grain or pork; that the plaintiffs never knew that the defendants did not contemplate or intend that the defendants should become the purchasers of any grain or produce, or that the grain or produce that plaintiffs were ordered to purchase would never be delivered. I again quote from deponent's testimony:

Q. State whether or not the defendants in this action owned or controlled grain or produce upon which you expended any money.

A. They bought and sold grain through us here.

Q. Well, did they own the grain?

A. Yes, or we owned it for them.

Q. You held it as their agents?

A. Yes, as their agents.

On his cross-examination the deponent testified that the purchase of 5,000 bushels of December corn at $37\frac{1}{2}$ cents per bushel, by plaintiffs for and on account of defendants, on October 5, was made from John Hill, Jr.; that on October 11, plaintiff sold to Poole & Sherman 5,000 bushels December corn at $35\frac{1}{2}$. I again quote:

Q. Now, one of these deals simply closed the other?

A. So far as Wickersham & Ware were concerned, it did.

Q. And so far as your firm was concerned, it did?

A. No, sir.

Q. Except that you charged them with a loss of \$93.75, including your commission?

A. Well, that closes as far as Wickersham & Ware are concerned, but not as far as we are concerned, because we have to satisfy both contracts made.

* * * * *

Q. Were either of those ever delivered to you?

A. It was either delivered or settled for.

Q. Which was it? The purchase of October 5, 5,000 bushels of December corn, was that ever delivered to you?

* * * * *

Q. Well, which was it?

A. John Hill actually delivered us that 5,000 of corn.

Q. Where?

A. On the floor of the Exchange hall.

Q. How?

A. The first day of every month all members of the Exchange, that have grain coming to them, are obliged to be in the Exchange room, ready to receive that grain; or if the seller wishes, he can deliver it any other place.

Q. How? What was the evidence of the receipt?

A. The receipt for 5,000 bushels of No. 2 corn stored in a warehouse in Chicago, or within fifty bushels of 5,000 bushels.

Q. That was the first day of December, 1886, that was delivered to you?

A. Yes, December corn.

Q. You had already sold it on October 11?

A. Yes, sir.

Q. And closed Wickersham & Ware's account, so far as that transaction was concerned?

A. No, sir. If there had been a loss in our receiving that corn, or delivering it, we should have held Wickersham & Ware for the loss.

Q. Look at the paper I now hand you, is not that a copy of the account of this 5,000 bushels December corn-deal, rendered to Wickersham & Ware on the 12th day of October, 1886?

A. Yes, sir.

Q. This shows a loss to them in the transaction, 5,000 bushels December corn, of \$93.75?

A. With commissions added, yes.

Q. Had they paid that \$93.75 at that time, that would have closed that deal so far as they were concerned, would it not?

A. It would, provided the deals had gone through all right; I will explain right here: It is customary for the commission man to look out for his own deliveries, and see that they go through all right, but they do not consider themselves responsible if there is a loss in receiving, or delivering it.

Q. Who owned this corn from the 11th day of October, at the date of the closing of the Wickersham & Ware account, up till the first day of December, when it was delivered to you?

A. Now that is a question I cannot answer; I don't know who did hold these receipts; we had the corn bought.

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Q. What did you do with the corn after December 1, 1886?

A. We delivered it out on contracts that we had sold to be delivered in December.

Q. Was it delivered on any of Wickersham & Ware's accounts?

A. Well, I can't tell you that; I can answer that question by stating that it was delivered to parties that we had corn sold to, either for Wickersham & Ware, or some other of our customers.

Q. Have you any method by which you can follow this particular 5,000 bushel deal, and keep it separate from all others and show what was done with it after the 1st of December?

A. I delivered it out again on the first of December to H. L. Flint & Co.

Q. Of whom did you receive at that day?

A. John Hill, Jr.

Q. Did Wickersham & Ware owe any corn at that date to the persons to whom you delivered it?

A. That corn received from John Hill, Jr., was delivered to H. L. Flint & Co. on a sale of 5,000 bushels December corn, made November 30, at 37 $\frac{3}{4}$ cents.

Q. By whom?

A. Probably by me.

Q. On whose account?

A. Account of I. W. Brown.

Q. Then will you explain how it is that on December 1, you delivered to Flint, and cancelled Brown's obligation, the corn that you had already bought for Wickersham & Ware?

A. Because probably, the sale that we had made for Wickersham & Ware to Poole & Sherman was either settled for before that time by consent of ourselves and Poole & Sherman, and so we delivered to other parties.

The evidence on the part of the defendants was to the

effect that the defendants reside in the city of Lincoln, in this state; that their business and occupation was that of train dispatchers in the employment of one of the railroads there, where they resided, and in which occupations they were engaged during the whole time of the transactions involved in this controversy; that they, nor either of them, were possessed of capital or means sufficient to purchase and pay for any considerable amount of grain, produce, or other property; that they never were the owners of grain, pork, or other produce, to sell or ship, and that all of this was known to William Dillon, the agent and business solicitor of the plaintiffs; that they had both known Mr. Dillon for several years, but first met him in business relations shortly before the commencement of the dealings between them and the plaintiffs, out of which this controversy arose, at a place in the city of Lincoln, which the defendants designate as a "bucket shop;" that Dillon, knowing defendants to be to some extent dealing in options at said "bucket shop," solicited them to do business of a similar character directly with the plaintiffs, giving them plaintiffs' card, with his own name thereon as agent or solicitor. Defendants then had an understanding with Dillon that they would do business with the plaintiffs, whereupon Dillon wrote to plaintiffs to that effect, and directed the defendants to deposit money in one of the banks of Lincoln which he designated, subject to the order of plaintiffs to cover margins, which they did. The defendants then commenced making orders or requests on the plaintiffs to buy grain on their account on the board of trade of Chicago. I quote from the testimony of defendant Wickersham:

Q. State in what way the margins were deposited.

A. As a rule we tried to have from one to two cents, that is, two cents on a bushel of grain. We had two cents margin on it and deposited that amount; if we bought 5,000 bushels we would deposit two cents a bushel on that in the First National Bank, subject to their call.

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Q. What took place after that? Follow the business right along down.

A. We kept dealing with them, and I would frequently see Dillon at the depot and talk the matter over. He knew, of course, the deals we had, and he would ask about and give us advice on it, but our advice did not hit. He was on one side and we were generally on the other; in fact we did not feel like changing to his, but that don't amount to much, but the matter would be talked about when we would meet.

Q. With whom were the arrangements made in regard to putting up the margins?

A. Mr. Dillon; also with the house; Mr. Dillon first told us how we wanted to fix the margins; then we had a letter from the house telling us how much to put up, if I am not mistaken.

Q. Go on and state what took place down to the end of the deals.

A. We had several deals with them.

Q. Does this statement which I now put in evidence represent those deals?

A. Yes, sir.

Q. Those were received from the house?

A. Yes, sir, through the mail; and at last we got to dealing without a margin; hadn't any money to pay, and they kept writing and sending us drafts, and one draft in particular we got notice from the bank that it had to be paid or it would go to protest; and we went around and deposited it, and it was a very hard time in the market so far as we were concerned. They commenced to go down, and we were on the wrong side of it; and at last we got a message from them in cipher, "tid-bits," which means, "margins exhausted, we have closed the deal."

Q. State whether or not you always put up the two cents margin in the First National Bank before you made the order.

A. As a rule we did, but I am not positive; but I think there were some times that we didn't, and they carried us.

Q. How was it at the last?

A. No, sir; we didn't have anything in the bank.

Q. State whether or not, when you made any of these sales of grain that are mentioned in these several statements of sales and purchases—state whether you had at any of those times any of that wheat on hand.

A. No, sir.

Q. State whether or not, when you made any of those sales of grain through them, if you had any intention of ever delivering any of the grain.

A. No, sir.

Q. State when you made any of these large purchases of grain whether at that time, if any of that grain had been delivered, if you had any money to pay for that grain.

A. No, sir.

Q. State whether or not, in April, you and Mr. Ware were financially able to make any of these large purchases of grain or pay for them.

A. No, sir.

Q. State whether or not, at the time you made any of these purchases, you had any intention of receiving the grain and paying for it.

A. No, sir, I never did.

Q. State at the time you made any of these sales of grain or pork if you had any intention of delivering this fifty thousand bushels of wheat or anything of that kind, or any of these amounts of wheat.

A. No, sir, that was not the intention.

Q. State whether or not Mr. Dillon ever asked you as to whether you had any grain in store in Nebraska or not.

A. He never asked me that question.

Q. State whether or not Mr. Dillon ever called upon you for money to pay for the purchases of any of these items of wheat or produce.

A. No, sir, he never asked for that.

He also testified that the plaintiffs never wrote to defendants for money to pay for those large items of produce purchased; that defendants were never in business in Chicago, except in this matter; that defendants never had funds in Chicago sufficient to pay for these large quantities of wheat; that defendants were never financially able to pay for any of these large items of purchase, nor to pay \$12,493.00 for wheat purchased; that defendants never had any actual wheat, corn, or pork on hand; that on none of those deals that defendants made through plaintiffs was any of the produce bought or sold, delivered to or by defendants, or to his knowledge, to the plaintiffs for them.

The testimony of defendant H. B. Ware was substantially the same as that of Wickersham.

The evidence in this case, both on the part of the plaintiffs and the defendants, is substantially the same as that in the case of *Sprague v. Warren*, decided by this court at the last term, and reported in 26 Neb. at p. 326; I am unable to distinguish the facts of this case from those of that. The status and condition of the defendants, in the case at bar, was, at the date of the transactions involved, substantially the same as that of the defendant Sprague in that case, and Fisher, his partner. In both cases the defendants were men whose residence, business, avocation, and employment were such as to give notice to the person dealing, or coming in contact in business relations with them, that any purchases or sales which they might make, or desire to make, of grain, or pork on the board of trade of Chicago were mere wagers on the fluctuations in the values of such products, and that they possessed neither the intention nor the ability to actually produce and deliver large quantities of wheat, corn, or pork in the Chicago market; or to receive and ship or otherwise legitimately utilize such produce, if delivered to them there. In the case at bar the evidence is ample that the plaintiffs, through

their agent, William Dillon, had notice of this status and condition of the defendants.

In the case above cited, one of the plaintiffs in his deposition described the manner of settling losses in deals on the board of trade. In the case at bar the plaintiff, Mr. Axtell, in his deposition, described the process by which such settlements are effected. They both call it delivering and receiving grain and pork; but the thing described falls far short of it. With the exception of the use of the phrase "rung up," by Mr. Warren in the former case, which phrase is not used by Mr. Axtell in the case at bar, the two descriptions of the method of settling losses in deals on the board of trade are substantially the same. In the case of *Sprague v. Warren*, *supra*, the court in the opinion says: "Real contracts for the delivery of property at a future time will be sustained, because parties then deal with actual property. Where, however, there was no intention to deliver the property, but simply to pay the difference between the contract price and the price on the day agreed upon, the contract will not be enforced; as in fact it is a mere wager." In the case at bar, it is clearly shown, by the testimony of the defendants, that it was never their intention to actually receive and pay for any of the grain or pork nominally bought; nor to deliver and receive pay for any nominally sold by them on their account; and there is no evidence as to intention of the parties of and to whom these nominal purchases and sales were made; and while it may be admitted that the plaintiffs were at all times faithful to their duties, as agents of the defendants, as contended by counsel in the brief, and while it was doubtless their intention at all times to do precisely what they did do, yet, as we have seen, their intention to do that was not an intention to buy or to sell actual bushels of wheat and corn or barrels of pork *in specie*; and indeed, as agents of the defendants, their intention doubtless was, as it should have been, to carry out their principal's intentions.

Following the case of *Sprague v. Warren*, *supra*, which was carefully considered, though the opinion was only agreed to by a divided court, I hold that the verdict is sustained by the evidence, and is not contrary to law.

Plaintiffs in the brief present as error on the part of the trial court the admission of testimony on the trial on the part of defendants, in which they testified that they were unable to pay for the grain and commodity purchased; also testimony of the defendants as to whether they owned grain elevators, etc. This testimony, in connection with evidence that their inability to pay for such purchases, as well as the fact of their not being the owners or controllers of elevators or otherwise engaged in storing, shipping, or handling grain, but that they were engaged in a different business and avocation, was known to plaintiffs through their agent Dillon, was admissible as going to the question of intention, and of the real character of the transactions between the plaintiffs and the defendants. The above also applies to plaintiffs' objection to the admission of testimony on the part of defendants that they did not own or have possession of any grain, and particularly of the grain sold at the time they ordered plaintiffs to sell the grain testified to by them.

I have carefully examined the instructions given and refused, but find no error in their giving or refusal, and will not therefore further extend this opinion by reproducing or commenting upon them.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

STATE, EX REL. LAVINA J. FOSTER ET AL., V. WALLACE
R. BARTON ET AL.

[FILED OCTOBER 3, 1889.]

Liquors: REMONSTRANCE: MANDAMUS: NOT GRANTED PENDENTE LITE. D. and F. severally applied to the city council of T. for license to sell malt, spirituous, and vinous liquors. Sixty-four citizens of T. remonstrated. Upon a day set for the hearing the council, by a majority vote, granted such license. The remonstrants took an appeal to the district court of the county. Upon trial there, the proceedings and order of the city council were affirmed and the appeal dismissed; to which it is alleged by the remonstrants, they took exceptions and brought the cause, as to both applications, to this court on error, where the same is pending and undetermined. The remonstrants, *pendente lite*, applied for a peremptory writ of *mandamus* requiring and commanding the city council to recall and cancel the license to sell liquors issued to D. and F., respectively, until the appeals were determined: *Held*, That had application been made while the appeals were pending in the district court, a *mandamus* would probably have been granted; but, after the determination of the appeals in the district court, and before their review on error or appeal in this court, the proceedings below are to be presumed to have been in accordance with law, and the final judgment correct; and this court will not, therefore, interfere by *mandamus*.

ORIGINAL application for *mandamus*.*S. P. Davidson*, for relators.*Clarence K. Chamberlain*, for respondents.

COBB, J.

This is an original application in the name of the state of Nebraska, on the relation of Lavina J. Foster, Mary A. McKee, Lucinda Russell, Mary A. Hill, and Charlotte Barrow for a peremptory writ of *mandamus* to be issued

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to the mayor, the councilmen, and the city clerk of the city of Tecumseh, in the county of Johnson.

On June 14, 1889, the relators served sufficient notice on the defendants that in certain causes then lately determined by the mayor and councilmen of Tecumseh, being the applications of James Devinney and Robert Frost, for licenses to sell malt, spirituous, and vinous liquors in the first ward of said city, and the remonstrances thereto of the relators and others, a petition in error and transcript of the record, with waiver of summons and notice in appeal, were filed in this court June 3, 1889, by the relators, making application to the court for a peremptory writ of *mandamus* to compel the defendants to revoke and recall the license to sell malt, spirituous, and vinous liquors, in said city, issued to said Devinney and Frost, respectively, and setting up that on April 16, 1889, said Devinney and Frost each filed with the city clerk his application for a license to sell liquors in the first ward of said city, for the year commencing in May, 1889; and on May 7th, before either of the applications were considered by the defendants, the relators and fifty-nine others filed their remonstrances against the issuance of a license to either of said applicants, with the said city clerk, averring good and sufficient grounds therefor; and on May 10 said remonstrances were considered by said mayor and councilmen upon evidence and argument and were overruled by said mayor and a majority of the councilmen, to which the relators excepted, and appealed to the district court of said county therefrom.

It was ordered by the mayor and a majority of the council that said applications be granted and licenses were issued, to which the relators excepted and from which they appealed to the district court; and on May 11, after procuring the evidence to be duly certified by the mayor and city clerk, the same, with a transcript of the record and proceedings in said cases, was filed and docketed on appeal in said court; and on May 24 said causes were heard and

the orders and judgment of the mayor and council were affirmed in said district court, to which the relators excepted, and filed their motion for a new trial, which was overruled. The court further ordered that said appeals be dismissed, to which the relators excepted. The relators aver that notwithstanding the premises licenses were issued on May 11, 1889, to both of said applicants by the city clerk at the direction of the mayor and council, but against all of which Councilman George Hill voted, and in favor of all of which all the other councilmen voted; that on the 24th day of May, after judgment was entered in the district court, in pursuance of said applications for license, Devinney and Frost each began and has since continued the sale of liquors, in said place, in violation of law and against the rights of the relators and their co-remonstrants, and will continue to sell liquors notwithstanding the pendency of said cause and of this application, wherefore the relators ask for a peremptory writ of *mandamus* commanding the mayor and council and the city clerk to recall and revoke said licenses during the pendency of said appeal and proceedings in error, and until the same shall have been finally determined in this court.

The defendants, W. R. Barton, mayor, and G. C. Zutavern, C. H. Halstead, C. W. Pool, Jorth Grim, and D. R. Bush, councilmen of the city of Tecumseh, answered, admitting the statement of facts by the relators, but denying that they have refused to recall and revoke the licenses granted to Devinney and Frost, or either of them. They say that their first knowledge that proceedings in error had been commenced by the relators was the service of notice of this application for a writ of *mandamus* on June 13 and 14, the day on which the application was to be heard at the state house in Lincoln; that new and additional evidence was admitted at the hearing in the district court, and no bill of exceptions to the judgment and proceeding has been presented to them as a board or been settled by the judge of said court, and no undertaking been filed as required by law.

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The defendant Percy A. Brundage answering, says that he is city clerk of the city of Tecumseh; that the meetings of the city council are held on the first Tuesday of each month; that at no meeting of the council since the granting of licenses to Devinney and Frost after the hearing and decision of the district court has any notice been brought to the attention of the council that an appeal or proceedings in error had been taken to the supreme court, or any request made to revoke or annul the license granted to Devinney and Frost, nor had said council refused to revoke and annul said licenses, or either of them.

Chapter 50 of Compiled Statutes, entitled Liquors, provides for the granting of license for the sale of malt, spirituous, and vinous liquors, if deemed expedient by the authorities of any county, city, or incorporated village, and directs the method of applying therefor, and of considering and allowing or rejecting such applications.

Sections 3 and 4 of these provisions are directly pertinent to the questions involved in this application and are quoted:

"Sec. 3. If there be any objection, protest, or remonstrance filed in the office where the application is made against the issuance of said license, the county board shall appoint a day for hearing of said case, and if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license.

"Sec. 4. On the hearing of any case arising under the provisions of the last two sections, any party interested shall have process to compel the attendance of witnesses, who shall have the same compensation as now provided by law in the district court, to be paid by the party calling said witnesses. The testimony on said hearing shall be reduced to writing and filed in the office of application, and

if any party feels himself aggrieved by the decision in said case he may appeal therefrom to the district court, and said testimony shall be transmitted to said district court, and such appeal shall be decided by the judge of such court upon said evidence alone."

This act, and especially the sections quoted, have been several times before this court and their provisions considered. In the case of *State v. Bonsfield*, 24 Neb., 517, like questions arose upon the application for a writ of *mandamus* to the mayor and city council of Auburn to compel them to sign and certify to the district court the evidence taken at the hearing of an application for license to sell liquors, an appeal having been taken by the remonstrants, and to require the mayor and council to revoke and recall the license issued to respondent Ford during the pendency of the appeal. The writ was allowed, and here I quote the first clause of the syllabus: "Where an application is made to the city council for a license to sell intoxicating liquors, to the issuance of which a remonstrance is filed, and upon a hearing a license is ordered to issue, it is the duty of the council, upon notice of appeal being given, to withhold the license until the expiration of a sufficient time within which an appeal may be taken to the district court by the remonstrants. Where a license is issued, and the appeal is taken, it is the duty of the council to recall such license, until the appeal is decided by the district court, and in case of their refusal *mandamus* will issue to compel action."

It follows from this, and from previous cases in this court, that where an application for license is resisted by remonstrance, and an appeal is taken from the action of local authority granting such license, the proceedings are deemed and taken to be *in limine*, until the judgment of the district court is given thereon; and a license issued and delivered pending such appeal is held to be improvidently granted, and its revocation and recall will, upon due process, be enforced by *mandamus*.

The question raised in the present application, as I understand it, is to extend and enlarge that suspension of the power of county and city authorities to act in such cases, not only until the final judgment of the district court, but also until the further review of the proceedings in error, or upon appeal, in this court.

It appears from the averments of the relators that on May 11, 1889, after notice of appeal by the remonstrants to the district court, and before the hearing of the same, licenses were issued upon both applications; but it further appears that the licensees only availed themselves of their privilege and sold under their licenses after the hearing and final judgment, in their favor, of the district court. Doubtless, under the decision of the supreme court cited and referred to, had application for *mandamus* been made after the issuance of the licenses, and before the final judgment of the district court upon the case appealed, such licenses would have been held as prematurely issued and their revocation enforced. Quite another and different question arises upon the application being made after the final judgment thereon of the district court.

The sale of malt, spirituous, and vinous liquors in this state is, *prima facie*, unlawful, and is prohibited. The statute, however, points out and permits a method by which proper persons may, by the use and compliance of the prescribed means, and with approval and concurrence of constituted authorities, obtain license to sell intoxicating liquors, upon terms and restrictions by which, if complied with and strictly kept, the sale becomes legal and is tolerated.

These prescribed methods commence with the application to the proper local board. In case there is no remonstrance to an application they end substantially with the hearing of the board. But in case of remonstrance, they provide for a proper time and hearing of evidence in support of the remonstrants, and of all parties interested. In case of appeal they are continuous until the final hearing, trial, and

judgment of the district court. The law does not provide for the further continuance of formula and proceedings in order to exclude improper persons from license, excepting the abstract rule of the constitution and laws that all persons aggrieved shall have a final hearing in the supreme court.

At the initial stage and commencement the presumption of law is against the issuance of the license, and the presumption runs through to the end of the prescribed proceedings required in such cases. We are asked to extend that presumption until all suggested errors in the district court shall be further examined. In my judgment that could not be done without a departure as well from the spirit of the law as from that line of equity and consistency which must be preserved in judicial proceedings. Practically such a construction would nullify the statute governing such cases, and provide for the accomplishment, by litigation and contention, of that which has been regarded as an important moral and political question to be controlled by the people themselves.

The district court is one of general jurisdiction. To it the people must appeal primarily for protection in all personal and property rights. The presumption of law is always in favor of the correctness of its judgment and proceedings. Nevertheless, there is an appeal available in proper cases, but pending such appeal the decision of the court is to be regarded *prima facie* as correct.

We are informed by the relators that the cases of the licensees are now pending in this court, both on appeal and in error, brought up from the district court. If upon the hearing here it should be found that manifest injustice or reversible error has occurred, the judgment below would be reversed, and with its reversal will again obtain the presumption against the issuance of license, and of that already issued for the sale of intoxicating liquors to the parties applying; but until then the presumption of law has estab-

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lished the judgment below, and it also attaches to the licenses granted. The writ is therefore denied.

WRIT DENIED.

THE other Judges concur.

LYDIA WALTHAM V. TOWN OF MULLALLY.

[FILED OCTOBER 3, 1889.]

1. **PAUPERS: TOWNSHIPS: LIABILITY FOR SUPPORT.** The several townships of a county organized under the township system of government are charged by law with the care, support, and maintenance of paupers residing and legally settled therein, respectively.
2. **SUPERVISORS: PAUPERS: CONTRACT FOR SUPPORT.** The supervisors of the respective townships are the officers charged by law with the duty of caring for, and contracting for their support and maintenance, and when they so contract, and the contractor earns money under such contract by furnishing such support and maintenance, in good faith, according to the terms of the contract, the township is liable and legally bound therefor; and such liability cannot be avoided by refusing or neglecting to vote and levy the necessary taxes for its payment.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

Kidd & Porter, and *F. B. Beall*, for plaintiff in error:

Under township organization, the supervisor is *ex-officio* overseer of the poor (Comp. Stats. 1887, ch. 18, sec. 37); and county is liable only when it has a lawful poor-house. (Id., ch. 77, sec. 77; ch. 18, sec. 13.) All money for town purposes, authorized by vote of town meeting, or directed by law to be raised, is a town charge (Id., ch. 18, sec. 53); and the electors at the town meeting are empow-

ered to raise money for the support of the town poor when there is no county poor-house. (Id., ch. 18, sec. 12.) Hence, as plaintiff's petition sets up an express contract with defendant, the county is liable.

Lamb, Ricketts & Wilson, for defendants in error:

Plaintiff's petition is defective in failing to state to what county Mullally belongs, or that it has the authority of towns under the township organization act. Said act did not go into force until June 1, 1883, and even if township organization had been adopted at the first opportunity, there could have been no legal town meeting (at which alone the alleged obligation could have been incurred) before April, 1884, while said obligation is claimed to reach back to November, 1883. The fact that the town may have power to raise money to support the town poor, does not of itself authorize it to incur obligations; it must be specifically empowered. (*Stewart v. Otoe County*, 2 Neb., 177; *Hallenbeck v. Hahn*, Id., 397; *S., etc., R. Co. v. Washington County*, 3 Id., 42; *Sexson v. Kelley*, Id., 107; *People v. Com'rs*, 4 Id., 157; *Hamlin v. Meadville*, 6 Id., 227; *McCann v. Otoe County*, 9 Id., 330; *Walsh v. Rogers*, 15 Id., 311; *State v. Lincoln County*, 18 Id., 283.) The exercise of the power is discretionary. For aught that appears in the petition, plaintiff's claim may have been rejected because the fund was exhausted, which would have been proper (*Lancaster County v. State*, 13 Neb., 523); and plaintiff's only remedy was appeal to the district court; an action directly against the town does not lie. An overseer of the poor may bind the county (*Gage County v. Fulton*, 16 Neb., 5); but it nowhere appears that he can bind the town.

COBB, J.

This action is brought on error, by the plaintiff below, to the judgment of the district court of Harlan county.

The plaintiff complained of the town of Mullally in said county, for services rendered in the care and support of A. E. Davis, a pauper of said township, from November 26, 1883, to August 12, 1887, one hundred and ninety-three weeks, at nine dollars per week, amounting to the sum of \$1,737, which services were rendered at the defendant's instance and request, and for which the defendant promised to pay the plaintiff on demand such sum as they were reasonably worth.

2. Such services, the plaintiff alleges, were reasonably worth the sum of nine dollars per week as stated, and that on March 27, 1888, the plaintiff presented to the supervisor of the defendant her account therefor, duly verified, which was wholly disallowed by the defendant at its regular meeting to consider the same, in April, 1888. The defendant appeared by attorney and demurred to the plaintiff's petition, for the reason that the facts stated are not sufficient to constitute a cause of action which was sustained by the court, with judgment for defendant's costs, to which the plaintiff excepts, and assigns as error; that the court erred in sustaining the demurrer of defendant to the plaintiff's petition.

The law for the government of towns in those counties where the system of township organization has been adopted is far from perfect, or comprehensive in its provisions; yet there is probably enough to be found in the statute book to warrant the holding that upon such towns is imposed the duty of caring for and supporting its local poor. In all states and countries, of which I have any knowledge, this duty, as well as the powers necessary to its discharge, is imposed upon the smallest subdivision of rural municipal government. Among the powers invested in the electors of the township by sec. 13, art. 4, ch. 18, Comp. Stats., is that of directing the raising of money by taxation "for the support of the poor within the town," but that power is not to be exercised when the county

board have established a poor-house under the statute of our state.

Section 53 of the same act provides that "The following shall be deemed town charges, to-wit: the compensation of town officers for services rendered their respective towns, contingent expenses necessarily incurred for the use and benefit of the town, the moneys authorized by the vote of any town meeting for any town purpose, and every sum directed by law to be raised for town purposes."

Section 54, following, provides that "the moneys necessary to defray the town charges of each town shall be levied on the taxable property in such town, in the manner prescribed by law for raising revenue. The rate of taxes for town purposes shall not exceed, for roads, two mills on each dollar of the valuation; for bridges, two mills on each dollar of the valuation; for all other purposes, three mills on each dollar of the valuation. And if the electors at the annual town meeting fail to vote a tax to pay the town charges hereinbefore specified, or the town board fail to certify up to the county board the amount of tax voted, if any, by a town meeting, then the county board shall have power, and it shall be the duty of such county board, to levy upon the taxable property in said town a tax sufficient to pay all such town charges."

Considering these provisions together it is the duty of each township to vote a tax at each annual town meeting sufficient to meet such expenses in the support and maintenance of the town poor as may be reasonably anticipated, and if, in any case, such duty is neglected, then it becomes the duty of the county board to levy upon the taxable property of such township a tax sufficient to pay all of such town charges.

It seems to be the contention of the defendant in error that a township may avoid the obligation of supporting its poor by simply refusing to vote a tax for that purpose. I do not agree with that proposition; nor that the power

or duty of the town supervisor to bind the town by contract for the support of a poor person in such township depends upon the fact of there being money on hand in the township treasury raised for such purpose. But, on the contrary, that the supervisor may, in the discharge of his official duty, incur a legal obligation on the part of the township for the support of a township pauper.

Sections 37, 38, and 39 of the statute provide:

"37. The supervisor of each town (who shall be *ex-officio* overseer of the poor) shall attend the regular meetings of the board of supervisors of the county and every adjourned or special meeting of said board of which he shall have notice; he shall receive all accounts which may be presented to him against the town; he shall lay before the board of supervisors such copies of entries concerning moneys to be raised in his town as shall be delivered to him by the town clerk.

"38. He shall keep a just and true account of the receipts and expenditures of all moneys which shall come into his hands by virtue of his office, in a book to be provided for that purpose at the expense of the town, and said book shall be delivered to his successor in office.

"39. On Tuesday preceding the annual town meeting he shall account to the town board for all moneys received and disbursed by him in his official capacity."

These provisions, while but a mere skeleton of township government, are sufficient to point out the duties of the supervisor, and of the town board, in regard to the care and support of the poor.

The defendant in error, in its brief, says that "if the plaintiff was dissatisfied with the rejection of her claim by defendant, her only remedy was appeal to the district court, as in claims rejected by the county board."

In reply to this proposition, the question as to whether this case was brought to this court by appeal or not, does not arise upon demurrer. If it did, we would then have

to say that it does not appear, from the record, in what manner the cause was brought into the district court, whether by appeal or original process, but as there must be further proceedings in the case, I will observe that I know of no authority, nor are we cited to any, for taking a claim either from a town board or a town meeting to the district court by appeal.

It is true that section 580 of the Code provides that "a judgment rendered, or final order made, by a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated, or modified by the district court." But this is not the provision relied on by counsel, but rather that of sec. 37, art. 1, chap. 18, Comp. Stats., which provides that "when the claim of any person against a county is disallowed in whole or in part by the county board, such person may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the county clerk within twenty days after making such decision, and executing a bond to such county, with sufficient security, to be approved by the county clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant."

This provision, substantially in its present form, has been in force since 1859. In the case of *The Sioux City & Pacific R. R. v. Washington County, etc.*, 3 Neb., 39, in the opinion by Justice GANTT, the court says that "the act of February 15, 1869, * * * provides for a 'board of equalization for the county,' and that the county commissioners of each county shall constitute such board. This 'board of equalization' is a new one, created for a distinct object and purpose, different in name from that of a 'board of county commissioners,' and from the 'decisions of this new board there is no statutory provision for an appeal to the district court. Hence there is no remedy by appeal from its dec-

ions." Section 580 of the Civil Code was in force at the time this decision was made, but seems not to have been referred to in that branch of the decision. But in a subsequent portion of the opinion it was held that the proceedings of the county commissioners sitting as a board of equalization, being the final order of a board of inferior jurisdiction to the district court, a petition in error was the proper remedy and was allowable by statute.

The distinction between the application of a former provision of law giving an appeal and one giving a remedy by error, to the decision of a new board, subsequently created, as to both was not drawn, and does not appear from the opinion. The conclusion, however, is that when there are existing provisions of law giving a remedy by appeal from decisions of a board then in existence, that remedy does not pertain to the decisions of a board subsequently created by law; but that when such remedy is given by error, from the final decisions "of any probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions inferior to the district court," such decision may be reversed, vacated, or modified by the district court. And the conclusion is drawn that it may be reached by proceedings in error. But the question remains, from the decision of what board, or tribunal, should the plaintiff in error have appealed? or rather, of what board did she complain in her petition in the court below? In this regard her petition is neither definite nor certain, and had the defendant moved for a ruling making it definite and certain, it should properly have been allowed. The language is "that on March 27, 1888, the plaintiff presented to William Waggoner, supervisor of said town of Mullally, her account duly verified, which account was wholly disallowed *by said town at their regular meeting in April, 1888.*" Whether this refers to a meeting of the township board, consisting of the supervisor, township clerk, and justice of the peace, or to the town meeting required by law to be

held on the first Tuesday of April of each year, does not appear. If the former, then the question arises does that board exercise judicial functions? If so, proceedings in error would lie from its decision rejecting a claim to the district court.

I am of the opinion, however, that the township board in no instance exercises judicial functions, or at least does not in a case of auditing and passing upon an account for supporting a pauper in accordance with a contract of the township made in its behalf by the supervisor. The duties which it exercises in such case are simply those of an auditing board, to be governed by facts and figures alone without judicial learning or discretion. If the claim of the plaintiff in error was rejected by the town meeting, by the people in their primary, elective, and governmental capacity, I think it must be conceded that neither appeal nor error lies from their decision.

I will now repeat that it seems clear to me that a township, in a county organized upon such basis, is the proper organization to be charged, and is by law charged with the support and maintenance of the poor residing and legally settled therein; and that the supervisor is the proper officer to be charged with the duty, and is by law so charged with looking after such poor, and contracting for their support, care, and maintenance; and that when he does so contract—probably within limits—for support and maintenance, and the contractor complies in good faith, the township is legally liable and bound therefor, and such liability cannot be avoided by refusing or simply neglecting to vote and levy the necessary taxes for its payment.

The judgment of the district court is reversed and the cause remanded for further proceedings, with instructions to allow the plaintiff to amend her petition as she may be advised.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

S. H. SORNBORGER V. M. B. HUFFMAN ET AL.

[FILED OCTOBER 3, 1889.]

Replevin: PROCEDURE: DEFAULT. In an action of replevin before a justice of the peace, the plaintiff having failed to give bonds, the property was returned to the principal defendant. On the return day of the writ all the parties came before the justice, and after sundry motions and rulings of the justice the plaintiff withdrew and made no further appearance. On motion of the principal defendant the case was heard and tried by the court, which found that at the commencement of the action he was entitled to the possession of the property replevied, and that he had sustained damages in the wrongful taking thereof in the sum of one dollar, with judgment against the plaintiff in that amount. The plaintiff appealed to the district court. At the next succeeding term the defendants appeared and moved to dismiss the appeal on the grounds (1) that judgment was rendered against the plaintiff in the court below while he was in default; (2) that no petition had been filed as required by law; which motion was sustained and the cause dismissed.

On error to this court the judgment is reversed as to both grounds of the motion.

ERROR to the district court for Antelope county. Tried below before POST, J.

Bell & Sornborger, for plaintiff in error.

Thomas O'Day, for defendants in error.

COBB, J.

The plaintiff, who is here plaintiff in error, commenced an action before a justice of the peace of Antelope county against M. B. Huffman, sheriff of the county, James T. Brown, his deputy, Roche, Anderson & Ray, copartners, etc., and Henry Beckman, defendants. He presented and filed an affidavit in replevin, caused the same to be placed in the hands of J. B. Waite, coroner of the county,

and caused to be replevied the personal property therein named, to-wit: One black horse, seven years old; one red cow, with white face; one red calf, with white face; one red calf, one year old. Afterwards, the plaintiff failing to give the required bond in replevin, the coroner returned the property to the defendants. On the return day of the writ of replevin the plaintiff, by his attorney, appeared before the justice, and the defendants, by their attorneys, made special appearance, and objected to the jurisdiction of the court over the persons of defendants, for the reason that no service of process was made on them by the coroner. Leave was then granted until 11 o'clock A. M. for the coroner to file his amended return of service. It appears that such return was filed by the coroner at the time appointed by the adjournment, but in what it consisted does not appear. The defendants Huffman, Roche, Anderson & Ray, and Beckman, by their attorneys, again made special appearance and objected to the jurisdiction of the court, for the reason that no service of process had been made upon either of them. The objection of the defendants was sustained and the cause dismissed as to Huffman, Roche, Anderson & Ray, and Beckman.

The plaintiff then filed his motion for a continuance, to make service on the defendants last named, which motion was overruled. The defendant Brown made a general appearance, and filed his answer, and the plaintiff moved to be allowed an amended return as to service on Roche, Anderson & Ray, which was denied. The plaintiff then filed his motion for continuance, which was overruled. The counsel for the plaintiff withdrew from the case, and made no further appearance. The case, on motion of defendant, was heard and considered by the court, a jury having been waived.

The defendant Brown was examined as a witness in his own behalf, and also exhibited in evidence a note and chattel mortgage of the property, and after hearing the

evidence the court found that said defendant was at the time of the commencement of the suit entitled to the possession of the property described, and that he had sustained damages in the wrongful taking thereof in the sum of one dollar. Judgment was rendered thereon for one dollar damages and costs, taxed at \$11.35.

The cause afterwards came to the district court of Antelope county on the appeal of the plaintiff; whereupon all of the defendants appeared and filed their motion to dismiss the appeal on the grounds (1) that judgment was rendered against the plaintiff in the court below, while said plaintiff was in default; and (2) that no petition had been filed as required by law. The motion to dismiss was filed August 19, 1885. On October 15, following, the plaintiff filed a petition in the district court against all of the defendants, which seems to be in proper form. On December 3, 1885, at an adjourned term of the court, the cause came on for hearing on defendant's motion to dismiss the appeal and dismiss the action; which motions were sustained and the cause dismissed at plaintiff's costs.

This judgment of dismissal the plaintiff brings for review to this court, by petition in error, against all of the defendants. There was no sufficient authority for dismissing the appeal upon either of the grounds stated in the motion. It is scarcely necessary to say that the case does not fall within the provisions of section 1001 of the Civil Code, as that provision applies solely to causes where judgment is rendered against a *defendant* in his absence. It does not appear from the record that the plaintiff was in default, there having been no order of the court requiring him to file his petition. Attention is called to the fact that the statute in reference to pleadings in justices' courts, has been amended since the date of this proceeding there (sec. 1010a of the Code); but at that time there was, as I believe, no provision of law prescribing the time of filing the petition in such cases, and the practice was to apply to the

court for a rule on the plaintiff to file his petition by a day certain, in cases where that party was in default.

The judgment of the district court is reversed, and cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

The other Judges concur.

HENRY D. ROWLAND V. JAMES F. SHEPHARD.

[FILED OCTOBER 4, 1889.]

1. **Practice: CONTINUANCE: AFFIDAVIT: WITNESSES.** An affidavit for a continuance on account of absent witnesses which fails to show that either their personal attendance or testimony will probably be obtained, if time be granted, is insufficient, where it does not appear that the same facts cannot be proven by other witnesses within the jurisdiction of the court.
2. —: **CASE STATED.** The docket of the county judge contained a recital that a motion for a continuance was overruled "as not appearing sufficient to the court, after examination, a settlement made between plaintiff and defendant and signed by H. D. Rowland." There was nothing of record to show that the settlement referred to was submitted to the court; whether it was in writing or rested on parole, nor that any evidence was offered by either party except the affidavit for a continuance, and which of itself was insufficient. It was *held*, that the district court did not err in refusing to reverse the judgment of the county judge upon the ground that other evidence was heard contradicting the affidavit filed in support of the motion.
3. **Partnership: JOINDER OF PARTIES: SERVICE OF SUMMONS.** An action against "C. C. and H. R., in business under the firm name of C. & R.," is not an action against a firm but against the individual members thereof, and the fact that one of the defendants cannot be served with summons within the county where the action is pending before an inferior court, will not prevent the court from hearing the case against the party duly served with summons and who has appeared generally in the case.

27 494
36 635
27 494
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27 494
45 710

ERROR to the district court for Sheridan county. Tried below before KINKAID, J.

W. H. Westover, and *J. C. Johnston*, for plaintiff in error:

The overruling of the motion for continuance by the county court was an abuse of discretion, which is sufficient ground for a new trial. (*Ingalls v. Noble*, 14 Neb., 272; *Singer Mfg. Co. v. McAllister*, 22 Id., 362.) The affidavit was sufficient, because it stated the evidence intended under the rule in *Jameson v. Butler*, 1 Neb., 118; *Williams v. State*, 6 Id., 338; *Johnson v. Dinsmore*, 11 Id., 393; also because it is specific, and an indictment for perjury will lie if the facts stated are not true. (*Ingalls v. Noble*, *supra*.) Service should have been had upon the firm; not upon plaintiff in error individually. (*Herron v. Cole*, 25 Neb., 692.)

W. W. Wood, and *J. M. Stewart*, for defendant in error:

The judgment was rendered against the defendants; not against Rowland and the firm. Defendant Collins, by appearing generally, waived any rights he may have had because he was not served with summons. The judgment of the county court was against the partners, while the appellate proceedings were by Rowland only; which is contrary to the rule in *Wolf v. Murphy*, 21 Neb., 472. The affidavit for continuance is insufficient in the matter of locating the witness Gamble. (*Newman v. State*, 22 Neb., 358.) The application for continuance was a matter of discretion, and the rights of the defendant were not prejudiced by the refusal to grant it.

REESE, CH. J.

This action was instituted before the county judge of Sheridan county by defendant in error against "Charles C. Collins and Henry Rowland, in business under the firm name of Collins & Rowland." The action was for the re-

covery of the sum of \$138.51, which was alleged to be due defendant in error from Collins & Rowland for labor, hauling lumber, etc. The summons was issued returnable on the 13th day of August, 1887, and was returned "served upon Henry Rowland by delivering to him a certified copy of the summons with all the indorsements thereon, C. C. Collins not being found in the county." On the day named as return day the parties appeared and by mutual consent the cause was continued until October 27, 1887. On that day, at the hour fixed, the parties again appeared, when plaintiff in error filed a motion for continuance until the 1st day of October of the same year. This motion was overruled, but to the ruling no exception appears to have been taken by the plaintiff in error. Plaintiff in error then objected to the introduction of any testimony, for the reason that the service as returned did not show service on the firm of Collins & Rowland. This objection was overruled.

A trial was had, which resulted in a finding in favor of the plaintiff in the action and judgment in his favor for the sum of \$154.51, together with costs of the suit. The cause was then removed to the district court by proceedings in error. The assignment of error being: "*First*, the court erred in overruling the defendant's motion for continuance; *second*, the court erred in taking testimony to contradict the allegations of defendant's affidavit filed in support of his motion for a continuance; and *third*, the court erred in overruling defendant's objection to the introduction of testimony." Upon a hearing in the district court the judgment of the county court was affirmed. Plaintiff now prosecutes error to this court, assigning the ruling of the district court as error.

The first question in logical order is as to the ruling of the county court on the motion for a continuance. The failure to take an exception to the decision of the county court would probably deprive plaintiff in error of the right to an examination of this question. But aside from

this, we think the district court did not err in affirming the decision of the county judge. The affidavit for continuance was as follows:

"Henry D. Rowland, being first duly sworn, deposes and says that he is one of the defendants in the above entitled case; that he cannot safely proceed to trial in said cause on account of the absence from Sheridan county of one C. A. Gamble, who is now at some place in Iowa, and whose testimony is material to this defendant's defense in the above case:

"Affiant further swears that at the time the work was done, which is mentioned in plaintiff's petition and bill of particulars, said Gamble kept the time-book, said time-book being still in the possession of said Gamble, and that said book contains information concerning the subject-matter of plaintiff's cause of action which this defendant can procure at no other place.

"Affiant further says that said Gamble knows, and, when his evidence can be procured, he will swear, that the plaintiff did not work for the firm of Collins & Rowland, and that the work he did for one C. C. Collins, which affiant presumes was charged against the firm of Collins & Rowland, was contracted for by said plaintiff with said C. C. Collins at the rate of \$3 per day instead of \$4 per day as charged by plaintiff.

"Affiant further says that he has used due diligence in trying to discover the whereabouts of said Gamble; that he has made inquiry from said Gamble's friends and acquaintances, and but a few days ago heard he was in Iowa.

"Affiant further says that he has good reason to believe and does believe that he can find said Gamble and procure his deposition and the time-book above mentioned within the time between this date and October 1, 1887.

"Affiant further says that this affidavit is not made for the purpose of delay, but that substantial justice may be done this defendant."

The action being for a demand within the ordinary jurisdiction of a justice of the peace, the provisions of the Code governing that court must be applied in this case. The application not having been made upon the return day, and being for a longer period than thirty days, it was made under sec. 961 of the Civil Code, which is as follows:

"An adjournment may be had either at the return day, or at any subsequent time to which the cause may stand adjourned, on the application of either party, for a period longer than thirty days, but not to exceed ninety days from the time of the return of the summons, upon compliance with the provisions of the preceding section, and upon proof by oath of the party, or otherwise, to the satisfaction of the justice, that such party cannot be ready for trial before the time to which he desires an adjournment for want of material evidence, describing it, that the delay has not been made necessary by any act or negligence on his part since the action was commenced, and that he expects to procure the evidence at the time stated by him."

By this section it is required that before the party can demand an adjournment for more than thirty days from the return day, he must prove by his own oath, or otherwise, to the satisfaction of the justice, that he cannot be ready for trial before the time to which he desires the adjournment, for want of material evidence, which must be described, and that the delay has not been made necessary by any act or negligence on his part, and that he expects to procure the evidence at the time stated by him. By reference to the motion for continuance it will be observed that the witness Gamble referred to kept the time-book, and that the time-book was in his possession, and that "it contained information concerning the subject-matter of plaintiff's cause of action." What the information was the motion did not divulge. The fact that the contract was that plaintiff should be paid at the rate of \$3 per day

instead of \$4, if made with C. C. Collins, was not a material inquiry in the case then to be tried; and the only averment contained in the motion which could be considered material was that Gamble would swear that the plaintiff did not work for the firm of Collins & Rowland. There is no suggestion on the part of the affiant that the facts stated were believed by him to be true, nor that he could not procure the evidence by calling some other witness. Again, the fact that the witness was somewhere in Iowa was not sufficient to justify the belief on the part of the court that his testimony could be obtained, even though an adjournment were had. (*Newman v. The State*, 22 Neb., 355.)

The next contention is that the county court erred in receiving evidence to contradict the averments of the affidavit filed in support of the motion for a continuance. Upon that subject the docket of the county judge is as follows:

"Motion overruled, as not appearing sufficient to the court, after examination a settlement made between plaintiff and defendant and signed by H. D. Rowland."

It is quite doubtful if this record will sustain the contention of plaintiff in error, in point of fact, for we are informed by the entry that the court considered the affidavit of itself insufficient to justify it in adjourning the case. It does not appear that any evidence was offered on the part of defendant in error for the purpose of contradicting the averments in the motion for a continuance; and no evidence is presented to this court, nor was any submitted to the district court so far as this record shows, which it is claimed the county judge considered as contradicting the averments of the motion. Just what the recital contained in the transcript means is somewhat difficult to say, but we think it does not clearly appear that any evidence was offered and considered by the court for the purpose of contradicting the averments of the affidavit. Without further evidence than is shown by the docket entry we cannot say

that the district court erred in passing upon this part of the case.

The transcript of the county judge shows that "defendant objects to the introduction of any testimony, for the reason that service and return does not show service of the firm of Collins & Rowland." This objection was overruled and the ruling is now assigned for error.

The action was not instituted against the firm of Collins & Rowland, a partnership, but against the individual members of the firm. There was no effort made to get service upon the partnership, but upon the individual members. As to Collins, the effort, whatever it may have been, was fruitless, and no jurisdiction was obtained over him. As to Rowland, the service was made and the appearance by him was general. The court therefore had jurisdiction over him and was authorized to hear evidence as against him. In this action of the court there was no error. The county court had no jurisdiction over Collins, and therefore the judgment rendered against him was a nullity. But of that Rowland cannot now complain. The judgment of the district court affirming the judgment of the county court as far as Rowland was concerned was correct, and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

STATE OF NEBRASKA, EX REL. GARRETT STEVENS, V.
WASHINGTON I. CARSON.

[FILED OCTOBER 4, 1889.]

27	501
36	351
27	501
56	424

1. **Attachment: EXEMPTION.** Where the property of a debtor who is the head of a family is levied upon by the sheriff by authority of an order of attachment and advertised to be sold to satisfy the judgment obtained in the attachment proceedings, such judgment and order of sale will not deprive him of the right to claim the property as exempt from execution, under the provisions of secs. 521 and 522 of the Civil Code.
2. **Exemption: TRANSFER OF PROPERTY NOT A WAIVER.** The fact that relator, who was the head of a family, transferred the property to his wife, who instituted an action of replevin against the officer making the levy, but was unsuccessful in her suit—the property being held to be that of her husband—will not deprive the debtor of the benefit of the exemption laws, even though he may have testified upon the trial that the property belonged to his wife and that he had no interest in it.

ORIGINAL application for mandamus.

J. P. Maule, and *F. B. Donisthorpe*, for relator.*W. V. Fifield*, *J. D. Carson*, and *W. C. Sloan*, for respondent.

REESE, CH. J.

This is an application to this court, in the exercise of its original jurisdiction, for a peremptory writ of mandamus to respondent, who is the sheriff of Fillmore county, requiring him to appraise certain personal property which has been levied upon by him as the property of relator, in order that \$500 worth of said property may be set off to relator as exempt in lieu of a homestead, it being alleged that he has neither lands, town lots, nor houses subject to exemption.

It is alleged that certain judgments have been rendered against relator, and that, after the levy, he had filed an inventory in the court where the judgment was rendered and requested the appraisement of the property; but that respondent had refused to comply with the request, and was proceeding to sell the property to satisfy the judgment referred to.

By the answer of respondent it is admitted that he is the sheriff of Fillmore county, and that the relator is the head of a family, a resident of this state, and that he has neither lands, town lots, nor houses subject to exemption under the laws of this state; but it is alleged that the suits, when originally instituted against relator for the purpose of procuring judgment, were accompanied by orders of attachment which had been levied upon the property, and that subsequent to such levy the causes were heard in court, at which relator appeared, and that he made no objection to the levy upon the property, by an effort to discharge the attachment or otherwise; that he consented to judgment being rendered against him, and that he is now estopped to insist upon the exemption.

This contention is based principally upon the cases of *State, ex rel., v. Sanford*, 12 Neb., 425, and *State, ex rel., v. Krumpus*, 13 Id., 321; but as the question here presented was pretty thoroughly examined and discussed in *Hamilton v. Fleming*, 26 Id., 240, recently decided by this court, in which the rulings in the two former cases were substantially overruled, it is not deemed necessary to rediscuss the question here, except so far as to say that, as we understand sec. 522 of the Civil Code, it is provided that the person entitled to the exemption may avail himself of the benefits of sec. 521, by filing an inventory, "under oath, in the court where the judgment was obtained, or with the officer holding the execution, of the whole of the personal property owned by him or them at any time before the sale of the property," and by so doing it becomes the duty of

State, ex rel. Stevens, v. Carson.

the officer to call the appraisers and set off to the party entitled thereto the property which is found to be exempt. It is further alleged in the answer that subsequent to the levy upon the property by respondent, Jessie A. Stevens, the wife of relator, instituted an action in replevin in the district court of Fillmore county, and against the respondent, for the possession of the goods, she claiming to be the owner thereof by virtue of a bill of sale executed from the relator, her husband, to her, prior to that time; that the order of replevin was placed in the hands of the coroner of the county for service, and that, in accordance with the direction therein, he levied upon and took the property from the possession of respondent, causing the same to be appraised, as required in replevin cases; but that the plaintiff in the action failing to give the undertaking required by law, the property was returned to respondent, and the action proceeded as one for damages under the provision of sec. 193 of the Code.

That the suit instituted by Mrs. Stevens had proceeded to trial in the district court to a jury, when a verdict was returned and judgment rendered in favor of respondent, the defendant in the action, and that a *supersedeas* bond had been filed by Mrs. Stevens, and the cause taken by proceedings in error to the supreme court; that upon the trial of that case relator was called as a witness and testified that he had no interest whatever in the property; that it all belonged to Mrs. Stevens, the plaintiff in that action. It is therefore now insisted that, having transferred the property to his wife, whether fraudulently or otherwise, and declared that he had no interest in it, and said action being still pending, the title to the property being virtually undecided, he is now estopped to claim the property as exempt to him, and insist upon the appraisalment thereof.

In support of this contention a number of cases have been cited in the brief of respondent, all of which we have examined, but fail to find that they are in point. In

Pennsylvania it has been held that a debtor who conceals his property or otherwise attempts to delay or prevent the execution of the writ, forfeits the benefit of the exemption laws (*Strouse v. Becker*, 38 Pa. St., 190); but it is said in Freeman on Executions, sec. 214a, that the "rule does not seem to have had its foundation in any provision of the statutes of that state. It resulted from the belief of the judges that these statutes were designed for the exclusive benefit of *honest* debtors,—for those only who would not seek to avoid the operation of the writs directed against them. If, however, we concede that the dishonest are not worthy of the benefits of the exemption laws, it still seems that we should not, as judges, enforce our peculiar ideas until they had met the express approval of the legislature. Judges ought not to pronounce sentence where the law has provided no penalty. Besides, it must be remembered that one of the chief objects of these laws is to protect and provide for the debtor's family, and that this object would be partially subverted by making the benefit of the law depend upon the character of the debtor. Hence the position taken by the courts of Pennsylvania has been vigorously, and we think successfully, assailed, as will appear from the following quotation extracted from an opinion of the highest court in Mississippi (*Moseley v. Anderson*, 4 Miss., 49): 'This exemption is granted without any reference to the merit or demerit of the debtor. It is founded upon a policy that has no relation to the character or conduct of the parties claiming the benefit of it. It is the interest of the state that no citizen should be stripped of the implements necessary to enable him to carry on his usual employment, and that families should not be made paupers or beggars, or deprived of shelter and reasonable comforts in consequence of the follies, the vices, or the crimes of their head. * * * The statute makes no such exceptions and it is not for the court to engraft them upon it.'"

The author in the work, before us, in further discussion

State, ex rel. Stevens, v. Carson.

of the subject, says: "The debtor's claim for exemption cannot be successfully resisted on the ground that he has committed perjury in swearing to a false schedule, or has made a fraudulent mortgage and has property in another county which has not been levied upon, or has other property which he fraudulently conceals for the purpose of hindering, delaying, and defrauding his creditors. Nor does an attempt by the debtor to prevent a levy by disclaiming all interest in the property and falsely representing it to belong to a third person forfeit or estop him from enforcing his exemption rights. The reason for this rule has been thus stated. The conduct and statements of a party never operate as an estoppel in favor of another party, where the latter is not influenced thereby in his subsequent action, and to his prejudice. The fact that respondent disclaimed any ownership in the property himself at the time of the levy had no influence whatever on the officer who made it, for he made it notwithstanding the disclaimer, and afterwards sold the property. The failure of respondent to interpose his claim of exemption as to such property at the time of the levy could not work an estoppel against his making the claim subsequently, for it is neither found nor shown that the officer did or omitted to do anything by reason of such act of omission of respondent, or that the plaintiff in the execution was in any way prejudiced thereby. If a debtor conveys his property to delay or defraud creditors, he cannot sustain an action for it as exempt, because he has parted with the title and cannot urge his own fraudulent design for the purpose of defeating his deed. If, however, the conveyance should be vacated for fraud, the exemption right would revive."

It appears from the answer that notwithstanding the relator had conveyed the property in question to his wife, and she brought an action against the sheriff for the conversion thereof, yet it was found upon the trial that the property in question did not belong to her, and the judg-

ment was in favor of respondent. Whether this was upon the ground that the transfers by relator were fraudulent or without consideration, or for some other reason, is not clearly made to appear. However, it does appear that the verdict of the jury and the judgment of the court were that relator's wife was not the owner of the property. If this be true, then the property belonged to him, and he is entitled to his exemption. It is quite probable also that the fact of the conveyance to the wife would not divest the property of its exempt character, she being a member of the family, for whose benefit the exemption is declared by law. It is a well established and settled doctrine of the courts, not only of this state but of all others so far as we are advised, that exemption laws should be liberally construed in favor of the debtor, the purpose being to prevent the wresting from him of the property which is set apart and used exclusively for the benefit of the family which is dependent upon him. This being the case, it would seem to make no difference as to the result of the action instituted against respondent by the wife of relator. Suppose we assume that in another trial it might be shown that the bill of sale from the husband to the wife was valid, and that the levy on the part of the officer was wrongful, her measure of damages would be the value of the property which he had sold. He would only be liable, therefore, for the surplus of the property after setting off to relator the property claimed by him as exempt. For the property returned she could not recover. Or, suppose that it should be ascertained upon such trial—as it has in the previous one—that the conveyance made by the husband to the wife did not transfer to her the title to the property, and that the title remained vested in him. In that case he would still be entitled to exemption, and the sale of the property by respondent, after the filing of the inventory which is alleged to have been filed by him, would be wrongful and he would be liable therefor. So in any

Neb. Loan & Trust Co. v. Nine.

view of the case which we may take, we think the purpose of the statute would be subserved by a compliance on the part of defendant with the demand of relator.

The writ will therefore be allowed.

WRIT ALLOWED.

THE other Judges concur.

NEBRASKA LOAN AND TRUST COMPANY, APPELLANT,
v. W. F. NINE ET AL., APPELLEES.

[FILED OCTOBER 4, 1889.]

Corporations: TRADE NAME: INFRINGEMENT. In the year 1892 plaintiff organized a business of loaning money, buying and selling real estate mortgages, city and county and other municipal evidences of debt, at the city of Hastings, Nebraska, and took as its corporate name "The Nebraska Loan and Trust Company," its place of business being in Hastings. In carrying on its business it largely increased its capital and extended the sphere of its operations until it transacted business in a number of counties of the state. Subsequent to that time, and in the year 1886, defendants were proposing to organize a loan and trust company in the city of Lincoln with the corporate name of "Nebraska Loan and Trust Company." In an action in equity by the Hastings company to enjoin the members of the Lincoln company from taking the corporate name referred to, it was held, that the law governing trade-marks upon manufactured goods did not apply, and that plaintiff could take no property in the name of the state to the exclusion of the defendant. The proof failing to show a conflict of interest, or that the business transacted by the defendants would materially interfere with the business of the plaintiff, an injunction was refused.

APPEAL from the district court for Lancaster county.
Heard below before FIELD, J.

Angus McDonald, J. M. Ragan, and Lamb, Ricketts & Wilson, for appellant:

Appellant had a right to adopt its present corporate name and to be protected in its exclusive use even though a part thereof consisted of the geographical word "Nebraska." (*Newby v. R. Co.*, Deady [U. S. C. C.], 609.) Regarding the name simply as a trade-mark, appellant has this right. (*Newman v. Alvord*, 59 N. Y., 189; *Congress, etc., Spring Co. v. High Rock Congress Spring Co.*, 45 Id., 291; *Hier v. Abrahams*, 82 Id., 519; *McLean v. Fleming*, 96 U. S., 245; *Southern White Lead Co. v. Cary*, 25 Fed. Rep., 125; *Fleischmann v. Schuckmann*, 62 How. Pr. [N. Y.], 92; *Pierce v. Guittard*, 8 Pac. Rep., 645.) The geographical element in the name is descriptive neither of the kind of business nor of the place of its transaction, and the component words are not of such a nature nor so combined as to be common property. (*M'Andrew v. Bassett*, 10 Jur. [N. S.], 550.) Courts of equity interfere in cases of this kind, not on the ground of the exclusive right to the use of trade-marks, but on that of fraud. (*Newman v. Alvord*, and *Fleischmann v. Schuckmann*, *supra*; *Dunbar v. Glenn*, 42 Wis., 118; *Brooklyn White Lead Co. v. Masury*, 25 Barb., 416; *Anheuser-Busch Ass'n v. Piza*, 24 Fed. Rep., 149; *Matsell v. Flanagan*, 2 Abb. Pr. [N. S.], 459; *Southern White Lead Co. v. Cary*, 25 Fed. Rep., 125.) Attorney Houston, as employee of appellant, is properly joined in an action to restrain the infringement. (*Matsell v. Flanagan*, *supra*; *Estes v. Worthington*, 30 Fed. Rep., 465.)

Houston & Baird, for appellees:

In the cases cited by appellant, as in *Brooklyn White Lead Co. v. Masury*, 25 Barb., 416, and *Dunbar v. Glenn*, 42 Wis., 118, there was an actual sign or trade-mark to deceive the public, while in this case both companies advertise their business and there is no attempt at deception.

A name, to constitute a trade-mark, must be original or invented, merely a fancy one, or one indicating ownership or manufacture. (*Stokes v. Langraff*, 17 Barb., 608; *Corwin v. Daly*, 7 Bosw. [N. Y.], 222; *Singleton v. Bolton*, 3 Douglas [Eng. K. B.], 293; *Burgess v. Burgess*, 17 Eng. Law & Eq., 257.) No one has a right to appropriate names which another can use with equal truth for the same purpose. (*Canal Co. v. Clark*, 13 Wall., 311.) Appellant must have an exclusive right to the trade-mark or name to sustain an injunction. (*Newman v. Alvord*, 51 N. Y., 189.) A merely descriptive phrase, like the one in controversy, is not a trade-mark. (2 High on Injunctions, ch. 18.) There can be no property in a geographical name. (*Canal Co. v. Clark*, 13 Wall., 324.) Defendant Houston had no interest in the company save as an attorney, and is improperly joined.

REESE, CH. J.

This action was instituted in the district court of Lancaster county by the plaintiff, a corporation duly incorporated under the laws of this state and doing business in the city of Hastings as the "Nebraska Loan and Trust Company," against the defendants, who it is alleged were proceeding to organize a company for the transaction of business similar to that transacted by plaintiff and to be known by the same corporate name. It was alleged in the petition that plaintiff was incorporated in the year 1882 under the name of the "Nebraska Loan and Trust Company," and that it had continued in business up to the time of the commencement of the action, increasing its capital until it amounted to the sum of \$500,000, all of which was paid in, and its business to about \$1,000,000 annually; that its business was that of loaning money secured by first mortgages, dealing in municipal bonds, etc., and that such business had increased until, at the time of the commencement of the action, it

had extended into a number of the counties of the state, by which its business had become very profitable, and its capital stock valuable; and that by its long continuance in business, and the careful and prudent manner in which it had transacted such business as was entrusted to its care, as well as by an expensive system of advertising, it had extended its business as stated, and had built up a commercial reputation in the money centers of the east, as well as in the west, which was of great value; that the name, "Nebraska Loan and Trust Company," had become its trade name, by which its responsibility and business reputation was known by its customers and the public, and by which the name had become of great importance and value to it; that defendants, well knowing these facts, with the design and purpose of getting the benefit of plaintiff's reputation, were forming themselves into an association or copartnership and had commenced to advertise to do the business of negotiating loans secured by mortgages, buying and selling city, county, and other municipal bonds and evidences of debt, and had assumed the same corporate name of plaintiff, to-wit, "Nebraska Loan and Trust Company," and that they were seeking to carry on said business under that name and no other; that while their principal place of business was in the city of Lincoln, yet they were attempting to carry on and were advertising to do said business under said name in the same territory occupied by plaintiff; thereby defendants were wrongfully using the trade name of plaintiff, to the great injury and damage of plaintiff, and defrauding and injuring those of plaintiff's customers who might, by the fraudulent representations of defendants, be induced to give their patronage and business to them; that defendants had no capital nor credit, were without experience in the business referred to, and were wholly dependent upon the credit and reputation of plaintiff for their ability to build up a business and reputation, and, by drawing from plaintiff's business, secure to

themselves a share of its profits and emoluments. An injunction was prayed for, together with a demand for general relief. A temporary injunction was allowed. Defendant Houston answered denying any interest in the alleged new corporation, and alleging that his only connection with the other defendants was, that he had been consulted by them as an attorney and had given such advice as was needed by them from time to time, and had been requested to act as legal adviser of the new corporation, or company. Nine and Austin answered by a general denial.

A trial was had to the district court, which resulted in a dissolution of the temporary injunction and a general finding and decree in favor of defendant. From this decree plaintiff appeals.

The evidence introduced upon the trial, in so far as it explained the purposes of the organization of plaintiff and the extent to which its business has been carried, the amount thereof transacted by it, and the capital invested, fully sustained the allegations of the petition; while that with reference to the business capacity and capital of defendants leaves some doubt in the mind as to their real purpose in the organization of the company or corporation by them. But, as we understand the case before us, there is but one question involved, and that is, whether or not the name assumed by plaintiff, to-wit, "Nebraska Loan and Trust Company," is one which they can appropriate to themselves to the exclusion of all other persons within the state and thereby render it unlawful for such person to enter into any business engagements of the kind under that name.

The words "loan and trust" are simply indicative of the character of the business which they propose to carry on, and so far as they are concerned there can be no question but that there can be no special property or right in them. So the real and only question involved is, whether or not a loan and trust company organized in any part of the state can appropriate the name of the state to its own exclusive

use, building up thereby a trade name which will be protected and to which such company will have the exclusive right, the word "Nebraska" being a geographical name. We are of the opinion that such cannot be done. In the discussion of this question we are not unmindful of the injury which can be inflicted upon plaintiff or the harm which might be done to the public by a new corporation, without financial means, organizing under the same name. That question, however, is not before us, the question simply is, whether or not the name assumed by plaintiff can be protected in equity as the exclusive property of plaintiff, and defendants enjoined from assuming the same name a hundred miles distant. The right of property in trade-marks in some cases is not to be questioned, but we know of no case which goes so far as to allow a company of persons to assume a corporate name for the transaction of the business which can be and is transacted in all parts of the state—one as well as another—and appropriate the name of the state to the exclusion of all others in all parts thereof and thus secure a property right therein.

Suppose a bank should be organized in the state as "The State Bank of Nebraska," and as such should extend its business until it became ever so strong a factor in the finances of the state, yet it could scarcely claim the right to thus appropriate the name of the state to the exclusion of all other banks therein. As a general rule geographical names are not the subject of property as a trade name. It is true there are exceptions, among which is *Newby v. Oregon Central Railroad Company*, Deady's U. S. C. C., 609. In that case, while the name assumed by the original Oregon Central Railroad Company contains the name of the state, yet by the addition of the word "Central" the location of the road was thereby indicated and the geographical character of the name was avoided. It would seem also that the argument in favor of the right would apply with much greater force in the case of a railroad company than in the ordinary

commercial transactions of the kind referred to in the plaintiff's petition. In the former case it might be presumed that the lines of the road would traverse the whole state, and that they would necessarily cross each other; the cars being of uniform manufacture and color, when designated with the same initial letters, would be quite difficult of identification; and many other reasons could suggest themselves to the mind in favor of applying the rule stated. But these conditions cannot be applied to the case at bar. The business is carried on mainly by correspondence, and, as we have said, the offices are near one hundred miles distant from each other—one in Hastings, the other in Lincoln. There could be but little, if any, danger of confusion through the mails by the wrong delivery of mail matter. The letters sent out by either party would designate the office from which they came. Again, it cannot be that the same reason for the rule exists in cases of this kind as in cases of trade-marks. In trade-mark cases there is a commodity manufactured or in some way prepared for the general market. In such cases it is due both to the public and to the first manufacturer that, if he furnish a superior quality of goods or wares, the former be protected from fraudulent imitations, the latter from the destruction of a trade he has built up at great expense and labor, and by honesty in his manufactures. The products of the new enterprise should stand upon their own merits in their race for favor in the markets to which they are sent.

In *Congress and Empire Spring Company v. High Rock Spring Company*, 45 N. Y., 291, an injunction was granted against the defendant from bottling and placing upon the market a water with a name similar to that of the water bottled and sold by the plaintiff. The plaintiff was the owner of what was denominated the "Congress Spring" property in Saratoga, and for a number of years it had been engaged in bottling and selling "Congress Water." The defendant was organized as "The High

Rock Congress Spring Company" and was engaged in bottling and selling "High Rock Congress Spring Water," and so labeling its products. An injunction was allowed for the reason that the word "Congress," from long use by the plaintiff, became its legitimate property as a trade-mark and as indicating the origin and ownership of the water flowing from the Congress spring. *Hier v. Abrahams*, 82 Id., 519, was to restrain the defendant from the appropriation of a trade-mark upon the label of manufactured cigars, and an injunction was allowed. *Pierce v. Guittard*, 8 Pac. Rep., 645, was to restrain an infringement upon a trade-mark used for manufactured chocolate, and the same principles were held to apply. The rule applied to the above cases runs through the line of cases where the manufactured or prepared product is placed upon the open market in competition with other articles of the same character or kind. But we think it does not apply to the case at bar. In this case a different principle is involved. The damages, if any, inflicted upon the public could not be by the devices referred to. The place of business of defendant being so remote from plaintiff would seem to preclude the idea of such damage resulting to plaintiff, considering the character of the business in which the parties desire to engage. The nature of the business transacted by the companies is such that, considering the distance between their principal offices, there can be no substantial conflict of interest. Before plaintiff can enjoin defendants this conflict would have to be shown, and that the establishment of the new company in business in Lincoln would be to practice a deception upon those who used ordinary care in the conduct of their business transactions. (Cox's Manual of Trade-mark Cases, numbers 618, 619, 236, 237; *Canal Co. v. Clarke*, 13 Wall., 311.)

The decree of the district court is affirmed.

DECREE AFFIRMED.

THE other Judges concur.

C. W. CRESSLER V. DAVID REES.

[FILED OCTOBER 4, 1889.]

1. **False Representations: REPLEVIN: EVIDENCE.** In an action of replevin for the possession of personal property which it is alleged had been transferred to the defendant in the action in exchange for real estate in another state, and with which the defendant was acquainted and plaintiff not, plaintiff's want of acquaintance being known to the defendant, it was *held*, no error for the court to permit the plaintiff in the action to testify that the defendant represented the property to be worth the sum of \$3,000 by reason of its quality and location, when at the same time the defendant knew it was not worth over half that sum.
2. **Evidence.** In such case it was not error for the court to permit the plaintiff in the action to testify that he relied upon the statements made as to the quality and value of the real estate, and that it was upon such reliance that the trade was made.
3. ———. While the plaintiff in the action was upon the witness stand, and during his cross-examination, he was asked whether for several years prior to the time of this trade he had been engaged in the business of buying and selling real estate in Iowa and Nebraska, and that he knew the character and value of such property. An objection to this question was sustained. *Held*, No error, it being conceded that the witness knew nothing of the real estate in question or of the values of real estate in the immediate neighborhood thereof.
4. **Instructions given and refused, examined and no error found.**
5. **Evidence examined, and *held*, to sustain the verdict.**

ERROR to the district court for Madison county. Tried below before POWERS, J.

H. C. Brome (*Burt Mapes* with him), for plaintiff in error:

A misrepresentation as to the market value of property is not actionable. (*Chrysler v. Canaday*, 90 N. Y., 272; *Hartman v. Flaharty*, 80 Ind., 472; *King v. Mills*, 10 Allen [Mass.], 548.) Under the circumstances, it was

proper on cross-examination to show plaintiff's experience in the real estate business and his knowledge of the value of lands. (1 Wharton on Evidence 530; *Wilson v. Wagar*, 26 Mich., 452.) Restoration of the seller to his former position is necessary to rescission.

Wigton & Whitham, for defendant in error:

False representations of value, greatly exaggerated, are sufficient to rescind. (*Morgan v. Dinges*, 23 Neb., 271; *Bank v. Yocum*, 11 Id., 328; *Phillips v. Jones*, 12 Id., 213; *Mohler v. Carder*, 35 N. W. Rep., 647; 2 Pomeroy Eq. Jur., 878.) The effect of these representations was material and properly given in evidence. (*Faulkner v. Klamp*, 16 Neb., 177; *Berringer v. Beecher*, 25 N. W. Rep., 491.) Failing to obtain a marketable title, defendant in error may have the contract rescinded. (*Scadin v. Sherwood*, 34 N. W. Rep., 555; *Judson v. Wass*, 11 Johns. [N. Y.], 525; *Clute v. Robison*, 2 Id., 595.) As to third instruction see *Faulkner v. Klamp*, *supra*; *Fallon v. Ellison*, 3 Neb., 74; *Bank v. Yocum*, 11 Id., 328.

REESE, CH. J.

This was an action in replevin, instituted in the district court of Madison county, for the possession of a stock of furniture kept in a store in the city of Norfolk. A jury trial was had, which resulted in a verdict in favor of defendant in error and upon which a judgment was rendered; for the reversal of which plaintiff brings the case to this court by proceedings in error.

It appears that defendant in error was the owner of the stock of goods referred to and doing business in the city of Norfolk, and that he made a trade with plaintiff in error by which the stock of furniture was traded for real estate in Davis county, Iowa, and on which plaintiff in error had paid defendant in error the sum of about \$140.

Subsequent to this trade defendant in error seems to have become satisfied that plaintiff in error had practiced a fraud upon him in his representations as to the quality of the land in Davis county. He therefore tendered back the money and claimed to rescind the contract, and brought this action for the possession of the stock of furniture.

The errors alleged will be noticed in the order in which they are presented. *First*, it is insisted that the court erred in admitting evidence as to Cressler's representation as to the value of the Davis county farm. It is shown by the evidence that plaintiff in error had been upon the land, had seen it and knew what it was, and what its value was. And it is testified by defendant in error that plaintiff in error represented to him, or told him, that it was worth \$3,000. It is claimed by plaintiff in error in his evidence that he made no representations as to the value of the property whatever. It also appears that defendant in error had not seen the farm and knew nothing as to its quality. This part of the conversation though, as testified to by defendant in error, is not to our mind a very essential element in the case, but there were other representations testified to by him which, if believed by the jury, would be sufficient to avoid the contract.

In *Morgan v Dingjes*, 23 Neb., 273, it is said by Judge MAXWELL, in writing the opinion: "Where parties stand on an equal footing, expressions of opinion as to the value of certain property will not usually be considered so material that misstatements will constitute fraud. But where the purchaser resides near the property in this state and has full knowledge of its situation and approximate value, and the owner resides in another state without any knowledge on that subject, expressions of opinion as to value by such purchaser which he knows to be much beneath the true value of the property, and statements made by him that the owner's title had been abrogated by reason of a sale of the

property for taxes, will be sufficient, where the property was purchased for a grossly inadequate consideration, to set aside the deed."

It would seem, therefore, to follow logically that, if plaintiff in error knew of the quality of the land and also knew that the defendant in error knew nothing of it, which is shown by the evidence, a representation by him that the property was worth very much more than he knew it to be at the time the representations were made is equally fraudulent. The court did err in this ruling.

Upon the trial defendant in error testified in substance that plaintiff in error represented to him that the farm referred to "was a good farm of ninety-four acres, sixty acres of it under cultivation, all of it under fence; the rest of it was timber and pasture land; a good house, insured for \$600, and about a mile from the nice little town of Floris, which had six hundred inhabitants, and that the farm was worth \$3,000." He also testified that he relied upon the representations made, and would not have made the exchange had it not been for them.

The depositions of other witnesses who resided near the property were read upon the trial, showing that such representations, if made, were untrue. It is now insisted that the court erred in permitting defendant in error to testify that the representations made by Cressler induced him to make the trade; that this was testifying to a conclusion which it was the province of the jury to determine, the witness stating the facts. We cannot agree to this conclusion; it was entirely competent for the witness to state whether he believed the representation, alleged to have been made, and whether or not they were the moving cause of the transfer.

During the cross-examination of defendant in error he was asked whether or not he had been in the habit of trading and dealing in real estate in Iowa and in this state. To this question objection was made, which was sustained.

The ruling of the court upon this subject is now assigned for error. It seems to be conceded that the defendant in error knew nothing of the real estate in question. Neither did he know anything of the values of real estate in the neighborhood where the farm was located. The fact then, if true, could have had no bearing upon the case at bar. The decision of the court in excluding the offered evidence was correct, but had it been otherwise there could have been no prejudice to plaintiff in error.

In connection with the alleged misrepresentation of the quality of the land, it was insisted upon the trial that there was a misrepresentation as to the title, two of the grantors in the chain of title having been infants at the time of the execution of the deed by them, and not having yet attained their majority. Upon the request of defendant in error the court gave to the jury the following instruction, numbered 3: "If you find from the testimony that, in order to induce the plaintiff to make the sale of the stock of goods replevied in this action with other property for defendant's real estate in Iowa, defendant made to plaintiff misrepresentations by either word, act, or suppression of material facts, known to defendant, of matters affecting the condition, quality, character, value, or title of the defendant's real estate in Davis county, Iowa, in any material respect for which plaintiff would have suffered loss had such sale been completed and not rescinded, and that plaintiff relied on such statements and representations as true, and that by reason of said misrepresentations plaintiff was induced to make such sale, and that plaintiff, soon after the discovery of such misrepresentations, rescinded the sale and tendered to defendant the money paid by defendant on such sale, then your verdict will be for plaintiff."

The giving of this instruction was excepted to by plaintiff and is now assigned for error. Plaintiff in error had furnished to defendant in error an abstract of the title, showing the different conveyances from the government of

the United States down to plaintiff in error. But the abstract did not show nor was the defendant in error informed of any disability existing at the time of the conveyance by any of the grantors, the fact of the disability being shown by the deposition of the parties themselves. Taking this instruction as a whole and in connection with his other instructions, which were given by the court upon its own motion, we think there was no error in giving it.

It is next contended that the verdict of the jury was not sustained by sufficient evidence. The evidence upon that part of the case which refers to the representations made by plaintiff in error to defendant in error prior to the trade was conflicting; defendant testifying to the representations in detail, while plaintiff in error testified that he made no such representations at all. In addition to the representations hereinbefore given from the testimony of defendant in error, he testified that plaintiff in error stated to him that the farm was to a great extent bottom land, and that it never overflowed; while it was shown by other witnesses on the part of defendant in error that the bottom land did overflow quite frequently, so much so as to render it of but little value for farming. It was also shown by the depositions of witnesses, taken in Davis county, Iowa, that the land was of much less value than that represented by plaintiff in error; according to the testimony of defendant in error, many of them putting it at less than one-third. This question of fact was solely for the jury, and if they believed the testimony of defendant in error, and disbelieved that of plaintiff in error, their verdict could not have been otherwise than what it was.

At the time of the seizure of the property by the sheriff, under his writ of replevin in this case, a considerable portion of the property was not found by him, and was therefore not returned to defendant in error. The value of this property was found by the jury to be \$797, which was in accordance with the evidence in the case.

The ninth instruction given to the jury by the court on its own motion was as follows:

"If you find from the evidence that the plaintiff at the commencement of the action was the owner of the property in controversy and entitled to the possession of the same, you will award him such damages as the testimony has shown him entitled to, if any, for the wrongful detention of such property, together with the value of such portions of the property as shown by the testimony, if any, you find was retained by defendant and not delivered to the plaintiff under the writ of replevin in this case."

The giving of this instruction is now assigned for error. The objection is based upon the contention that defendant in error was not entitled to recover at all, and upon the further contention that defendant in error already had \$464 of plaintiff's money, which should have been credited upon the amount found due by the jury.

Upon this part of the case the evidence shows beyond question the tender of this money by defendant in error to plaintiff in error, prior to the commencement of the action. But it is not shown that the tender was kept good or that the money was paid into court for him. Had it been shown that the tender was kept good and that the money was at all times subject to his command, no objection could have been made to the judgment, and this contention of plaintiff in error would not avail.

Defendant in error while upon the witness stand was asked what he did with the money which he tendered to plaintiff in error; his answer was that he put it in his pocket, and for aught that appears from the records it is there yet, and hence not subject to the control of plaintiff in error.

The judgment of the district court will therefore be reversed, unless defendant in error within forty days from the filing of this opinion remit from the judgment \$464.

If such remittitur is filed the judgment of the district court will be affirmed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

JOHN S. BRITTON ET AL. V. JAMES I. BOYER ET AL.

[FILED OCTOBER 4, 1889.]

1. **The Evidence**, which is somewhat conflicting, examined and held, sufficient to sustain the finding and judgment of the district court.
2. **Assignment for Creditors: PREFERENCE.** The preference by a debtor of a *bona fide* creditor to the exclusion of other creditors is not of itself necessarily fraudulent.
3. ———. The question as to the validity of a chattel mortgage containing a reservation of the surplus, after the satisfaction of the debt secured, held, not to be in the case.

ERROR to the district court for Red Willow county.
Tried below before COCHRAN, J.

R. M. Snively, for plaintiff in error:

The garnishment proceeding was the only method of appropriating the surplus value of the goods in possession of the mortgagees. (*Burnham v. Doolittle*, 14 Neb., 214; *Carte v. Fenstermaker*, 14 O. S., 457); and it enabled testimony to be introduced tending to show fraud, which in a mere attachment would not have been admissible. Conduct of parties may be shown, to establish fraudulent intent. (Wait, *Fraud. Conv.*, pp. 8-10; Waples on Attachment, 57, 58; *Weiller v. Schreiber*, 63 How. Pr. [N. Y.], 481.) Concealment is an absconding sufficient to justify attachment. (Waples, 49, 50; *Ives v. Curtis*, 2 Root [Conn.],

 Britton v. Boyer.

133; *House v. Hamilton*, 43 Ill., 185; *Young v. Nelson*, 25 Id., 565; *Nutter v. Connet*, 3 B. Mon. [Ky.], 199; *Dunn v. Saller*, 1 Duv. [Ky.], 342; *Field v. Adreon*, 7 Md., 209; *Fitzgerald's Case*, 2 Caines [N. Y.], 318; *Jewel v. Howe*, 3 Watts [Pa.], 144; *Boggs v. Bindskoff*, 23 Ill., 66.) A reservation of control, etc., by the grantor in a pretended conveyance, renders it fraudulent. (Pierson on Mtgs. of Mdse., secs. 156, 161; *Wilson & Wormal's case*, Godbolt [Eng. K. B.], 161; *Passmore v. Eldridge*, 12 S. & R. [Pa.], 198; *Lang v. Stockwell*, 55 N. H., 561; *Sangston v. Gaither*, 3 Md., 40; *Riggs v. Murray*, 2 Johns. Ch., 565; *Pierson v. Manning*, 2 Mich., 445.) In *Holland v. Bank*, 22 Neb., 583, the evidence, though not nearly so strong as in this case, was held sufficient to sustain the attachment.

G. M. Lamberton, Rittenhouse & Starr, and *H. W. Keyes*, for defendants in error:

Mere insolvency is not a cause for attachment (*Parmer v. Keüh*, 16 Neb., 92; *Walker v. Haggarty*, 20 Id., 485); nor is removal of property, unless with fraudulent intent. (*Steele v. Dodd*, 14 Neb., 499.) The garnishment fails if the attachment does, as the one is but a species of the other. (Wade on Attachment, secs. 2, 325, 327, 328, 356; *Dolby v. Tingley*, 9 Neb., 412; Waples on Attachment, 344, 345.) If the mortgage is void because of non-conformity to the assignment law, the fact is no evidence of a fraudulent disposition of property. (*Fox v. Atwell*, 24 Kas., 144.) The attachment and garnishment cannot prevail, because two claims—one due, the other not—are joined in the affidavit. (*Green v. Raymond*, 9 Neb., 295; *Seidentopf v. Annabil*, 6 Id., 527; *Mayer v. Zingre*, 18 Id., 462.)

REESE, CH. J.

This is a proceeding in error to the district court of Red Willow county. On the 25th day of September, 1887,

plaintiffs filed their petition in the district court for the recovery of the sum of \$898.30, with interest thereon. At the time of filing the petition, an affidavit for attachment was filed, alleging as the ground therefor that "the defendants have assigned, removed, and disposed of a part of their property with intent to defraud their creditors, and are about to assign and dispose of their property with intention to defraud their creditors, and are about to convert their property, or a part thereof, into money for the purpose of placing it beyond the reach of their creditors." An order of attachment was issued, which was not executed by levy upon property, but by serving notice of garnishment upon L. J. Holland, The First National Bank of Indianola, J. W. Dolan, Metcalf Bros., Lambert Jay, and J. W. Montrose. It appears that prior to the issuance of the orders of attachment, Boyer and Davidson, who were merchants in Indianola, having become indebted to Holland and to the bank to the extent of \$5,336.46, executed to them a chattel mortgage on the stock of goods, by virtue of which the mortgagees had taken possession. For the purpose of reaching the surplus in the hands of the mortgagees the proceeding in garnishment was instituted. The defendants in the action appeared and filed their motion to dissolve the attachment and discharge the garnishees, for the reason that the facts stated in the affidavit on which the attachment was issued were untrue. This motion was submitted to the district court upon affidavits filed by the parties, and was sustained, the attachment discharged, and the proceedings in garnishment vacated. From this order plaintiff prosecutes error to this court.

The principal contention of plaintiff in error is, that the findings and judgment of the district court are against the clear weight of the evidence and are contrary to the law of the case. There are other assignments, a part of which will be noticed, but as we understand the case, they are of somewhat minor importance. The affidavits upon which the mo-

tion was submitted to the district court are preserved by a proper bill of exceptions, but are of too great length to be here set out either in whole or in substance, and we must be content with giving our conclusion as to the established facts.

We think it must be conceded that the mortgage above referred to was given and taken in good faith, and to secure actual *bona fide* debts for money before that time borrowed by defendants of the mortgagees, or the payment of which had been assumed by them; also, that defendants were indebted to Raymond Bros. in the sum of \$2,090.27; that soon after the execution of the mortgage Holland and the bank took possession of the mortgaged property, under the mortgage; and that by the execution of the mortgage the mortgagees were preferred to the exclusion of other creditors, but that this preference was not necessarily fraudulent in fact. Indeed the mortgage seems to be conceded to have been valid, and by the garnishment proceedings the surplus remaining after its payment is all that plaintiff sought to recover. Pending the attachment proceedings, Raymond Bros. appeared with their claim and it was agreed that they should purchase the notes and mortgage from Holland and the bank, and that defendants should confess judgment in their favor for the amount due upon their account. This arrangement was carried out, Raymond Bros. paying the full amount due on the notes and mortgage and taking an assignment thereof with the possession of the property, judgment being confessed by defendants. This confession was made and the judgment rendered in the evening, but we think that fact is fully explained by showing that it was made to depend upon the negotiations between Raymond Bros. and the bank and Holland, and was delayed until a late hour, about ten o'clock in the evening. But these facts could hardly be considered as of much importance, except as they might tend to throw light upon, and give color to, the previous conduct of the defendants, as they occurred

after the issuance of the order of attachment. This must also be said of other parts of the case, and need not be further noticed as of primary importance.

There is no doubt but that it was the purpose of defendants to aid Holland and the bank, as well as Raymond Bros., in preference to other creditors, in the collection of their demands. This, when not accompanied with a dishonest purpose—the debts being *bona fide*—is not fraudulent (for a debtor has the right to prefer his actual *bona fide* creditors), and of itself would not sustain an attachment.

There is proof of conduct on the part of defendants, after the institution of the attachment suit, which appears at least unfriendly to plaintiffs, but in the face of the explanatory evidence offered, they are not sufficient to warrant the court in reversing the judgment of the district court. The evidence was also somewhat conflicting, and for this reason we should hesitate to interfere with the findings of the trial court. We are unable to find any convincing proof in the record that any of the partnership assets were secreted at the time, or disposed of fraudulently, or converted into money, with any fraudulent intent; or that any intention of converting the property into money, for the purpose of placing it beyond the reach of the creditors of defendant, existed.

It is also contended that the reservations contained in the mortgage, that the money remaining after the payment of the debts should “be paid on demand to the parties of the first part *pro rata*,” rendered the mortgage fraudulent as to creditors of the mortgagor other than the mortgagee. As it is not sought to attack the mortgage as against the mortgagees, we are at a loss to see how that question can arise here. If the mortgage is valid as to the parties to it against the creditors of the mortgagor, it must be conceded that it is valid, and not fraudulent, so far as this case is concerned.

Were this an attack upon the mortgage itself, as fraud-

ulent and void, the question would be presented for decision, between plaintiffs in error and the mortgagees. But that is not this case. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

STATE INSURANCE COMPANY OF DES MOINES, IOWA,
v. JOHN SCHRECK.

[FILED OCTOBER 4, 1889.]

1. **Insurance: CONTRACT DIVISIBLE: BREACH OF CONDITION AS TO PART.** A policy of insurance was written upon certain buildings upon the farm of the assured, which were fixtures and constituted a part of the real estate. In addition to the buildings the policy included personal property on the farm of various classes, but not exceeding a certain amount on each class. No specific personal property was named. The policy also contained a provision to the effect that if any subsequent incumbrance was imposed upon the property insured, or the title changed without the written consent of the secretary of the insurance company, the policy should be void. Prior to the loss the insured executed a mortgage upon the real estate. It was held, that the execution of the mortgage would not prevent a recovery for the loss occasioned by the destruction of the personal property.
2. **CONDITION BROKEN BY CHATTEL MORTGAGE: CANCELLATION BEFORE LOSS.** In such case, there being no specific personal property insured, the fact that the assured had incumbered his personal property by the execution of chattel mortgages thereon subsequent to the execution of the policy and prior to the fire, but which mortgages were all paid and canceled prior to the destruction of the property, would not prevent the assured from recovering the loss on personal property of the kind insured, the title to which was unimpaired at the time of the loss.
3. **EVIDENCE: SPECIAL FINDING.** Upon the cross examination of defendant in error he was asked if subsequent to the execution of the policy and prior to the loss he had not exe-

27	527
33	146
32	768
27	527
33	348
27	527
41	28
27	527
143	490
27	527
44	248
144	874
27	527
54	550
55	364
27	527
59	352
27	527
60	346

ecuted chattel mortgages upon the property insured. His answer was that he had, but that they had all been paid. The questions of the execution of the mortgages and of their payment before the loss were specially submitted to the jury, and they found that the mortgages had been executed, but that they had been paid and canceled prior to the loss. It was *held*, that the finding of payment was sustained by the evidence.

4. — : PLEADING: EVIDENCE. There was no issue of the payment of the mortgage presented by the pleadings, the allegations of the answer of their execution being denied. But as the proof of the execution and cancellation of the mortgages was made by plaintiff in error on the cross-examination of the defendant in error when upon the witness stand, plaintiff could not successfully contend upon proceedings in error that the evidence was incompetent or immaterial under the issues joined.
5. NOTICE OF LOSS: PROOF. The policy of insurance required notice of loss to be given to the insurer within thirty days after such loss. It was testified by defendant in error that two of the agents of plaintiff in error were at the fire by which the property was destroyed, and that they had notice of the fact and agreed to give notice to plaintiff in error; that soon thereafter the adjuster for plaintiff in error (giving his name) appeared and adjusted the loss. It was *held*, that this was sufficient proof of notice (the policy not requiring it to be in writing) and of the agency of the parties named as agents and adjuster.
6. — : DESCRIPTION OF PROPERTY: VARIANCE. The policy described the real estate upon which the insured property was situated as the N. E. quarter of sec. 2, tp. 30, range 16, county of Holt, state of Nebraska. The proof showed that the property was on the northwest quarter of the section named at the time of the insurance and had so remained from that time until the loss, the mistake being in the policy. It was *held*, that the variance was not material, and that it was not necessary that the policy be reformed before the trial.

ERROR to the district court for Holt county. Tried below before NORRIS, J.

E. W. Adams, J. J. King, M. F. Harrington, and Cummins & Wright, for plaintiff in error:

The contract is not divisible, and an act which avoids it as to part of the property avoids it as to all. (1 Wood,

State Ins. Co. v. Schreck.

Fire Ins., 384; May, Ins., sec. 277; *Garver v. Ins. Co.*, 69 Ia., 202; *Plath v. Ins. Co.*, 23 Minn., 479; *Kelly v. Ins. Co.*, 6 Atl. Rep., 740; *Gottzman v. Ins. Co.*, 56 Pa. St., 210; *Trustees v. Williamson*, 26 Id., 196; *Lee v. Ins. Co.*, 3 Gray [Mass.], 583; *Kimball v. Howard*, 8 Id., 33; *Bozman v. Ins. Co.*, 40 Md., 620; *Ins. Co. v. Assum*, 5 Id., 165; *Schumitz v. Ins. Co.*, 48 Wis., 26; *Hinman v. Ins. Co.*, 36 Id., 159; *Clark v. Ins. Co.*, 6 Cush. [Mass.], 342; *Friesmuth v. Ins. Co.*, 10 Id., 587; *Brown v. Ins. Co.*, 11 Id., 280; *Biggs v. Ins. Co.*, 88 N. C., 141; *Moore v. Ins. Co.*, 28 Gratt. [Va.], 508; *Culbertson v. Ins. Co.*, 2 S. E. Rep., 258; *Todd v. Ins. Co.*, 11 Phila., 355; *McGowan v. Ins. Co.*, 54 Vt., 211; *Havens v. Ins. Co.*, 111 Ind., 90; *Hartshorn v. Ins. Co.*, 14 Atl. Rep., 615; *Barber, Ins.*, sec. 20; *Elma Ins. Co. v. Resh*, 44 Mich., 55; *Baldwin v. Ins. Co.*, 60 N. H., 422; *Patten v. Ins. Co.*, 38 Id., 338; *Bleakley v. Ins. Co.*, 16 Grant's Ch. [U. C.], 198; *Russ v. Ins. Co.*, 29 U. C. Q. B., 73; *Phillips v. Ins. Co.*, 46 Id., 334; *Harris v. Ins. Co.*, 10 Ont., 718; *Cashman v. Ins. Co.*, 5 Allen [N. B.], 246; *Supple v. Ins. Co.*, 58 Ia., 29.) If the consideration to be paid is entire, the contract must be held so, though its subject-matter may consist of several distinct items. (*Parsons, Cont.*, 650; *Clark v. Baker*, 5 Metc. [Mass.], 452; *Mansfield v. Trigg*, 113 Mass., 350; *Young v. Wakefield*, 121 Id., 91; *Miner v. Bradley*, 22 Pick. [Id.], 457.) Furnishing proofs is a condition precedent to recovery, and the petition must allege such furnishing before evidence thereof is admissible. (*Edgerly v. Ins. Co.*, 43 Ia., 587; *Blakely v. Ins. Co.*, 20 Wis., 217; *Inman v. Ins. Co.*, 12 Wend. [N. Y.], 452; *Owen v. Ins. Co.*, 45 Barb. [N. Y.], 518; *Wellcome v. Ins. Co.*, 2 Gray [Mass.], 480; *Johnson v. Ins. Co.*, 112 Mass., 49; *St. Louis Ins. Co. v. Kyle*, 11 Mo., 185.) There is no evidence that proper notice was given. (*Gladling v. Ins. Co.*, 4 Pac. Rep., 764.) There is a fatal variance between petition and proof in the description of the premises.

Rice Brothers, for defendant in error:

The Iowa, Minnesota, and Maine cases, cited by counsel for plaintiff in error, are brief and ill-considered, and do not correctly state the law. The contract in question is divisible, and the breach of its conditions made by defendant in error affects only that class of property which was the immediate subject of the act of incumbrance. (*Merrill v. Ins. Co.*, 73 N. Y., 452; *Clark v. Ins. Co.*, 6 Cush. [Mass.], 342; *Com. Ins. Co. v. Spankneble*, 52 Ill., 53; *Hartford Ins. Co. v. Walsh*, 54 Id., 164; *Howard, etc., Ins. Co. v. Cornick*, 24 Id., 455; *Lœhner v. Ins. Co.*, 17 Mo., 247; *Koontz v. Ins. Co.*, 42 Id., 126; *French v. Ins. Co.*, 7 Hill [N. Y.], 122; *Moore v. Ins. Co.*, 28 Gratt. [Va.], 508; *Phoenix Ins. Co. v. Lawrence*, 4 Mete. [Ky.], 9; *Deidericks v. Ins. Co.*, 10 Johns. [N. Y.], 233; 3 Kent, 330; *Quarrier v. Ins. Co.*, 10 W. Va., 507; *Barber, Ins.*, sec. 20; *Schuster v. Ins. Co.*, 102 N. Y., 260; *Holmes v. Drew*, 16 Hun. [N. Y.], 491; *Woodward v. Ins. Co.*, 32 Id., 365; *Perry v. Ins. Co.*, 11 Fed. Rep., 478; *Goring v. Ins. Co.*, 10 Ont., 236; *Phillips v. Ins. Co.*, 46 U. C. Q. B., 334; *Date v. Ins. Co.*, 14 U. C. C. P., 549; 1 Phillips, Ins., 381-2; 1 Wood, Ins., sec. 350; Flanders, Ins., 425; *Knight v. Ins. Co.*, 26 O. S., 664.) Insurance contracts are to be sustained if possible. (*Phoenix Ins. Co. v. Barnd*, 16 Neb., 90; *Rolker v. Ins. Co.*, 4 Abb. Ct. App. Dec. [N. Y.], 76; *Reed v. Ins. Co.*, 95 U. S. 23.) There was great disparity between the conditions of insurer and insured in this case; the former having much the advantage in experience, etc. As to notice and waiver thereof, see *Beatty v. Ins. Co.*, 66 Pa. St., 9; *West Branch Ins. Co. v. Helfenstein*, 40 Id., 9; *Dohn v. Ins. Co.*, 5 Lansing [N. Y.], 275; May, Ins., 2d ed., 701. Want of notice is not made a defense; not being specially pleaded. (*Underhill v. Ins. Co.*, 6 Cushing [Mass.], 440; *Peoria, etc., Ins. Co. v. Lewis*, 18 Ill., 553; *Priest v. Ins. Co.*, 3

Allen [Mass.], 602; *N. Y. Ice Co. v. Ins. Co.*, 23 N. Y., 357; Barber, Ins., sec. 70.) The variance in the descriptions is not fatal. (May, Ins., 872; *American Cent. Ins. Co. v. McLanathan*, 11 Kas., 533.)

REESE, CH. J.

This action was instituted in the district court of Holt county for the purpose of recovering upon an insurance policy the value of certain property which had been insured and destroyed by fire. The petition was in the usual form. A number of defenses were presented by the answer, some of which will be noticed in the order in which they are presented by counsel in arguments and briefs.

By the policy of insurance it is provided that "In consideration that John Schreck, of Stuart, Nebraska, having made his note or obligation to the State Insurance Company for one hundred dollars, agreeing to pay the same according to the terms thereof, for insurance against loss or damage by fire, lightning, wind-storms, cyclones, and tornadoes to the amount of twenty-five hundred dollars on the property hereinafter described, namely:

On his dwelling-house (value of house, \$300).....	\$200
On beds and bedding while therein.....	50
On wearing apparel while therein.....	100
On household furniture while therein.....	150
On sewing machine while therein	25
On hog house	50
On frame barn (value of barn, \$75).....	50
On harness on farm	75
On wagons and carriages on premises (\$250).....	190
On farming utensils on premises, other than mowing and reaping machines (\$75).....	60
On mowing machine on premises (\$85)	40
On hen house	50
On grain in buildings or in stack on premises, and	

against fire and lightning in buildings or in stack on plowed land on premises (except flax).....	\$300
On frame granary (value, \$125)	100
On carriage house.....	50
On work horses or mules (not to exceed \$100 on each) in barns, or on farm herein described, and against lightning and tornadoes, while at large or in use, (\$500)	400
On cattle therein and against lightning and tornadoes, while at large, not to exceed \$25 on any one animal, (\$660)	490
On hogs therein or at large, not to exceed \$8 on a hog (\$200).....	120
"All situated and being on the N. E. quarter of sec. 2, tp. 30, range 16, county of Holt, state of Nebraska.	
"Term, five years; total amount insured, \$2,500, premium, \$100."	

Among the defenses presented by the answer was one that defendant in error had by mortgages incumbered the property insured in violation of the condition of the policy. This condition was as follows:

"Any other insurance or any incumbrance upon any of the property hereby insured existing at the date of this policy not made known in the application, or if any subsequent incumbrance is imposed, or title or occupancy changed or hazard increased without the written consent of the secretary of the company, or if the building becomes vacant, this policy shall be void. Any false statement in the application shall make this policy void. Every renewal of this policy will be governed and subject to all the provisions of the original application and policy."

The buildings referred to in the policy were destroyed by fire, together with a large amount of the personal property. Subsequent to the execution of the policy defendant in error had executed a mortgage upon his real estate, in violation of

the terms of the policy, and upon the trial this part of the case was virtually abandoned by him; the jury allowed nothing for the buildings. The general verdict was in favor of defendant in error for the sum of \$998.95, the value of the personal property destroyed. Upon the trial the court instructed the jury that if they found from the evidence that defendant in error had mortgaged the land on which the barn, granary, and hog house destroyed were situated, without the knowledge and consent of the plaintiff in error, he could not recover such loss, and that if he had executed any mortgages upon the personal property insured by the policy during its existence without the knowledge and consent of plaintiff in error, and the mortgages were not proven to have been paid at the time the loss occurred, the policy would be void as to such property, and plaintiff could not recover anything thereon; but that if at the time of the destruction of the property the mortgages had been paid, so that the property was not incumbered, the fact of their prior execution would not prevent the recovery. It is now contended by plaintiff in error that the policy was an entire contract, and that it prohibited the placing of any incumbrance upon any of the property, and provided that if such incumbrance was created the mortgage would be void, and therefore the defendant in error would not be entitled to recover anything, having violated this provision. It is contended on the part of defendant in error that while the specific buildings referred to in the policy were insured, and that the execution of the mortgage upon the real estate had the effect of avoiding the policy so far as the buildings were concerned, yet there was no specific personal property insured; that the risk being upon a particular kind of property instead of specific articles, to a certain amount, the fact that the property had been mortgaged or sold prior to the fire would make no difference if there was property of the kind and quality described in the policy which was destroyed and to which the defendant in error had a good title.

The briefs presented by counsel upon either side are quite elaborate and show a commendable research and investigation as to the proper rules to be applied in cases of this kind, and a large number of cases and text-books are cited by both parties, which to a considerable extent sustain the views entertained by them. That there is a wide conflict of authority upon this question cannot be disputed; and as it is now before the court for the first time, it becomes necessary for us to dispose of it upon principle, and
* in such a way as to us may seem most consistent with the rules of justice. It would be impossible for us, without extending this opinion to a much greater length than would be desirable, to review all the cases and authorities cited and presented by counsel, and therefore we trust we may be excused from entering upon such an undertaking.

It appears from an examination of the policy that the premium paid was a gross sum, to-wit, \$100. The amount of the insurance was \$2,500, or, at least, was limited to that sum, and to this extent the contract may be said to have been an entirety; but as to the property insured a different course seems to have been pursued by the parties to the contract, and to this extent the contract is severable. And it may also be observed that there is nothing necessarily in
* the character or quality of the insured property which would seem to make the insurance of one depend upon the insurance of the other. There is nothing, either in reason
* or law, which would prevent the insurance of the buildings upon the real estate without the insurance of the personal property upon the farm, the value of which is involved in this action; and also the wagon, farming utensils, mowing machine, carriages, live stock, and grain might have been as well insured without an insurance upon the building as with; also, we think it is fair to say that, according to the language of the policy, it appears to be a species of
* separate insurance upon the personal property. We apprehend there can be no doubt but had there been no incum-

brance upon any of the property, but a portion thereof had been destroyed by fire, an action could have been maintained for the damage sustained by the destruction of that particular portion, but not exceeding the amount of insurance placed upon that particular kind of property. So far as the execution of the real estate mortgage is concerned, we do not think it should be held to affect the rights of defendant in error in his action for the loss occasioned by the destruction of the personal property.

In *Merrill v. The Agricultural Ins. Co.*, 73 N. Y., 463, a case quite similar to this in its facts, it is said by Folger, J., in writing the opinion: "It is plain, from the fact of a separate valuation having been put by the parties upon the different subjects of the insurance, that they looked upon them as distinct matters of contract. The effect of the separate valuation was to make them so. No matter how much value there might have been in any one of these subjects, even to the whole amount of the policy, had it been totally destroyed the defendant could not have been made liable to an amount greater than that named in the policy as the valuation of it. Thus it was, at the inception of the contract, distinguished from the other subjects of insurance and the contract so made as to be capable of application to it alone."

The holdings in that case, and others of a like character cited by defendant in error, seem to us to be more in accord with the principles of common justice than those holding to the doctrine that the execution of a mortgage upon the real estate would not only prevent the assured from recovering the value of the real property destroyed but would also reach the whole contract and contaminate it with the vice. As said in *Phoenix Insurance Co. v. Barnd*, 16 Neb., 90: "A contract for insurance must receive a reasonable construction. The insurer receives the premium as a consideration to pay for loss of property by fire to a certain amount should such loss occur. Such a contract is to be sustained,

if possible to do so. The insurer retains the consideration for the contract and should be required to perform on its part, and no merely technical objection not materially affecting the risk is available as a defense."

Now it cannot be contended that the fact of mortgaging the real estate would in any degree affect the risk so far as the personal property was concerned. It did not affect the title in the assured, neither did it cause the property to be any more liable to be destroyed by fire, and it seems to us that the most common principles of justice and fair dealing are in the line of the large number of authorities cited by defendant in error holding that the contract of insurance on personal property would not be avoided by the execution of such mortgage. In the case of *Merrill v. Insurance Company, supra*, the opinion is quite exhaustive and consists of a careful review of a great number of the authorities presented by the counsel for the insurance company and a discussion of the whole question upon principle. It can serve no good purpose to further quote from it here. We are satisfied with its logic and its reasoning and believe that it states the true doctrine applicable to cases of this kind.

It was shown by defendant in error upon the witness stand on cross-examination, that some of the personal property which had been destroyed had at some time or other subsequent to the execution of the policy been mortgaged, but that at the time of the fire the mortgages had all been paid and there was no incumbrance upon the property. It is now contended by plaintiff in error that the fact of the execution of the mortgage referred to avoided the policy as to the personal property.

The term of the policy was five years from the date of its execution, which was the 8th day of September, 1884. An examination of the language hereinbefore copied satisfies us that it was not the intention of the parties to the contract to require that the same personal property should remain upon the farm for the whole term of the

policy, but that, as hereinbefore indicated, it was upon certain kinds of property upon the premises. The second item in the list given is "On beds and bedding while therein, \$50;" the third, "On wearing apparel while therein, \$100." It cannot be contended that it was the purpose of the parties to the contract that the same beds and bedding and wearing apparel should necessarily remain in that building for five years to secure the benefit of the insurance, but rather that beds and bedding and wearing apparel while in the building, without reference to any particular kind or quality, should receive the benefit of the insurance. The same may be said as to the household furniture, the sewing machine, the hay in the buildings or stack, the harness on the farm, wagon, farming utensils, and live stock. The clear intent and purpose of the parties was that such as might be worn out and destroyed might be replaced; that such as it might become necessary to sell might be sold and other stock purchased in its stead. The execution of a chattel mortgage is a sale subject to the conditions named in the mortgage. The legal title is vested in the mortgagee, and it is his property subject alone to the conditions contained in the mortgage. Had the property destroyed been sold, and the legal title transferred to the purchaser, defendant in error could recover nothing for his loss. Had it been mortgaged and the legal title so transferred, he could still recover nothing. But, under the plain sense of the policy, had the property been replaced by other of the same kind and species, there could be no doubt of plaintiff's liability in case of loss. Had the contract of insurance been upon specific personal property, it is possible that the defense presented would have been available. However, that question is not before us. But we are quite clear that the transfer of the legal title to the insured property, either by mortgage or sale, would avoid the policy so far only as that particular property was concerned, during the time of the existence of the title in the purchaser or mort-

gagee, and to that extent only could the sale or mortgaging of the property under the provisions of this policy be a successful defense.

But it is claimed that there was no competent proof that the mortgages were paid and the title of the property in the assured at the time of the fire, and that that burden was upon defendant in error. Upon an examination of the bill of exceptions we find that while defendant was upon the witness stand, after having testified to the loss, and during the cross-examination, he was interrogated by counsel for plaintiff in error as to his having executed the mortgages referred to, and in many instances his answers were that he had so executed the mortgages, but that they had been paid. In others he was not certain as to whether the mortgages covered the property lost or not. In view of this evidence the question was submitted specially to the jury as to the execution of the mortgages and the payment thereof, and they found as returned, that the mortgages had been executed, but that they had been canceled and paid at the time of the loss. Now had the plaintiff in error only proven the execution of the mortgages it would perhaps have devolved upon defendant in error to have shown that at the time of the loss the title to the property destroyed was not impaired. But that course was not pursued. They inquired of him particularly whether or not the mortgages had been canceled by payment, and his answer was that they had. They cannot now object to this evidence as failing to establish the fact. In this connection it is contended that, under the issues presented by the pleadings, evidence of payment or release was immaterial and therefore improperly submitted to the jury. This contention cannot be successfully urged here, for the reason, as we have said, that even over the objection of counsel for defendant in error, plaintiff in error upon the cross-examination of defendant insisted upon making this very proof. And he cannot now be heard to object

that it was not within the legal form presented by the pleadings. This contention is also unavailing.

The next contention of plaintiff in error is that there was no proof of loss prior to the commencement of the action. The provisions of the policy upon this subject are as follows: "In case of loss the assured shall notify the company within thirty days from the time such loss may have occurred." There seems to be no provision requiring proof of loss as is contained in some policies which have been before us; the provision seems to be that the company shall have notice of the fact. Nor is it stipulated that the notice shall be given to any particular person or officer; neither is there any requirement that the notice given shall be in writing. Upon this subject defendant in error testified that at the time of the fire two of the agents of plaintiff in error were present and saw the destruction of the property; that they then informed him that they would notify the company of his loss, and that a short time thereafter the adjuster for the company came to the residence of defendant in error and adjusted the loss. It is now insisted that there was no competent proof of the agency of the two persons who were present or of the person who represented himself as the adjuster for plaintiff in error.

Upon this subject defendant in error testifies positively to the fact of the agency. He was not cross-examined and therefore not interrogated by anyone as to his knowledge of the fact testified to by him. It may have been and probably was true that he had personal knowledge of the fact of the agency of the two persons referred to, and of the adjuster. At least we must assume the fact to be so in the absence of anything showing the contrary, as there is no presumption that he testified falsely, or upon a subject of which he knew nothing. It is possible that had counsel for plaintiff in error interrogated him as to his knowledge of that fact, they might have succeeded in showing that he in reality knew nothing about their agency.

But this was not done, and the testimony upon that subject must be taken as true. He does not show that the parties represented themselves to him to be such agents or that such representations were made by any person, but he testifies positively to the fact of the agency.

The next and last contention of the plaintiff in error is, that there is a material and fatal variance between the description of the premises as described in the petition and the proof. In the policy the property is described as all being situated upon the northeast quarter of section 2, township 30, range 16, and it is so described in the petition. It is shown in the proof that the correct description of the property would have been the northwest quarter of section 2, and of the same township and range. This seems to have been a mistake on the part of the agent or of the assured, or perhaps of both, at the time of the execution of the policy.

It is contended by plaintiff in error that before defendant could recover he should have instituted his action in equity to reform the policy, and that having failed to do so, he cannot recover. To this we cannot agree. It was shown upon the trial that at the time of the execution of the policy the agent went to the house of defendant in error, examined all the property and effected the insurance; that during the time intervening between the execution of the policy and the trial defendant in error had continually resided upon the premises upon which he then resided, and where the insurance was effected, and that the personal property had been there during the whole of the time.

In May on Insurance, 872, sec. 566, it is said: "In most of the states, however, courts of law will apply the doctrines of waiver and estoppel, or allow proof of their mistakes, so as to enable the plaintiff to maintain his action for indemnity, and not drive him into a court of equity."

This question was before the supreme court of Kansas in *American Central Insurance Company v. McLanathan*,

Neb. & Ia. Ins. Co. v. Seivers.

11 Kansas, 533. In that case the court says: "In such a case the contract is not void for uncertainty, nor is there any need of applying for a reformation of the contract, provided it appear, either from the face of the instrument or extrinsic facts, which is the true and which is the false description;" citing 1 Greenleaf Ev., secs. 300, 302; *Loomis v. Jackson*, 19 Johns., 449; 2 Hill on Real Property, 358 and 368; *Rootman v. Lessees of Waite*, 6 Pet. [U. S.], 340. See, also, *Manhattan Ins. Co. v. Webster*, 59 Pa. St., 227.

We find no error requiring a reversal of the judgment. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

NEBRASKA AND IOWA INSURANCE COMPANY V. JOHN SEIVERS.

[FILED OCTOBER 4, 1889.]

1. **Insurance: PAROL CONTRACT: MERGER.** The plaintiff in error, through one A., its local agent at N. B., for a sufficient consideration, agreed to insure S. against loss or damage by fire upon his hotel building and barn for the term of one year from September 17, 1885, and to deliver to S. a policy therefor in the sum of \$1,600. On several occasions between the time of the making of the contract and the destruction of the property by fire, A. stated that he had made out and executed such policy and had it in his safe. On August 26, 1886, the hotel building and barn were totally destroyed by fire. A. was present at the fire, and shortly afterwards denied that the property was insured in the N. & I. Ins. Co., but was insured in another company, for which he was also agent. Thirteen or fourteen days subsequently A. handed to one B., who was acting as attorney for S., a policy of the N. & I. Ins. Co. upon the property, executed

in due form, but dated to expire fourteen days before the fire and loss occurred. This policy B. carried to the general office of the N. & I. Ins. Co., at O., and presented to the secretary of the company, who kept and retained it. In an action by S. against the N. & I. Ins. Co. upon the parol contract to insure and issue a policy, *held*, that the parol contract was not merged in the said policy.

2. ———: ———: PROOF OF LOSS. In an action against an insurance company for the breach of a parol contract to insure, or to issue a policy of insurance, *held*, unnecessary to allege or prove the service upon the company of the proof of the loss within the time usually limited by such company for that purpose in its printed forms.

ERROR to the district court for Dodge county. Tried below before MARSHALL, J.

Scott & Scott, for plaintiff in error:

The alleged parol contract was not complete in itself, as the policy was to be issued in order to fulfill it. (*Fish v. Cottenet*, 44 N. Y., 538; *Ellis v. Ins. Co.*, 50 Id., 402; *Post v. Ins. Co.*, 43 Barb. [N. Y.], 361; *Sanburn v. Ins. Co.*, 16 Gray [Mass.], 448; *Ins. Co. v. Roessle*, 1 Id., 336.) In case of a loss while the alleged parol contract remained executory the assured's remedy would be in equity alone. (*Ins. Co. v. Colt*, 20 Wall. [U. S.], 560; *Sheldon v. Ins. Co.*, 25 Conn., 207; *Lightbody v. Ins. Co.*, 23 Wend. [N. Y.], 18; *Davenport v. Ins. Co.*, 17 Ia., 277.) In such a case an action in equity may be substituted for specific performance and the court may also determine the amount of loss and compel payment. (16 U. C. Q. B., 477; *Taylor v. Ins. Co.*, 9 How. [U. S.], 390; *Gerrish v. Ins. Co.*, 55 N. H., 355; *Kelley v. Ins. Co.*, 10 Bosw. [N. Y.], 82; *Ellis v. Ins. Co.*, 50 N. Y., 402.) All parol agreements are merged in a policy (*Savercool v. Farwell*, 17 Mich., 308; *Galpin v. Atwater*, 29 Conn., 97); and no action can be maintained on the former, after the latter is issued. (*Myers v. Ins. Co.*, 121 Mass., 338.) The insurer is en-

titled to proofs of loss stipulated by the policy, and as these were not furnished, defendant could not recover on the policy. (*O'Riley v. Ins. Co.*, 60 N. Y., 169; *Mix v. Ins. Co.*, 9 Hun. [N. Y.], 397; *Campbell v. Ins. Co.*, 10 Allen [Mass.], 213; *Blakeley v. Ins. Co.*, 20 Wis. 205; *Smith v. Ins. Co.*, 1 Allen, 297; *Ins. Co. v. Lindsey*, 26 O. S. 348.) A distinction is to be made between "notice of loss" and "proof of loss." There was no waiver of the latter in this case. Examination of the premises is not a waiver (*Cedar Rapids Ins. Co. v. Shimp*, 16 Bradw. [Ill. App.], 248); nor is retention of proofs (without offering to return them) when served too late (*McDermott v. Ins. Co.*, 12 Jones & Sp. [N. Y.], 221); nor offer by president of company to send check for loss. (*Universal, etc., Ins. Co. v. Weiss*, 106 Pa. St., 20; *Findeisen v. Ins. Co.*, 57 Vt., 520; *Engelbretson v. Ins. Co.*, 58 Wis., 301.) It is a question for the jury whether a company has waived formal proof. (*Crawford, etc., Ins. Co. v. Cochran*, 88 Pa. St., 230; *Underwood v. Ins. Co.*, 57 N. Y., 500; *Enterprise Ins. Co. v. Parisot*, 35 O. S., 35; *Knickerbocker Ins. Co. v. Gould*, 80 Ill., 388.) The parol contract is alleged to have been on the usual terms; hence the assured was bound to furnish proof of loss the same as though a policy was issued. (*Billington v. Ins. Co.*, 3 Can. S. C., 182; *State Fire Ins. Co. v. Porter*, 3 Grant's Cases [Pa.], 123; *McCann v. Ins. Co.*, 3 Neb., 198; *DeGrove v. Ins. Co.*, 61 N. Y., 594; *Hawke v. Ins. Co.*, 23 Grant Ch. [Ont.], 139; *Eames v. Ins. Co.*, 4 Otto [U. S.], 629.)

C. Hollenbeck, and *R. J. Stinson*, for defendant in error:

An action can be maintained on a parol contract of insurance, and even where a statute provides that only written policies shall be valid, a parol contract for insurance is enforceable. (1 Wood, Fire Ins., 2d ed., 26; *Cooke v. Ins. Co.*, 7 Daly [N. Y.], 555; *Franklin Ins. Co. v. Colt*, 20 Wall. [U. S.], 560.) An agent authorized to issue poli-

cies may bind the company by a parol contract. (1 Wood, Fire Ins., 29; *Angel v. Ins. Co.*, 59 N. Y., 171; *Ellis v. Ins. Co.*, 50 Id., 402; *Audubon v. Ins. Co.*, 27 Id., 216.) An action may be brought for breach of contract or a bill filed for specific performance (1 Wood, Fire Ins., 35; *Jones v. Ins. Co.*, 16 U. C. Q. B., 477; *Commercial Union Ins. Co. v. Union Ins. Co.*, 19 How., 321; *Ellis v. Ins. Co.*, *supra*; *Ky., etc., Ins. Co. v. Jencks*, 5 Ind., 96; *Audubon v. Ins. Co.*, *supra*; *Baxter v. Ins. Co.*, 13 Allen [Mass.], 320); and in the latter case the court may compel the payment of losses. (*McCann v. Ins. Co.*, 3 Neb., 198.) The conditions of the policies do not apply to a parol contract, and no proof of loss was necessary in this case. (2 Wood, 1024; *Gold v. Ins. Co.*, 73 Cal., 216; *Ganser v. Ins. Co.*, 34 Minn., 372; *Penly v. Assurance Co.*, 7 Grant Ch., [Ont.], 130; *Campbell v. Ins. Co.*, 40 N. W. Rep., 661; *Baile v. Ins. Co.*, 73 Mo., 371; *N. E. Ins. Co. v. Robinson*, 25 Ind., 536; *Taylor v. Ins. Co.*, 9 How., 390; *Eureka Ins. Co. v. Robinson*, 56 Pa. St., 257.) Where a company denies liability on the ground of fraud, no insurance, etc., it cannot insist on proofs of loss. (*Campbell v. Ins. Co.*, *supra*; *King v. Ins. Co.*, 58 Wis., 508; *McBride v. Ins. Co.*, 30 Id., 562.)

COBB, J.

This action is brought on error to the district court of Dodge county.

The plaintiff below alleged that the defendant was a corporation duly organized under the laws of this state, with power to insure property against loss or destruction by fire; that on September 17, 1885, the plaintiff was the owner of a two-story shingle roof hotel building known as the "City Hotel," situate on lots 3 and 4, block 52, of the city of North Bend, in said county; also a one and a half story frame, shingle roof, barn, located on lots 3 and

4, block 52, of the city of North Bend, in said county, and on said day the plaintiff applied to James W. Adams, the agent of defendant, lawfully authorized to make the contract herein set forth, for insurance against loss or damage by fire upon said hotel building and barn, and on said day the defendant, by its agent, in consideration of the sum of \$96, duly paid by the plaintiff, agreed to become an insurer of said property for the period of one year from September 17, 1885, and agreed to make and deliver to the plaintiff a policy of insurance for \$1,600 in the usual form of such policies issued by said defendant. It was agreed by the parties at the time of making said contract that said insurance should commence and bind the defendant from the date of the receipt and payment of the premium, and the defendant, in consideration of the premium, agreed to make and deliver to the plaintiff, within a reasonable time, its policy of insurance upon said buildings to the amount of \$1,600 against loss or damage by fire for the period aforesaid; that by the terms of the policies of insurance issued by defendant it promised and agreed to keep and save harmless said plaintiff in the sum of \$1,600 from loss or damage by fire on said hotel building and barn for one year from the date aforesaid; that on August 26, 1886, while said contract was in force, said buildings were entirely destroyed by fire; that the value of said buildings at the time said fire occurred was \$2,500; that the defendant accepted and received the said sum of \$96 premium in full payment of said insurance for the date and period aforesaid, but that said defendant, through its said agent, fraudulently and negligently omitted and failed to execute and deliver to the plaintiff its policy of insurance on said hotel building and on said barn as by the terms of the contract of insurance it was bound to do; that the plaintiff, immediately after said fire, notified the defendant of the loss of said buildings by fire, and on February —, 1887, made a particular statement of the loss and damage sustained, in

writing, under oath, which was duly served on defendant; that by reason of the premises the defendant became and now is indebted to the plaintiff in the sum of \$1,600, with interest from August 27, 1886, and that no part thereof has been paid; and the plaintiff prays judgment, etc.

The defendant answered denying every allegation except such as are expressly admitted or otherwise answered, and admitting that it is a corporation, under the laws of this state, for the purpose of insuring against loss by fire.

As to plaintiff's being the owner of the property described, or the holder thereof, or whether the same was destroyed by fire, the defendant has no knowledge or information from which to form a belief, and therefore denies the same; and subsequently on leave of the court amended its answer and set up an express denial that the plaintiff at any time, or that any one in his behalf, ever made out and served upon or furnished to the defendant any proof of loss whatever stated in the plaintiff's petition.

Defendant denies that at any time it effected the insurance of plaintiff's property as stated, or that any contract of insurance was directly or indirectly made as stated, and asks judgment, etc.

There was a trial to a jury, with a verdict for the plaintiff for \$1,742.80. The defendant's motion for a new trial was overruled, and judgment entered on the verdict; to which the defendant excepted.

The plaintiff in error assigns numerous errors of the court below, not necessary to set forth, as those argued in the brief of counsel present all the material questions to be considered.

It appears from the evidence set out in the bill of exceptions that on September 23, 1885, the Nebraska and Iowa Insurance Company, by and through its local agent, James W. Adams, at North Bend, Nebraska, contracted with the defendant in error, John Seivers, to insure him to the amount of \$1,600 upon his hotel building and barn, situate at North Bend, against loss or damage by fire for

one year from said date for a premium of \$96, forty dollars of which had been previously paid by Seivers to Adams, twenty dollars was paid on the day mentioned, and the balance, thirty-six dollars, making \$96, was paid during the year, and before the loss of the property by fire, in accordance with an agreement between Adams, the insurance agent, and Seivers, insured.

On August 26, 1886, the insured property was totally destroyed by fire. It was understood and agreed between the agent and Seivers, and was a part of the contract, that a formal policy of the insurance company was to be executed and delivered immediately, or in due course of business, but was not so delivered, nor was any policy under the terms of the contract ever executed and delivered to the insured; that at various times after the entering into the contract of insurance, and before the fire, the agent represented to the insured, and to his wife, that the policy contemplated by their said contract had been executed and was deposited in his safe; that immediately after the fire the agent claimed that the contract of insurance was not made with the Nebraska and Iowa Insurance Company, but was made with the Sun Fire Insurance Company, of London, England, for which he was also agent. It appears that about thirteen or fourteen days after the fire the agent handed to E. W. Barnard, acting as attorney or agent of Seivers, or his wife, a policy of insurance of the company (plaintiff in error) purporting to insure Seivers in \$1,600 against fire upon the property mentioned, for one year from August 12, 1885, which policy bore date August 12, 1886, the date on which upon its face it expired. On the 13th of September, three or four days after the delivery of the policy by Adams to Barnard, the latter, as attorney for Seivers and his wife, took it to Omaha to the general office of the insurance company and presented it to Matt. Goodwin, secretary and adjuster of the company. This policy does not appear to have been returned to Seivers, nor does

it appear to have been offered in evidence by either party. Nevertheless it is found attached to the bill of exceptions as an exhibit. It also appears that on September 13, the same day this policy was taken to Goodwin, he employed counsel to prosecute Adams, the agent at North Bend, for fraudulent practices in this transaction, and went himself to North Bend the evening of the same day. There was also evidence tending to prove that at the time Barnard went to Omaha and delivered the policy to Goodwin, the secretary of the company, he also delivered to him a notice or statement, drawn up by D. M. Strong, an attorney for Seivers, directed to the Nebraska and Iowa Insurance Company, with an estimate of the amount of loss by fire. It also appears that on February 21, 1887, before the commencement of this suit, the plaintiff below served upon the defendant a proof of loss, which is believed to be legally sufficient, both in form and substance.

The plaintiff below, in his brief here, claims this to be an action at law, for a breach of contract to issue a policy of insurance. Excepting to the designation of "action at law," I agree with him that it is an action for the breach of the defendant's contract to issue a policy of insurance; in other words, that it is not an action for a specific performance of the contract of insurance; at the same time it may be difficult under our Code and practice to draw a clear line of distinction between the action for breach of contract and that to enforce the specific performance of such contract after the term for which the contract was made has expired, and after the destruction by fire of the property against which the insurance was agreed to be made. In either case, if the action be sustained, the judgment would be the same; and, so far as I know, the substance of the pleadings, under the Code system, would be identical. This, I think, disposes of the first point presented in the plaintiff in error's brief, but which it is but just to counsel to say is not relied upon as vital.

The second point is that the parol contract to insure was merged in the written policy delivered by the agent Adams to the attorney Barnard for the plaintiff. The principal ground upon which this point is raised, as it is understood, is that the proof of loss made by the plaintiff, some six months subsequent to the loss, sets up this policy. The proposition of law stated by the plaintiff in error, to which counsel cites authorities, that a verbal contract reduced to writing, which covers all branches and elements of the contract, is merged therein is conceded. If the written policy had contained or fairly covered all branches and elements of the verbal contract, the verbal contract would have been merged and absorbed, and no action for a breach of it would be maintainable. But in order to avail itself of this point the plaintiff in error would have to admit the written contract as binding upon it. This it does not do, but on the contrary, to avoid the absurdity, has constantly repudiated it. Even this was scarcely necessary, as not only on its face was it executed and delivered long after the time which it assumed to cover had expired, but upon its face and by its terms it was made to expire before the happening of the loss by fire which is the event of this controversy, and which made it an object of interest to the parties. It was therefore at the moment of its execution utterly null and void for any and for all purposes. Being so, its recital in the proof of loss by the plaintiff was merely incumbering that paper with an extraneous fiction without any legal significance whatever.

Again, it is contended by the plaintiff in error that the proof of loss was made and presented long after the time required by the usages of the insurance company for a proof of loss, under its policy, to be made, and hence was inoperative and insufficient as proof. Here arises the question whether, in an action upon a parol contract to insure, it is necessary, as a condition precedent to his right of action, for the plaintiff to prove the making of proof

of loss. The plaintiff in error contends that it is, and to that point cites the case of *McCann v. The Aetna Insurance Co.*, 3 Neb., 198. I concede the authority of that decision to its full extent. Were it not for that precedent I would be inclined to hold with the supreme court of the United States in *Taylor v. The Merchants Fire Insurance Co.*, 9 Howard, 390; the Supreme Court Com. of California in *Gold v. The Sun Ins. Co.*, 73 Cal., 216; and the supreme court of Missouri in *Baile v. The St. Joseph Fire & Marine Ins. Co.*, 73 Mo., 371, to the effect that when an insurance company enters into parol contract to issue a policy and fails to issue such policy it waives its right to demand proof of the loss arising under such contract of insurance. But let us consider to what extent the decision in *McCann's* case sustains the position of the plaintiff in error. It would seem to be claimed that where a company enters into a parol contract of insurance, or a contract to make and deliver a policy, it is a condition precedent to the maintaining of an action by the assured for a loss arising thereunder to make and present proof of such loss within the time which would have been limited for the same by the terms of such policy had it been executed and delivered. The rule in *McCann's* case, cited, falls far short of that requirement, while it does hold that proof of loss shall be made and served on the insurance company as a condition precedent for the bringing of an action. I quote the clause of the syllabus of that case: "Although there may be sufficient evidence to establish a parol contract of insurance, yet before the assured has any right of action for the loss sustained he must make and deliver to the company a particular account of the loss, signed and sworn to, together with a statement of the whole value of the subject insured, his interest therein, and when and how the loss originated: the giving of notice and taking of preliminary proofs are conditions precedent, and must be performed before the assured is entitled to receive payment,

or to sue for the loss, unless the company by some act on its part waives the performance of such conditions."

The first point by plaintiff in error applicable to the instruction of the court to the jury is, that the court erred in stating the issues of the case. In the first clause of the instruction, on the court's own motion, it is stated "that J. W. Adams was the agent of defendant, duly authorized to make contracts for defendant against losses or damage by fire." The counsel say in their brief that "we could admit that Adams had authority to contract for insurance, but to admit that he had authority to make the contract as alleged is quite another question." The point as I understand it is that, while plaintiff in error could admit that Adams had authority for insurance on its behalf, yet that that authority was limited to the making and signing of written policies of insurance, and did not extend to the making of parol contracts to insure. To this point I quote from the bill of exceptions, premising that on impanelling the jury and before entering upon the trial the plaintiff asked leave of the court to withdraw a juror and continue the case on the ground of surprise, to his disadvantage; and in explanation of his sudden surprise "the plaintiff says that if the defendant will admit that J. W. Adams was the agent of the defendant at the time stated in the petition, and duly authorized to make the contract of insurance sued upon, and that the money was paid, as stated, to defendant, in the petition I will proceed to trial. The defendant says he will admit all but the money matter; the court says that under the admission he will require the plaintiff to proceed to trial; the motion to withdraw juror is overruled;" and the trial proceeded.

On this record it would seem that the court had full authority for the statement in the charge referred to, and all question of the power and authority of the agent Adams to make the parol contract to insure on behalf of defendant, as set out in the petition, was put to rest, so far as this action was concerned.

The second point on the instructions is that they ignore the question of the written policy merging the alleged parol contract. In my opinion there was nothing to submit to the jury on that question. I am unable to find from the bill of exceptions that this so-called written policy was in evidence before the jury. If it was, I am of the opinion that the only charge which the court could properly give them in respect to it would have been that it was *no* contract binding upon the defendant.

In addition to these objections to the instructions, counsel in the brief say: "Goodwin's presence after the fire may have waived or superseded the necessity of notice of loss," but certainly was not proof of it.

The ninth instruction given to the jury was that "if they believe from the evidence that Goodwin was, in the month of September, 1886, the secretary or assistant secretary of the defendant company, and that he at the time saw that the buildings in question were burned, and that he then had notice by his personal observation of such burning of said buildings, and then knew those to be the buildings in question in this action, then this should be sufficient notice to the defendant of the loss by burning of said buildings, if by personal observation the said Goodwin then actually saw that the loss was total and complete, then proof of the extent of the loss, by the plaintiff to the defendant, would not be necessary."

An examination of this instruction shows that the objection of the plaintiff in error to it is confined to the latter clause. In this I concede that, in view of the authority in the case of McCann, *supra*, the court fell into an error in instructing the jury that the presence of Goodwin at the scene of the late fire, and actually seeing that the loss of the buildings was total and complete, did away with the necessity of proof of loss by the plaintiff; but, as we have seen that there was proof of loss, which was not only complete and sufficient proof, undisputed by the defendant, the

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incorporating with it a reference to the alleged written policy is urged as substantive ground of defense to the action.

The only ground of contention against the proof of loss is that it was not made and presented in limited specified time; whereas, under the rule in McCann's case, we have not been able to sustain that objection. The error of the court below, therefore, worked no prejudice to the plaintiff in error.

The instructions given by the court on its own motion, with the exception of the above, meet our approval; those asked by the plaintiff in error and refused by the court, being but the antithesis of those given, their refusal is approved.

Other points raised by the bill of exceptions not being argued by the plaintiff in error in the brief will not be further considered.

Judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

97	553
42	345

CHESTER HOLLOWAY V. NELSON SCHOOLEY.

[FILED OCTOBER 4, 1889.]

1. **Bill of Exceptions: DEFECTS.** A paper in the semblance of a bill of exceptions, but which has not been allowed and certified by the judge who tried the cause in the court below, nor by the clerk of such court, under the circumstances, or in the manner provided by statute, filed with the record in this court will be stricken out on motion.
2. **Practice: INSTRUCTIONS: REVIEW.** In civil cases, instructions by the court to a jury, the giving or refusal of which was not excepted to upon the trial in the court below, will not be considered in this court.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

Stanley Thompson, for plaintiff in error :

Mere voluntary dismissal of a criminal prosecution is not *prima facie* evidence of malice. (*Adams v. Lisher*, 3 Blackf. [Ind.], 445; *Lindsay v. Larned*, 17 Mass., 190; *Ivers v. Bartholomew*, 9 Conn., 309; *Kidder v. Parkhurst*, 3 Allen [Mass.], 393; Cooley on Torts, 185.) The question of probable cause is one of law and fact, and should not have been submitted to the jury except as to the facts. (*Turner v. O'Brien*, 5 Neb., 547; *Ross v. Langworthy*, 13 Id., 495; *Boyd v. Cross*, 35 Md., 194.)

L. S. Irvin, and *John M. Stewart*, for defendant in error :

No exceptions were taken to the instructions below, and there is nothing for this court to review. In the Nebraska cases cited by counsel for plaintiff in error the instructions were too favorable to defendant, and the judgment was for that reason reversed. If the instructions in this case are open to the objection urged by counsel for plaintiff in error, they would for that reason be clearly favorable to him and, if excepted to, would not warrant a reversal.

COBB, J.

This cause is brought on error to review the judgment of the district court of Buffalo county.

Nelson Schooley, the plaintiff below, alleged that the defendant, Chester Holloway, on December 18, 1886, falsely and maliciously, and without reasonable and probable cause, complained under oath before T. J. Mahoney, a justice of the peace of Gibbon township, in said county, that on December 13, 1886, the plaintiff went to the house

occupied by James Burgess, in said county, and broke the lock of the door of said house and took therefrom 200 bushels of oats, the property of defendant, which property was unlawfully stolen and taken away by the plaintiff; that the defendant caused a warrant to be issued by the said justice of the peace upon his said complaint for the apprehension of plaintiff, and maliciously, and without probable cause, caused the plaintiff to be arrested on said charge and to be held a prisoner by the constable of said township for the period of one day; that on the day set for trial, December 22, 1886, the defendant dismissed his complaint and the plaintiff was discharged of said crime and the prosecution was ended; that the plaintiff expended two dollars in his defense, and was prevented from transacting his business for two and a half days, to his damage seven and a half dollars, by means of which premises the plaintiff has been put to great trouble and annoyance to procure his discharge from arrest and prosecution and has been prevented from transacting his business and has been greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered great anxiety and pain of body and mind, to his damage in the sum of \$2,000, for which he asks judgment.

The defendant answered denying specifically that he made a complaint on December 18, 1886, under oath falsely, maliciously, and without probable cause before a justice of the peace of Gibbon township, in said county, as set out in plaintiff's petition.

II. Denying specifically that he caused to be issued by the said justice, falsely, maliciously, and without probable cause, a warrant for the arrest of the plaintiff.

III. Denying that on December 22, 1886, he dismissed the said complaint against the plaintiff, but that the same was dismissed at the instance of George E. Evans, who was acting in the capacity of state prosecutor.

IV. That he admits that he made the complaint alleged,

but had reasonable and probable grounds for believing the plaintiff guilty as in said complaint and warrant charged.

V. That he denies specifically that the plaintiff was put to great trouble and annoyance and expense, or was brought into public scandal and disgrace, or that, by reason of the premises, plaintiff was damaged in the sum of \$2,000, or in any other amount, or on any other account, connected with said charge and complaint.

There was a trial to a jury, with verdict for the plaintiff for \$500 damages. The motion of defendant to set aside the verdict being overruled, judgment was entered for the amount of the verdict and costs, to which the defendant excepts, and forty days allowed in which to reduce bill of exceptions to writing.

The plaintiff in error assigns the following errors in the trial in the court below :

1. Excessive damages awarded by the jury, unwarranted by the evidence and the instructions of the court on its motion, appearing to have been given under the influence of passion and prejudice.
2. Errors excepted to on the trial.
3. Error of instruction No. 1, by the court on its own motion.
4. Instructions Nos. 1, 2, 3, 4, 5, and 6, on request of plaintiff.
5. In refusing Nos. 5 and 6, on request of defendant.
6. The verdict is not sustained by sufficient evidence.
7. In overruling the motion for new trial.

On motion of defendant in error to strike from the files the bill of exceptions presented, for the reason that the same had not been allowed and certified by the court below, nor filed in the office of the clerk of the district court, but was an unauthorized bill of exceptions, the motion was sustained. The bill of exceptions having been stricken out of the record, so much of the errors assigned as refer to excessive damages, errors of law, and want of sufficient

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evidence at the trial cannot now be considered in this court, as those questions depended upon the disclosures of the bill of exceptions.

The other errors assigned are based upon the giving, or the refusal to give, certain instructions by the court to the jury. By inspection of the record it does not appear that either the instructions given by the court on its own motion, or those given at the request of the plaintiff, or those requested by the defendant and refused by the court, were excepted to by the plaintiff in error upon the trial. The province of this court of review to interpose and consider the errors assigned is, therefore, at an end, so far as this cause is concerned, it being a settled rule that the giving or refusal of instructions to a jury, unless exceptions shall be taken, and made of record at the time, by the complaining party, will not be considered as grounds for reversal in the supreme court. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

MARK LEVY V. THE FIRST NATIONAL BANK OF
HASTINGS.

[FILED OCTOBER 4, 1889.]

1. **Principal and Agent.** A principal is bound by the acts of his agent to the extent of the apparent authority conferred on him. (*Webster v. Wray*, 17 Neb., 579; *Lorton v. Russell*, ante, 372.)
2. —: **NEGOTIABLE INSTRUMENTS: FORGERY.** A check drawn by I. W. F., paymaster, on J. G. T., assistant treasurer B. & M. R. R. Co. in Neb., to the order of F. L. D., was presented to the Nat. Bk. of H. by L. with a forged indorsement of the name of F. L. D. thereon, and the money received by L. from the bank, which, having accounted to F. L. D. for the amount of the check, sued L. therefor. *Held*, That L. was liable.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Capps & McCreary, for plaintiff in error:

The act of a special agent outside the scope of his authority is void, unless ratified, but does not affect the validity of what he was authorized to do. (*Davenport Savings Association v. Ins. Co.*, 16 Ia., 74; *Bangor Boom Corporation v. Whiting*, 29 Me., 123.) All persons are bound to inquire into the extent of a special agent's powers. (*Wheeler v. Plattsmouth*, 7 Neb., 279.) An agent can bind his principal only while acting within the scope of his authority. (*Matthews v. Sowle*, 12 Neb., 404; *Mechanics' Bank v. R. Co.*, 3 Kernan [N. Y.], 599; *Mussey v. Beecher*, 3 Cush. [Mass.], 511; *Coleman v. Riches*, 16 C. B. [81 E. C. L.], 104; *Grant v. Norway*, 10 Id., 665.) The bank placed it in the power of Abbott and Dudley to do the wrong and must therefore suffer. (*Homan v. Laboo*, 2 Neb., 297; *Dinsmore v. Stimbert*, 12 Id., 439.) Were all the parties equally innocent the law would leave them undisturbed. (*Bank v. Bank*, 17 Mass., 33.) Only those who appear on a negotiable instrument can be held liable for its non payment. (*Webster v. Wray*, 19 Neb., 558, and cases cited; *R. Co. v. Benedict*, 5 Gray [Mass.], 561; Edwards on Bills, 80; Chitty on Bills, 27.)

J. B. Cessna, for defendant in error:

Violation of private instructions by an agent acting under a general authority will not relieve the principal. (Story on Agency, secs. 126, 127-133; *Minler v. R. Co.*, 41 Mo., 503; *Cruzan v. Smith*, 41 Ind., 288; *Thurber v. Anderson*, 38 Ill., 167; *Palmer v. Cheney*, 35 Id., 281; *Noble v. Nugent*, 89 Id., 252.) Partial acceptance by the principal of a contract made by an agent adopts the whole. (*McKeigan v. Hopkins*, 19 Neb., 33; *Mortgage Co. v. Hen-*

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derson, 13 Id., 159; *Rich v. Bank*, 7 Id., 201; *Joslin v. Miller*, 14 Id., 91; *Beidman v. Goodell*, 9 N. W. Rep., 900; *Laurence v. Lewis*, 133 Mass., 161; *Nicholls v. Shafer*, 30 N.W. Rep., 383; *Bank v. Bank*, 16 Wis., 125; *McCormick v. Peters*, 24 Neb., 70.) Acceptance of an agent's unauthorized acts amounts to ratification. (1 Am. and Eng. Ency. of Law, 432 ff.; *Tooker v. Sloan*, 30 N. J. Eq., 394; *Jones v. Atkinson*, 68 Ala., 167; *Perkins v. Boothby*, 71 Me., 91; *Guilford v. Ashbaugh*, 44 Ia., 519.) The exceptions should present specifically the objections relied on. (*Lowrie v. France*, 7 Neb., 192; *Tomer v. Densmore*, 8 Id., 384.) By the assignment by delivery of the forged draft, under the facts disclosed, plaintiff in error is liable. (*Smith v. McNair*, 19 Kas., 330; *Snyder v. Reno*, 38 Ia., 329; *Cabot Bank v. Morton*, 4 Gray [Mass.], 156; *Jones v. Ryde*, 5 Taunt., 488; *Wilkinson v. Johnson*, 3 B. & C., 428; *Gurney v. Womersly*, 28 Eng. Law and Eq., 256; *Terry v. Bissell*, 26 Conn., 23; *Byles on Bills*, 278.)

COBB, J.

This cause is brought to this court on error, by the defendant in the court below, for the review of the judgment of the district court of Adams county.

The First National Bank of Hastings brought an action against Mark Levy, alleging that it was an organization of the government of the United States; that on August 8, 1887, the defendant sold a bill of goods to a person unknown, who represented himself as F. L. Dudley, taking in payment for the goods a check, or order as follows:

"Roll Faber.

No. 5443.

"BURLINGTON & MISSOURI R. R. IN NEB.

"\$90.

OMAHA, June 30, 1887.

"J. G. Taylor, asst. treasurer, pay to the order of F. L. Dudley, ninety dollars; payable at the Nebraska National Bank, Omaha; First National Bank, Lincoln; First Na-

tional Bank, Denver. Paid, Omaha, August 10, 1887,
Nebraska National Bank. J. W. FLOYD,

"Paymaster."

Endorsed: "Endorsement must be made in ink, must be technically correct—if by a X should be witnessed, and residence of witnesses stated. Signature of employee, F. L. Dudley. Witness, Myron Abbott, residence * * * Pay Omaha National Bank, Omaha, or order, for collection, account of First National Bank, Hastings, Nebraska, Geo. H. Pratt, cashier."

That on August 9 the defendant sold or procured said note or draft, to be sold and assigned by delivery to the plaintiff, the defendant receiving therefor ninety dollars in cash; that the draft was immediately presented for payment, and payment refused for the reason that F. L. Dudley, the payee, never endorsed said check, draft, or order, and his signature was a forgery; that on August 15, the plaintiff received notice of the refusal, and gave notice to the defendant, requesting him to redeem the draft, and pay the amount, which he refused to do. Wherefore the plaintiff asks judgment against the defendant, with interest on the amount from August 9, 1887.

The defendant answered denying each and every allegation of the plaintiff.

There was a trial to the court, without a jury, with findings for the plaintiff and judgment for \$95.26 and costs.

The defendant's motion for a new trial having been overruled the cause is brought to this court on the following errors:

1. That if the plaintiff was entitled to recover anything in the court below, it should not have been for a greater sum than the defendant actually received, \$6.30.
2. That the judgment is not supported by evidence that the plaintiff sustained any loss, as alleged in the petition.
3. The judgment is contrary to law and not supported by evidence.

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4. That the evidence, as shown by Exhibit "A," establishes the fact that the plaintiff never lost anything as alleged, and said evidence was introduced by the plaintiff on the trial in the court below.

5. That the court overruled the defendant's motion for a new trial.

It appears from the bill of exceptions that in August, 1887, the plaintiff in error was engaged in keeping a gentlemen's furnishing store at Hastings, Adams county. In this store were employed Myron H. Abbott, as under-clerk, Moses H. Levy, brother of the proprietor, as "confidential and financial man, and general manager and assistant bookkeeper," in the proprietor's absence. On August 9 the proprietor was absent in New York, and in the east, purchasing merchandise for the fall season's trade. The two clerks, Levy and Abbott, were present, in charge of the store, when a man, an entire stranger, came in and bought of Abbott a bill of goods amounting to \$7.07, and offered the check mentioned in payment. Abbott took the check to Levy to ascertain if there was any money in the drawer to cash it, and Levy answered there was not. Abbott said that he would then have to go to the bank to get it cashed and Levy said that he (the man) would have to sign it. The man then wrote the name of the payee of the check—as that of his own—on the back of it, Abbott took it across the street to the bank, got it cashed, received the full amount, returned to the store with the money, took out the amount of the bill of goods sold, and gave to the customer the balance, putting the \$7.07 in the cash drawer of the store. The customer received the money, left his package of goods in the store, and departed. He makes no subsequent appearance in the transaction.

It appeared upon the cross-examination of Abbott, on the trial, that he signed the back of the check as a witness to the stranger's signature. The check was forwarded by the bank and presented for payment, August 10, to the Ne-

braska National Bank, of Omaha, and by it refused. The check was identified from the deposition of J. G. Taylor, assistant treasurer of the railroad company, on whom it was drawn, and the endorsement of F. L. Dudley, the payee, was proven to be a forgery.

Upon the trial in the district court, as well as the argument of counsel in this court, the point relied upon seems to have been the want of authority of Abbott, the clerk, to bind his employer, the plaintiff in error, or to create a liability on his part, in the manner and by the means set out in the pleadings and proof.

The witness, Abbott, on his cross-examination, was asked :

Q. State as to whether Mr. Levy gave any instructions as to how the business should be conducted in his absence.

A. He said we should be careful in taking checks to know the signatures.

Q. You say that this transaction was without the knowledge or authority of Mr. Levy ?

A. He was not there, but he knew that I had taken checks.

Q. How many had you taken ?

A. I could not tell.

Q. What one check had you ever taken ?

A. John Blank's, and Burger Bros.'

Q. By the court : Were they the same checks as this ?

A. No, sir ; I had taken this kind of check though.

Q. By the court : Do you say that you took checks of that kind before and after this, and that Mr. Levy knew it ?

A. Yes, sir.

The defendant (plaintiff in error) testified that the witness Abbott was in his employ as a boy to sell goods, clean out the store, and fix up the store ; that he had no charge of the books, or of the business whatever ; and continued his testimony in answer to the question : What authority

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had he of you, at any time, as to receiving checks in payment for goods ?

A. He never had any authority ; I never allowed, when I was in the store, any of my clerks to receive any checks whatever, except they turn them over to me to examine.

The witness having stated that he was absent at New York, and the case, at the time of this occurrence was asked the further

Q. What instructions, or order, if any, did you leave with your clerks, before you went away, as to the taking of checks ?

A. I told Abbott and another clerk, at the time I left, not to take any checks whatever, as the day before I heard of some spurious checks. Also I told them they would not be allowed to deposit any checks in the drawer for selling any merchandise, and charge it up to my money orders and bank business, without permission from my head clerk, who kept the books.

Q. Was your head clerk present ?

A. Yes, sir, and heard it. I told him I expected him to see to it in every respect.

Q. What is your head clerk's name ?

A. Moses H. Levy.

On cross-examination he stated that he left Moses H. Levy as manager of his business ; that he had control of everything in his absence, as far as he would leave it with any one.

Taking all this evidence together, it is apparent that there was authority in Levy and Abbott, the one as head clerk and manager, the other as clerk and salesman, to transact all the business of the store, and of its retail dealings. And I think it must be conceded that Abbott had the apparent authority to carry the check to the bank, going directly from the chief clerk and manager of the store, and acting as messenger, in having the check cashed at the bank. And if he had this apparent authority, though

the real authority expressed and delegated by the plaintiff in error did not extend to bank transactions, and while the bank and its officers had no notice of any limitation placed upon his authority, they were still justified in dealing with him to the extent of his apparent authority. There was nothing in the transaction itself to awaken the officers' suspicions of fraud in the check, but everything, on the face of it, to invite confidence in its regularity.

We have recently examined the questions of limited and of apparent agency in the case of *Lorton v. Russell* at the present term, and have held that an implied agency in the necessary transactions of an accustomed business is a delegated authority.

I therefore come to the conclusion that in this court of review the case stands the same as though the plaintiff in error had personally carried the check to the bank and cashed it, the same as his clerk and agent, Abbott, did.

As to the liability which the law devolves upon him in that case, to make the check and its endorsement good, there can be no doubt. The question involved was considered and decided in this court in *Walsh v. Rogers*, which was twice considered and reported, 12 Neb., 28; 15 Id., 309. It was also before the supreme court of Connecticut, and decided in like manner in *Terry v. Bissell*, 26 Conn., 23, cited by defendant in error, and which furnishes an exhaustive argument supported by numerous citations of authority. The case of *Smith v. McNair*, 19 Kansas, 330, also cited by counsel, is likewise an instructive and convincing precedent in support of the view maintained.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM NOLLKAMPER V. WYATT & ABBINGTON.

[FILED OCTOBER 4, 1889.]

1. **Replevin: AFFIDAVIT: AMENDMENT: VARIANCE.** In the affidavit for replevin and original petition the property was described as "seven head of horses," marked by certain brands, set out. In the amended petition, with other descriptive terms, three were described as "three mares," setting out the brands as in the original; three others as "three horses," setting out the brands as in the original; and one as "one colt," also setting out the brand thereon: *Held*, There was no departure.
2. **Instructions given and refused**, as stated in the opinion, considered and *held*, properly given and refused.
3. **The Judgment examined and found sufficient.**

ERROR to the district court for Holt county. Tried below before KINKAID, J.

Utley & Benedict, for plaintiff in error:

The proof must correspond to the affidavit and writ (Wells on Replevin, sec. 182); and the latter must specify the property to be replevied. (*Id.*, sec. 169; *Welch v. Smith*, 45 Cal., 230; *Stevens v. Townsend*, 1 Mich., 92; *De Witt v. Morris*, 13 Wend., 456.) The description was insufficient to convey title and hence defective. (*Price v. McComas*, 21 Neb., 195; *Ayres v. Adair County*, 61 Ia., 731; *Ormsby v. Nolan*, 28 N. W. Rep., 569; *Barr v. Cannon*, *Id.*, 413; *De Witt v. Morris*, *supra.*) It is necessary that the identical property be specifically described to prevent the possibility of trying the same issues twice. (*Welch v. Smith*, and other cases *supra.*) If the property is not susceptible of definite description the court cannot acquire jurisdiction. (Wells on Replevin, sec 186f; *Parrell v. Circuit Judge*, 39 Mich., 542; *Welch v. Smith*, *supra.*) The same rule should apply in case of failure to describe,

hence no subsequent amendment could confer jurisdiction in this case. (*Murphy v. Lyons*, 19 Neb., 689; *Brondberg v. Babbett*, 14 Id., 517; *Cooban v. Bryant*, 36 Wis., 605; *Strugham v. Board*, 24 Id., 594; *Malone v. Clark*, 2 Hill [N. Y.], 657; *Stevens v. Boswell*, 2 J. J. Marshall [Ky.], 29.) The amended petition should have been stricken from the files, as it presented issues different from those tried below. (*Stevens v. Townsend*, and *De Witt v. Morris*, *supra*; *Fuller v. Schrøder*, 20 Neb., 631; *O'Leary v. Iskey*, 12 Neb., 136.) An instruction assuming the existence of a material fact is erroneous. (*Paine v. Kohl*, 14 Neb., 581; *Newton Wagon Co. v. Diers*, 10 Id., 284; *Hand v. Langland*, 25 N. W. Rep., 122; *Lewis v. Rice*, 27 Id., 867; *People v. Hare*, 24 Id., 843; *Express Co. v. Jenkins*, 25 Id., 549; *Duffy v. Hickey*, 23 Id., 707; *McPherson v. Wiswell*, 19 Neb., 117; *Meredith v. Kennard*, 1 Neb., 312; *Meyer v. R. Co.*, 2 Neb., 319.)

M. F. Harrington, for defendants in error:

The trial in the county court without objection operated as a waiver of all defects in the affidavit. (*Wilson v. Macklin*, 7 Neb., 52; *Craines v. Cunningham*, 13 Neb., 205; Wells on Replevin, sec. 657; *Smith v. Emerson*, 16 Ind., 355; *Baker v. Dubois*, 32 Mich., 92.) The description is such as would have been good in a chattel mortgage and is sufficient. (*Corbin v. Kincaid*, 33 Kas., 649; *King v. Aultman*, 24 Id., 246; *Mills v. Lumber Co.*, 26 Kas., 574; *Brock v. Barr*, 30 N. W. Rep., 652; *Wheeler v. Becker*, 28 Id., 40; *Foredice v. Rinehart*, 11 Or., 208; Code, sec. 145.)

COBB, J.

This case is brought on error from the district court of Holt county. It was an original action in replevin for the possession of seven head of horses tried to a jury in the

county court of Holt county, with judgment for the defendant, and appealed by the plaintiffs to the district court. The plaintiffs there alleged that they were the owners and entitled to the possession of seven head of horses marked on the left hip with an open A, branded thus "A," three of which have the M cross, branded thus "M₊," and valued at \$100 each; that the defendant wrongfully detained the property from the possession of the plaintiffs, and had wrongfully detained the same for sixty days, last past, to the damage of the plaintiffs, \$100; and the plaintiffs pray judgment for the return of the property, or for the value thereof, and for damages and costs.

The defendant demurred to the petition on the grounds that the facts alleged did not entitle them to judgment; and that the property claimed by plaintiffs was not sufficiently described to warrant taking any testimony as to the ownership of the same; which demurrer was sustained, and the plaintiffs were given leave to amend their petition, alleging that they are copartners doing business in Nebraska under the firm name of Wyatt & Abbingtion; that they are the owners of and entitled to the immediate possession of the following property: Seven horses branded open A, thus "A," on the left hip, and more particularly described as one bay mare branded open A, thus "A," on left hip, and M cross, thus "M₊," on left hip; one bay mare branded open A, thus "A," on left hip, and M cross, "M₊," on left hip; said two mares are the only bay mares with said brands in possession of defendant; also two white horses branded open A, thus "A," on left hip, being the only white horses with said brand in the possession of defendant; also one dark brown mare branded open A, thus "A," on left hip, being the only dark brown mare with said brand in the possession of defendant; also one brown horse branded open A, thus "A," on left hip, being the only brown horse with said brand in the possession of defendant; also one yearling colt branded open A, thus "A," on left

hip, being the only yearling colt with said brand in the possession of defendant; of the value of \$700, all of said property being detained and kept by the defendant in Holt county, Nebraska, and being the same taken on an order of replevin in the county court and described in the plaintiffs' affidavit for replevin.

The defendant's motion to strike out the amendment was made on the grounds, (1) that it states a different cause of action from the one in the court below; (2) that from it it appears that the property in controversy is not the same as described in the court below, in the affidavit and officer's return; (3) that the issues are not now the same as in the court below; which was overruled. The defendant answered denying each and every allegation of the amended petition. There was a trial to a jury and a verdict with findings that the right of property, and the right of possession thereto at the commencement of this action, were in the plaintiffs, assessing damages at one cent.

The special findings of the jury were:

1. That the plaintiffs, previous to the action, demanded of the defendant possession of the property in controversy, in person.
2. That previous to the action the defendant advised the plaintiffs to bring a replevin suit to recover possession of the property involved.
3. That the defendant refused the plaintiffs absolutely to deliver the property in controversy to them, either with or without proof of plaintiffs' ownership.
4. That the defendant refused to deliver possession of the property to the officer with process without the service of the process.
5. That the plaintiffs made demand, before the beginning of this action, and the defendant refused to give possession of the property involved.
6. That the plaintiffs, in making their demand of defendant for the possession of the property, reasonably explained their claim thereto.

Additional special finding:

That the property described in the petition and in the evidence is the same identical property described in the affidavit of replevin and taken on the order of replevin in the county court of Holt county.

The defendant's motion for a new trial was overruled and judgment for the plaintiffs entered on the verdict; to which the plaintiff in error duly excepted on the record, and brought the cause to this court on an assignment of errors in his petition, numbering twenty.

The first point presented and argued is that the court erred in overruling the defendant's motion to strike out the plaintiffs' amended petition; and he states the substance of his motion to be that the property described in the amendment is not the same property mentioned in the original petition and the affidavit in replevin. If the plaintiff in error is correct in the proposition—if the plaintiffs below declared, in and by their amended petition, for different articles of property in fact from those described in the affidavit for replevin, on which the suit was predicated, then it must be conceded that the objection is well taken, and that error obtained. But on the other hand, if the amendment described the same property, by an additional and more particular description merely, then the point of error does not seem to be well taken; and this is the conclusion to which I have arrived upon a careful examination of the two alternatives. I do not propose to elaborate the point. The petition, which is but little more than a copy of the plaintiff's affidavit, as well as the amendment, is set forth in the statement and will, I think, fully justify the conclusion.

It is true, as stated by counsel, that by the affidavit and original petition the property is described as "seven head of horses," marked with certain brands, and in the amendment, among other descriptive terms, three are described as mares with the same brands, three horses with the same

brands, and one colt with like brand. The generic term horse includes the three species described as horse, mare, and colt; hence is but a more general description of the same animals and does not include other and different animals not marked with the same brand.

In cases where the identity of property is the principal point of controversy, a specific and technical description of articles is frequently deemed necessary, but the exigencies of this case call only for a consistent and convincing description.

The plaintiffs claim to be entitled to the possession of certain live stock of the horse kind found in the possession of defendant, which claim is denied. The right of possession was the sole question to be determined by the jury; and it was only necessary to couple their inquiry with the identical property and not with property answering to a technical equine description. And while it is not my purpose to decide questions not presented, I think it will appear clearly that the error is insignificant, by the observation that the original petition demurred to was fully sufficient for the purposes of recovery in this case. The amendment, however, was no departure from but was a restatement of the original, with unimportant additions; and while unnecessary, as I conceive, it is open to no objection.

While we overrule the objection as inapplicable in this instance, we fully concede the point made by counsel and the correctness of the rule which he cites, "that on the trial of a cause appealed to the district court the same issues should be presented as were presented in the court from whose judgment the appeal was taken."

The second error presented is that the court erred in admitting any evidence whatever on the part of plaintiffs, for the reason that the issues presented in their amended petition were different and contrary from those tried in the court below. If I am correct in the views expressed, it is

but necessary to refer to that fact to dispose of this error without further consideration.

The third error alleged is that the court erred in receiving any evidence to prove the allegation of plaintiffs, for the reason that their original petition did not describe any property with sufficient identity to warrant the court in taking oral testimony to prove the ownership; or, in other words, that the petition "was insufficient to support a judgment." It was probably with this view and in consideration of the authorities cited in support of it that the court below sustained the demurrer to the original petition. If so, then, as I have said in my opinion, the original petition was sufficient; but if not, and the amendment was, as I conceive it to be, only an elaboration and extension of the original and not a departure from it, no objection on that behalf is competent to be taken; and it was upon that that the cause was tried in the district court.

The fourth error is simply a restating of the same proposition and need not be again considered.

The next error presented in the brief is designated the tenth, and is directed to the refusal of the court to give the 5th, 6th, 7th, 8th, 9th, and 13th instructions to the jury asked for by the defendant below, the plaintiff in error.

The court on its own motion charged the jury in five instructions. In the first and second it stated fully and impartially the issues found and joined by the pleadings, and also that the burden of proof devolved on the plaintiffs by a preponderance of all the evidence, that at the time of the commencement of the suit they were the owners and were entitled to the immediate possession of the property described in the first paragraph of the instruction, and that if the plaintiffs had so established their case they should find for them; but that if the plaintiffs had not proven, by such preponderance of evidence, that at the time and before the bringing of this action they were the owners and entitled to the immediate possession of said property,

they should find for the defendant; that the real question was whether the plaintiffs were, at the commencement of the action, entitled to the immediate possession of the property; if they were not, the jury should find for the defendant, for the sufficient reason that he was found in the possession of it at the commencement of the suit.

III. That property stolen may be recovered by the owner from any in whose possession it may be found, and if the jury believed, from evidence, that the plaintiffs, at the beginning of this action, were the owners and entitled to the immediate possession of the property, and that the same had been stolen from them in the county of Cheyenne, Nebraska, and driven to the premises of defendant in Holt county, then, though the defendant may have purchased and paid for the same in perfect good faith, the jury should find for the plaintiffs.

IV. That the jury will be required to answer whether the plaintiffs made a demand for the possession of the property before the beginning of this suit, and in determining that question they will consider all the evidence tending to show a conversation between plaintiffs' representative and defendant before this action was begun, and if they believe, from the evidence, that before the beginning of the suit defendant was informed by the plaintiffs, or one of their partners, that they were the owners of the property and claimed possession of it without suit, this would justify the jury in finding that a demand had been made for possession of the property before suit was begun; or if, during such conversation between a member of plaintiffs' firm and defendant, before suit, such partner informed defendant that plaintiffs were the owners of the property, and desired possession of it, and defendant refused to give it up without suit, then the facts would justify the jury in finding that a demand was made; or if they believe that during such a conversation between said parties, before suit, that the defendant advised the plaintiffs to begin an action of replevin

Nollkamper v. Wyatt.

to recover possession of the property, after having been informed that the plaintiffs were the owners and desired possession of the same, with a reasonable explanation of their claim, then, from such facts or conversation, the jury might find that a demand had been made previous to the bringing of the suit.

V. That possession of personal property raises a presumption of ownership in the person in possession, which may be overcome by evidence, and the jury will give the defendant the benefit of such presumption on account of his possession of the property at the beginning of this suit, and on account of the possession of defendant's vendor, if such possession has been proven, but if the plaintiffs have proven by a preponderance of all the evidence that, at the time of the bringing of the suit, they were the owners and entitled to the immediate possession of the property, then such possession of the defendant, or of his vendor, would be of no avail, and the jury should find for the plaintiffs. If, however, the plaintiffs have not made out their case by a preponderance of all the evidence, then the possession alone of defendant would entitle him to prevail, and the verdict would be for defendant.

The court also, at the request of the defendant, gave to the jury six additional instructions. In the first, were restated the issues of the case; in the second, that they were the sole judges of the credibility of witnesses, and of the weight to be given to each and all of them, and were not bound to take the testimony of any as absolutely true, if from all the evidence they did not believe it, and should not do so, if satisfied, from all facts and circumstances, that such witness is mistaken in the matter testified to; in the third, that the preponderance of evidence is not alone determined by the number of witnesses testifying to particular facts; and in determining that preponderance the jury were to consider the opportunities of the witnesses for seeing or knowing that to which they testified, their con-

duct and demeanor while testifying, their interest or unconcern in the result, the probability or improbability of the truth of their statements, in view of all other facts and circumstances of the trial, and from all of these considerations determine upon which side are the weight and preponderance of the evidence; in the fourth, that while the statute renders parties to a suit competent witnesses, the jury are the judges of the credibility and weight of their testimony, and in determining both, the fact that they are interested in the result, if it so appears, may be taken by the jury, and be given only such weight as they think it entitled to, under all the circumstances and evidence of the case, and in view of the interest of the witness; in the tenth of the series, fifth given, the jury were again instructed as to the presumptions arising from defendant's possession of the property at the time of the bringing of the suit, and that unless and until the plaintiffs shall have established their right to the same, and if the plaintiffs had failed to establish such right, they would find for the defendant, whether he offered any evidence or not; in the twelfth of the series, sixth given, that a demand by the officer who served the writ, or a demand by the plaintiffs, at that time would be too late; that the demand must be made before any process is issued.

As before stated, the court refused of the defendant's series Nos. 5, 6, 7, 8, 9, 11, and 13.

In the fifth, the court was asked to instruct that the defendant, being in possession, was presumed to be the owner, and would be protected in such possession, and no defect in title would warrant the jury in giving the property to the plaintiffs, who must rely solely on the strength of their own title, to be proven by a preponderance of the evidence.

This was properly refused; a sufficient reason is that the jury had been twice charged on the subject, first by the court voluntarily, and again, at the defendant's request, in the tenth instruction.

In the sixth, it was asked to repeat substantially the presumptions in favor of the defendant's possession of the property which had been twice given and once refused, and was deemed supererogation. In the seventh, the fifth and sixth were repeated, and it was necessarily refused. In the eighth, that it was not enough that the plaintiffs proved themselves the owners of and entitled to the possession of property of the same kind, quality, and of like description of that in controversy, but must prove by a preponderance of the evidence that they are the owners of the identical property.

I see no objection to the affirmative of this proposition, but the correlative of it had already been given in better sense and less objectionable form. It does not state the law; nor is it true, as a maxim, that the ownership of property must necessarily be proven to maintain the action of replevin. But the right to its immediate possession must always be proven to abide in the plaintiff to enable him to recover. It by no means follows that the general owner, and no other, is entitled to the immediate possession of property. There was no error in the refusal to give the instruction in the language presented.

In the ninth, that the fact that defendant bought the property of a stranger, who had left the country, raised no presumption that the property was stolen by the stranger. Having it in possession, he was presumed to be the owner until the contrary is shown.

The law of this proposition had been sufficiently given; its terms were objectionable as being voluntary and argumentative and were properly refused.

In the eleventh, that if the jury find that the defendant came lawfully into possession of the property they should find for defendant, unless they further find that the plaintiffs, prior to the bringing of the suit, made a demand for the property and the defendant refused to surrender it.

The court had fully and impartially charged the jury on the propositions of possession and demand for possession

of the property, and the application of the evidence therein. No further instructions seem to have been needed. Had it been of importance, the instruction presented was objectionable, for it was not necessary to prove, in any alternative, that the defendant refused to surrender the property on demand; that he failed to surrender it is all that need appear.

And in the thirteenth the court was asked to instruct that if the jury found that a demand was made for the property, and found further that the refusal to surrender possession was accompanied with a statement by defendant that he would surrender it upon reasonable proof of plaintiff's right to it, and should find further that the action was begun before such reasonable proof was furnished, then they would find for the defendant; that the demand must be certain, and the refusal absolute.

As before said, the jury had been impartially charged on this branch of the case, and on these propositions. It was not error, therefore, to have refused further instructions thereon. Again, also, as has been stated, it is not believed to be the law that a refusal must be absolute in such case; it is the *failure* to comply with the demand which constitutes the right of action, not the meretricious words which precede the failure.

Upon the whole case the jury was fairly instructed, and there does not appear to have been the errors alleged, in giving and refusing instructions, by the court.

The nineteenth and last assignment presented and argued by counsel, in the brief, is that the court erred in not rendering judgment for the possession of the property.

If it were admitted that the judgment in favor of the plaintiffs is not as ample as it should have been, the question would then arise, whether the plaintiff in error is prejudiced thereby; and we answer that he is not. But the judgment is believed to be sufficient. Section 192 of the Code provides that "in all cases, when the prop-

Bair v. Bank.

erty has been delivered to the plaintiff, where the jury shall find for the plaintiff on an issue joined, or on inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which, with costs of suit, the court shall render judgment for defendant." This is the only judgment provided for in this case, and it is believed to be sufficient. The property having already been delivered into the possession of the plaintiffs, the law leaves it there, and possession being the only ground of controversy, the labor of the law is at an end.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

SAMUEL BAIR ET AL. V. THE PEOPLE'S BANK.

[FILED OCTOBER 4, 1889.]

27	577
45	710
27	577
54	464
37	577
52	614

1. Negotiable Instruments: CAPACITY TO SUE: ESTOPPEL.

An action was brought by "The People's Bank" against the makers of a promissory note and personal service had on the same and judgment rendered by default. Afterwards the makers of the note took the case on error to the district court, where the judgment was affirmed. *Held*, That while the name of "The People's Bank" would not of itself show the legal capacity of the plaintiff, yet if the note was given to the bank by that name the makers could not deny its right to bring suit thereon; and as error must affirmatively appear, and the record showing that a note was introduced in evidence, it must be presumed to have been given to the bank by that name.

2. Summons: SERVICE BEYOND COUNTY: AUTHORITY OF PROBATE JUDGE.

In an action brought in a county court on a promissory note to recover less than \$200, where one or more of the defendants is properly summoned in that county, the judge

has authority to issue a summons to other counties of the state to bring in other joint or joint and several obligors.

Quære: Whether, under section 1085 of the Code, this power may not be exercised by justices of the peace.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Maule & Sloan, for plaintiff in error:

The description "The People's Bank," plaintiff, is not sufficient under our statute (Code, sec. 24; *B. & M. R. Co. v. Dick*, 7 Neb., 213); security for costs was not given as required, hence the court acquired no jurisdiction. (*Id.*; Code, sec. 26.) There was apparently no bill of particulars as required by sec. 1086 of the Code, and therefore no pleading sufficient to support a judgment. The court lost jurisdiction of the persons of defendants. (Code, secs. 959, 960, 961, 970.) The provisions of the Code authorizing a county judge to issue a summons to other counties do not apply when he acts as justice of the peace.

R. W. Sabin, for defendant in error:

"The People's Bank" is a resident corporation, and its corporate existence cannot be denied by maker of note. (*Platte Valley Bank v. Harding*, 1 Neb., 461; *Haskins v. Bank*, 12 Neb., 39.) There was a sufficient docket entry. A county judge may issue a summons to other counties when he acts as a justice of the peace. (*Ghost v. Hill*, 11 Neb., 472; Comp. Stats. 1887, ch. 20, secs. 23, 24.)

MAXWELL, J.

This action was brought by the defendant in error against the plaintiffs in error and O. C. Sabin in the county court of Gage county and judgment rendered in favor of the defendant in error. The case was then taken on error to the district court, where the judgment was affirmed. The record of the trial before the county court is as follows:

"THE PEOPLE'S BANK

v.

SAMUEL BAIR,
ELEANORE BAIR, AND
O. C. SABIN.

"April 10, 1888.—Plaintiff files bill of particulars, claiming judgment against defendants in the sum of \$100 and interest at ten per cent from November 11, 1886, as money due and unpaid on a certain promissory note. Summons issued to the sheriff of Fillmore county, Neb., returnable April 21, 1888, at 10 o'clock A. M.

"April 17, 1888.—Summons returned endorsed: 'Served by delivery to and leaving with the said Samuel Bair and Eleanore Bair a true and certified copy of this writ, with all the endorsements thereon. W. I. Carson, sheriff of Fillmore Co., Nebr. Fees, \$2.95, paid by People's Bank.'

"April 21, 1888.—It appearing to the court that no service of summons has been made on defendant Sabin, this case continued until April 30, 1888, at 10 o'clock A. M.

"April 23, 1888.—Comes the above named O. C. Sabin and enters voluntary appearance herein.

"April 30, 1888.—Cause continued until May 17, 1888, 9 o'clock A. M., on application of plaintiff's attorney.

"May 17, 1888, 9 o'clock A. M.—Plaintiffs by attorney in court; defendants come not but make default; default of defendants taken; after waiting one hour, and defendants still failing to appear, plaintiff demands trial; trial proceeds, note sued on offered in evidence, and the court being duly advised in the premises, finds there is due the plaintiff from the defendants or either of them the sum of \$115.15 on said note as found due. It is therefore considered by the court that plaintiff recover from said defendants or either of them the sum of \$115.15 debt, and costs of suit taxed at \$6.

O. M. ENLOW, *County Judge.*"

Two questions are presented by the record: First, Had the bank legal capacity to sue? and second, as to the authority of the county judge to issue a summons to be served on some of the defendants in another county. Section 24 of the Code provides that any company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued by such usual name as such company, partnership, or association may have assumed to itself, or be known by, and it shall not be necessary in such case to set forth in the process or pleading, or to prove at the trial, the names of the persons composing such company.

If the People's Bank is a partnership, it should be alleged that it was formed for the purpose of carrying on business in this state, etc., and if a corporation its corporate character should be pleaded.

In either case, if on the trial the want of legal capacity to sue appear, the plaintiff will fail in the action.

No copy of the note is set out in the record and none of the evidence is before us, so that we are unable to determine whether or not the note was given to the bank. If it was so given by that name the makers cannot deny the legal existence of the bank. (*Platte Valley Bank v. Harding*, 1 Neb., 461; *Missouri Valley Land Company v. Bushnell*, 11 Id., 192.) The record shows that the note sued on was introduced in evidence. In the absence of proof it will be presumed that this note was given to the bank by the plaintiffs in error, and that therefore they are estopped to deny its right to sue thereon. All presumptions are in favor of the judgment, and error must affirmatively appear to warrant this court in reversing the judgment.

Section 23, chapter 20, of the Compiled Statutes of 1887 provides that "all writs and other process, except subpoenas, may be executed and served, as the case may require, in any county in the state; and if it be a county other

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than that of the residence of the probate judge, the same shall be directed to the sheriff of such other county."

This provision is general and applies to all writs, at least where there is a joint or joint and several obligation which is the subject of the action, and it is desired to bring all the parties before the court. Aside from this special provision it is probable that any court in which an action may be brought upon a joint or joint and several obligation may issue process to other counties in the state to bring in all the parties in the action. This is the rule in the district court, and it is the policy of the law to have all parties in interest before the court so that the judgment may be final.

Section 1085 of the Code provides that "the provisions of this Code, which are in their nature applicable, and in respect to which no special provision is made by statute, shall apply to proceedings before justices of the peace." The same reasons which apply in the district court in favor of joining all persons as defendants who are legally liable on the instrument have like force when the action is brought before a justice of the peace, and there is no doubt that they may issue summons to be served on one or more defendants in a county other than that where the action is brought, in cases like that under consideration. In any view of the case, therefore, the judgment is right and it is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

ALFRED BISSELL V. CLINTON FLETCHER.

[FILED OCTOBER 4, 1889.]

1. **Accretion.** One F. was the owner of lot 3, sec. 31, T. 2 N., R. 18 W., which contained, according to his patent from the government, 52 60-100 acres. This quantity of land he was in possession of, but he also sought to recover about 117 acres more which the government had surveyed and sold to other parties, his claim being that said land was an accretion to lot 3. *Held*, That upon the facts proved he was not entitled to recover.
2. —: **GOVERNMENT SURVEY: PRESUMPTION.** The land claimed by the plaintiff as an accretion having been surveyed by the United States and sold to the defendants, the presumption is that they are the lawful owners thereof, and the burden of proof is on the plaintiff to show not only that the land is an accretion to his lot, but that the survey and sale of the same by the United States was without authority of law and in violation of his rights.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

Oyler & Beall, for plaintiff in error:

A plat, when referred to in a deed, becomes a part thereof. (Washb. R. P., 5th ed., 459-60; *Nicolin v. Schneiderhan*, 33 N. W. Rep., 33; *Newman v. Foster*, 3 How. [Miss.], 383.) The field notes of the original survey are the best evidence of the boundary. (Rev. Stats. U. S., sec. 2396.) Defendant cannot be permitted to show that the river is not where the plat represents it. (*Bates v. R. Co.*, 1 Black [U. S.], 204.) Monuments must control courses and distances. (3 Washb. R. P., 434; *Stafford v. King*, 30 Tex., 257; *Doe v. Paine*, 14 Hawks [N. C.], 64; *McCoy v. Galloway*, 3 O., 282; *Esmond v. Tarbox*, 7 Greenl. [Me.], 113; *Howe v. Bass*, 2 Mass., 380; *McIver v. Walker*, 9 Cranch [U. S.], 173; *Fisher v. Bennehoff*, 13 N. E. Rep., 151.) Meander lines are run not as boundaries, but to

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define the sinuosities of the banks and to ascertain the quantity of land in the fractional tract subject to sale. *Schurmeier v. R. Co.*, 10 Minn., 82, (affirmed 7 Wall. [U. S.], 82.) The exception to the rule in *Lammers v. Nissen*, 4 Neb., 25, may be explained by the fact that the intention of the surveyor was plainly to run the meander as a boundary line. Upon this distinction the cases of *James v. Howell*, 41 O. S., 710; *Granger v. Swartz*, 1 Woolworth [U. S. C. C.], 91; *R. Co. v. Schurmeier*, 7 Wall., 272, may all be harmonized. The difficulties here presented may best be solved by applying the rule of *Newsom v. Pryor*, 7 Wheat. [U. S.], 8-13. Quantity is the least reliable and last resorted to of all descriptive particulars in a deed. (*McClintock v. Rogers*, 11 Ill., 279; *Kruse v. Scripps*, Id., 98; *Heaton v. Hodges*, 30 Am. Dec., 740, N.) Plaintiff is not limited to the quantity designated on the plat. (*Newsom v. Pryor*, *supra*; *Kraut v. Crawford*, 18 Ia., 552.)

E. A. Fletcher, for defendant in error:

The government survey is conclusive upon patentee and all other parties. (*Maguire v. Tyler*, 25 Mo., 501; *McGill v. Somers*, 15 Id., 80.) This doctrine is also in accord with *Newsom v. Pryor*, cited by plaintiff. The corners established by government surveyors are conclusive and cannot be shown to have been wrongly located. (*Climer v. Wallace*, 28 Mo., 556; *West v. Cochran*, 17 How. [U. S.], 414; *Stanford v. Taylor*, 18 Id., 412; *Kissell v. Public Schools*, Id., 19.) The meander lines are intended as a means of computing the area; not as boundaries. (*Lammers v. Nissen*, 4 Neb. 45; *Palmer v. Dodd*, 7 West. Rep. [Mich.], 798, and cases cited.)

MAXWELL, J.

A decision was rendered in this case in 1886, the opinion being reported in 19 Neb., 726. A rehearing was af-

terwards granted, but for some cause which does not appear the parties have failed to again submit the case until the present time. The matter in dispute is the boundaries of lot 3, section 31, town 2, range 18 west, in Harlan county. This lot is shown, by the plat and patent under which the plaintiff claims, to contain $52\frac{80}{100}$ acres. This amount of land he is in the undisputed possession of, but he claims that he is also entitled to a large quantity of land as an accretion, but which the United States has caused to be surveyed and sold to the defendants or their grantors, so that the question in controversy is between two persons who have purchased and paid for distinct tracts of land from the United States government. George C. Reed, county surveyor of Harlan county, testified as a witness in the case as follows:

Q. State how far lot 3 would have to extend south of the meander line, as shown by the government plat, to reach the river as prayed for by the plaintiff, and how far would it have to run into township 1, range 18?

A. It would have to extend about three-quarters of a mile to reach the river, and about 20 rods into town 1; of course the boundary of the river is not even; some places it would be more and some less.

Q. About what number of acres would lot 3 contain, provided it extended to the river as prayed for by the plaintiff?

A. Of course I have not surveyed it so as to answer that question definitely, but it would contain about 170 acres. Of course I am approximating.

Q. Which would add about how many acres to lot 3 as shown by the government plat?

A. About 117 acres.

* * * * *

Q. In case either of those lots (3 and 5) just named, were extended beyond the boundary, as shown by Ex. A, would not each necessarily cover or obliterate lots 6 and 7 claimed by defendant?

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A. Yes, sir, if lots 3 or 5, either of them, extended to the river, they would cover all of lots 6 and 7.

Q. Would they also extend into town 1, so as to cut off territory — to what amount?

A. Lots 3, if allowed to extend to the river for a boundary, would extend into town 1 and would contain about ten acres in town 1; lot 5 might extend to the river on the west without extending into town 1.

Q. If there would be any other confusion, state what it would be, if this meander line was changed to run where the river now runs and instead of taking this line as shown by the map, Ex. A.

A. It would change the line about half a mile; it would throw more land north of the river than is shown by the original field notes.

The patent from the United States to Coon, the grantor of the plaintiff, describes the property conveyed as follows. "The west half of the southeast quarter of section 30 and the lot numbered 3 of section 31, township 2, range 18, in the district of lands subject to sale at Bloomington, Nebraska, contains $132\frac{60}{100}$ acres." The above west half of the southeast quarter of section 30 is not in controversy. There is no proof whatever that the land claimed by the plaintiff is an accretion to lot 3. In fact, all the proof tends to show that it is not.

The defendants have purchased their land, as part of the public domain, from the United States and it would be rank injustice to rob them of their property and give it to the plaintiff, who is already in possession of all the land that he purchased and the government sold to him.

In addition to this the official acts of public officers will be presumed to have been lawfully performed unless the circumstances of the case overturn this presumption; and acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter. (*Bank of United States v. Dandridge*, 12 Wheat.,

70; *Combs v. Lane*, 4 O. S., 112; *Ward v. Barrows*, 2 Id., 241; *Tecumseh Townsite case*, 3 Neb., 284.) In the case at bar the proof tends to show that the United States caused the defendant's land to be surveyed and offered the same for sale; and that the defendants, or their grantors, became the purchasers. If this is correct, the presumption is that the land in question was lawfully surveyed and sold, and the burden of proof is on the plaintiff to show not only that the defendant's land is an accretion to lot 3, but that the same was surveyed and sold without authority of law and in violation of his rights. That a mistake was made in the original plat of the government surveys there is no doubt, but the plaintiff has sustained no loss by such mistake and therefore is not in a position to complain. It is evident that justice has been done in the premises and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

27	586
62	806

SAMUEL H. STEELE ET AL., APPELLANTS, V. ARCHIBALD
F. COON ET AL., APPELLEES.

[FILED OCTOBER 15, 1889.]

1. **Fraudulent Conveyances: CONCEALMENT: NON-PURSUIT.**
"A deed not fraudulent at first, may become so afterwards by being concealed, or not pursued, by which means creditors have been drawn in to lend their money." (*Hildreth v. Sands*, 2 Johns. Ch., 35.)
2. —: **DEED FRAUDULENT THROUGH LACHES.** Upon the facts stated in the opinion, held, that the first set of conveyances therein referred to, though not fraudulent at first, became so afterwards by being withheld from the records.

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3. ———: *Held*, also, that the second deed of the farm therein referred to should be upheld to the extent of the money actually advanced and paid by R. C. to A. F. C.
4. ———: CONSIDERATION. *Held*, further, that the deed of the homestead from R. C. to A. F. C., under the facts and circumstances of the case, could not be deemed a consideration to the extent of the value of the same for the conveyance of the farm by A. F. C.
5. ———: ———. There being no evidence of the value of the estate in remainder to be vested in the heirs of the holder of the general title to said homestead, upon the death of the survivor, as between husband and wife, the same will not be considered as adding to the other consideration for the conveyance of the farm.

APPEAL from the district court for Butler county.
Heard below before NORVAL, J.

S. H. Steele, R. S. Norval, and J. W. McLoud, for appellants:

The consideration is inadequate and Mrs. Coon is not a *bona fide* purchaser. (*Savage v. Hazard*, 11 Neb., 323; *Case v. Sawtelle*, Id., 51.) Even though he pay a full consideration, the law will not protect a purchaser if the sale was made to hinder or defraud creditors. (*Wake v. Griffin*, 9 Neb., 52; *Gragg v. Martin*, 12 Allen [Mass.], 498; *Bunn v. Ahl*, 29 Pa. St., 387; *Root v. Reynolds*, 32 Vt., 139; *Blennerhassett v. Sherman*, 105 U.S., 117.) In order that possession by grantor after conveyance may be innocent, there must be a recording of the deed or notice to a third party before he deals with the grantor (*Bogard v. Gardley*, 4 Sm. & M. [Miss.], 302; *Harney v. Pack*, Id., 229; *Hilliard v. Cagle*, 46 Miss., 341); and a grantee by his long laches in failing to record is estopped from claiming the land as against the grantor's creditors (*Wait*, Fraud. Conv., secs. 235-6, 305; *Neslin v. Wells*, 104 U. S., 483; *Gill v. Griffith*, 2 Md. Ch. Dec., 281; *Coates v. Gerlach*, 44 Pa. St., 43; 1 Story, Eq. Jur., (13 Ed.), sec. 389; 2 Herman, Es-

toppel, secs. 953, 968, 976; 2 Pomeroy, Eq. Jur., secs. 810, 811.) Transactions between husband and wife to the prejudice of creditors are closely scrutinized and their *bona fides* must be established. (*Aultman v. Obermeyer*, 6 Neb., 260; *Bank v. Bartlett*, 8 Id., 329; *Lipscomb v. Lyon*, 19 Id., 511; *Thompson v. Loenig*, 13 Id., 386; *Seitz v. Mitchell*, 94 U. S., 580.) A deed not at first fraudulent, may become so by concealment or non-pursuit. (*Hungerford v. Earle*, 2 Vernon [Eng. Ch.], 260; *Hildreth v. Sands*, 2 Johns. Ch., 36; *Scrivenor v. Scrivenor*, 7 B. Mon. [Ky.], 374; *Bank v. Housman*, 6 Paige [N. Y.], 526.) There is a presumption against appellees which they must overcome by affirmative proof. (*Koch v. Rhodes*, 10 Neb., 447; *Roy v. McPherson*, 11 Id., 200; *Hoagland v. Wilson*, 15 Id., 320.) It is the policy of the law to discourage secret liens. (*Edminster v. Higgins*, 6 Neb., 265; *Ansley v. Passahro*, 22 Id., 662.)

J. C. Roberts, and A. J. Evans, for appellees:

A conveyance, though voluntary, to a relative, is good if grantor at the time is able to secure his creditors (3 Washburn, R. P., 356; *Stewart v. Rogers*, 25 Ia., 395; *Sparkman v. Place*, 5 Ben. [U. S. C. C.], 184); subsequent embarrassment does not make it fraudulent (*Lyman v. Cessford*, 15 Ia., 229); and one must show that he was a creditor at the time, to obtain relief against a fraudulent conveyance. (*Stone v. Meyers*, 9 Minn., 294.) This case differs from those cited by counsel for appellants on the doctrine of concealment and non-pursuit, in that the transfer was for a valuable consideration and the grantor was not in debt. Silence, without fraud or knowledge of its effect, will not constitute estoppel. (*Picard v. Sears*, 6 A. & E. [Eng. Q. B.], 469, [S. C. 2 Nev. & P., 488]; *Malloney v. Horan*, 49 N. Y., 111; *Anthony v. Stephens*, 46 Ga., 241; *Cady v. Owen*, 34 Vt., 598; *Banking Co. v. Duncan*, 86 N. Y., 221; *McGovern v. Knox*, 21 O. S.,

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547; Herman Estoppel, secs. 974, 975.) Parties under disability are not estopped unless they have been guilty of fraud. (Bigelow, Estoppel, 486; *Kane v. Herrington*, 50 Ill., 232; *Schnell v. Chicago*, 38 Ill., 382; *Davidson v. Young*, Id., 146; *Rogers v. Higgins*, 48 Id., 211; *Schwartz v. Saunders*, 46 Id., 18; *Miles v. Lingerman*, 24 Ind., 385; *M'Coon v. Smith*, 3 Hill [N. Y.], 147.) If the one doing the act could not have given a deed to the land, his act cannot create an estate by estoppel. (Herman, Estoppel, sec. 967; *Lowell v. Daniels*, 2 Gray [Mass.], 169; *Beaupland v. McKean*, 28 Pa. St., 124; *Ackley v. Dygert*, 33 Barb. [N. Y.], 176; *Allen v. Allen*, 45 Pa. St., 473.)

COBB, J.

This cause was appealed from the judgment of the district court of Butler county, by the First National Bank of Seward, Samuel H. Steele, and David Belsley, who exhibited their creditors' bills, in the court below, against Archibald F. Coon and Rebecca, his wife, Frank R. Coon, a minor, and J. G. Ross, setting up that on August 22, 1884, Archibald F. Coon was the owner of the southwest quarter of section 30, township 15 north, range 3 east, of the sixth principal meridian, of record, in his name, in said county; that with William H. Westover and J. Robert Williams he executed his promissory note to said bank for \$1,500, due October 22, 1884, with ten per cent interest; that credit for said loan was given them on the faith of said Coon being the owner of said real property; that on November 17, 1885, said bank recovered judgment on said note against the makers, in the district court of Seward county, Nebraska, for the sum of \$1,660 and \$9.53 costs, with interest thereon at ten per cent per annum from the date of judgment, which remains unpaid; that on June 29, 1886, a transcript of said judgment was filed in the district court of Butler county, and execution was issued

against said Coon which was duly served and returned "*nulla bona*," but was levied upon said land. That on June 24, 1878, the government of the United States patented said land to said Coon; that on October 13, 1884, said Coon, and his wife Rebecca, without consideration and with intent to defraud the First National Bank of Seward, and other creditors, pretended to convey said land to Jacob G. Ross, with like intent on his part, who, without consideration and for like purposes, pretended to convey said land to Rebecca Coon and Frank R. Coon; that at the time of such fraudulent conveyances Archibald F. Coon was indebted to various creditors \$6,000, and the judgment debtors, Westover and Williams, were entirely insolvent, the latter being out of the state and a fugitive from justice; that Archibald F. Coon has no other property except said land, which, if free of incumbrance, and with an unclouded title, is worth about \$8,000, out of which said judgment can be made, but which, by reason of said fraudulent conveyances, could not be sold to satisfy the same; with prayer that the conveyances be set aside, and for general and complete relief.

The bill of Samuel H. Steele represents his judgment (by proceedings in attachment, commenced October 25, 1884) against Archibald F. Coon and William H. Westover for the sum of \$1,535.66, with interest at ten per cent per annum, rendered in the district court of Butler county, December 8, 1884, and levied upon the same property, with prayer for like relief.

That of David Belsley represents his judgment against Archibald F. Coon and William H. Westover for the sum of \$1,264.30, on note made by the parties August 12, 1884, for \$990, with interest at ten per cent per annum, rendered in the district court of Butler county June 6, 1887, with prayer for like relief.

The record of the judgment of Sumner & Co., on note of Westover, Williams & Coon, dated April 22, 1884, for

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\$2,000, at ten per cent interest, in district court of Butler county June 6, 1887, for the sum of \$2,633.33 and \$24.83 costs, was filed in the case as a lien against the real estate in the creditors' bills herein.

The defendants answered, setting up that on October, 13, 1894, A. F. Coon and Rebecca, as husband and wife, executed and delivered certain deeds of conveyance of said land to J. G. Ross at the special instance and request of Rebecca; that the same were made in good faith and for the valuable consideration of \$4,000, and on March 27, 1883, the land was deeded by Rebecca Coon and said Ross to Rebecca Coon and Frank R. Coon jointly; that Rebecca Coon unintentionally failed to have her deeds recorded and the same became lost without the intention of delaying or defrauding the creditors of A. F. Coon, or aiding him to contract future indebtedness; that at the time of said conveyances to Ross and by him to Rebecca and Frank R. Coon, defendant A. F. Coon was not indebted to any person or persons, and did not after that time become indebted on his own account, or that of either of the defendants, or of any other person in whom he was pecuniarily interested; and all of the debts contracted after the execution of said conveyances were security debts for others from which the defendant A. F. Coon neither received nor was promised nor expected any consideration for himself or any other person; and the judgment which the plaintiff recovered and holds against him is a security debt for which these defendants nor either of them received any consideration whatever; that the debt so contracted to the plaintiffs, as well as all other debts which A. F. Coon may now owe as security for others, were contracted without the knowledge or consent of the co-defendants or either of them. It is further set up that at the time A. F. Coon first conveyed the land to Ross, Rebecca Coon was his wife, and the conveyances were made for the express purpose of being reconveyed to the wife and her son, Frank R. Coon. At the

time and prior thereto Rebecca Coon was the owner of lots one, four, and five in block forty-seven, in David City, which were of the value of \$1,600, purchased by her of one Rolph, with her own money from her father's estate, in the month of June, 1881; that as part consideration for the land in controversy, on March 27, 1883, she conveyed said town lots to Ross to be conveyed to A. F. Coon, which was executed on the same day; that as a further consideration for the land she paid A. F. Coon, on the same day, the sum of \$850. And as a further consideration she discharged and released A. F. Coon from an obligation and debt which was owing by him to her of \$1,700, contracted as follows in cash:

In the year 1867.....	\$500
“ 1872.....	100
“ 1876.....	100
“ 1880.....	500
“ 1880.....	168

which sums were received from her father's estate and were loaned by her to A. F. Coon, under an agreement between them at said times that the same should be repaid.

It is also set up that the deeds and conveyances made on the 13th of October, 1884, by the defendant's conveying the land in controversy were so made in lieu and place of those of March 27, 1883, which had become lost. Defendants deny all allegations of fraud, and deny that A. F. Coon was the owner of the land in controversy at the time of signing the note on which the plaintiffs' judgments are based, or that the land at that time was standing in his name; with prayer for complete discharge from the complaints of the petitioner's bill.

The First National Bank of Seward made reply denying the allegations of the defendant's answer, except that the deeds mentioned were executed March 27, 1883, and that those of October 13, 1884, were in lieu of those of March 27, 1883, and that defendant Coon was a surety

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on the note taken by plaintiff on which the judgment is based; and avers that the defendants, by reason of their failure to place on record in Butler county, Nebraska, the deeds alleged to have been made March 27, 1883, until long after contracting the indebtedness to plaintiff, which was contracted upon the responsibility of A. F. Coon, and upon the fact that the title to the land mentioned stood in his name, upon which the plaintiff relied that he was the owner thereof, and had no means of knowledge that A. F. Coon had ever made the deeds of date March 27, 1883, as stated in the answer—that by reason of the fraudulent acts of the defendants in negligently and carelessly withholding from the records the deed of March 27, 1883, the defendants are estopped from claiming any rights whatever under said deeds or any interest in said land as against the plaintiff.

The answer of defendants to the bills of Steele and Belsley were of the same tenor and defense as that stated in the case of the bank; that of the minor defendant, Frank R. Coon, was by guardian *ad litem*.

There was a stipulation by the parties in the court below that the several cases of The First National Bank of Seward, Samuel H. Steele, David Belsley, and Sumner & Co. against Archibald F. Coon and others shall be consolidated for the purposes of trial and the final determination of the rights of the several parties as of the 14th of July, 1887; that in the cases of Sumner & Co. and Belsley the defendants shall answer as of that date to the same effect as in the cases of the bank and of Steele, and replies in all cases shall be to the effect of that in the case of the bank; and that the parties in each case may severally object to all testimony offered as to competency and relevancy the same as if taken separately, with other special provisions as to the equal terms in the several cases upon which the merits of each shall be considered and adjudicated; not deemed necessary to further set out; the agreement to be

filed and treated as a part of the record of the consolidated case as a general stipulation, dated February 9, 1888.

There was a trial to the court under the terms of this stipulation, with findings for all the defendants and judgment that the consolidated case and the several actions upon which it is founded be dismissed at the cost of the plaintiffs, and that the title to the land in the petitions described be forever quieted and settled in the defendants, Rebecca Coon and Frank R. Coon, jointly.

It appears from the bill of exceptions that on the 27th day of March, 1883, and for a long time prior, the defendants, Archibald F. Coon and Rebecca Coon, were husband and wife, and that the defendant Frank Coon was their infant and only child. Archibald F. Coon was the owner of a farm adjoining David City, consisting of about one hundred and sixty acres of improved land of the value of five thousand two hundred and eighty-five dollars. Rebecca Coon was the owner of a homestead in David City consisting of three city lots on which were a dwelling house and appurtenances, which were used and occupied by all of the above named defendants as their family homestead. The occupation of Archibald F. Coon was that of United States postmaster at David City, and he was not indebted. Rebecca Coon, after her intermarriage with Archibald, had received from her father, during his life, and from his administrators, after his death, at sundry times, and in various amounts, the aggregate sum of about four thousand dollars. About eighteen hundred and fifty dollars of this money she had at sundry times, and in different amounts, loaned to her husband, the said Archibald, sixteen hundred and fifty dollars of which she had invested in the purchase of the homestead in David City, occupied by the family, as above stated, and about five hundred dollars of which she had then in possession. It also appears that at the said date Archibald F. Coon and Rebecca Coon executed a deed to the defendant J. G. Ross, of the

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farm above referred to, and Ross executed a deed of the same property to Rebecca Coon and Frank Coon, the minor. At the same time Rebecca Coon and Archibald F. Coon executed to said J. G. Ross a deed of the homestead, above referred to, and Ross executed a deed of the homestead to Archibald F. Coon. These deeds were all placed, by the attorney who drafted them, into the hands of Rebecca Coon. They were none of them ever recorded.

On the 12th day of August, 1884, Archibald F. Coon, together with one J. Robert Williams, and as surety for him, executed and delivered to the Platte Valley Bank a promissory note for the sum of nine hundred and ninety dollars, due the first day of September, next thereafter. On the 1st day of October, 1884, he, together with said J. Robert Williams, and one W. H. Westover, and as surety for them, executed and delivered to Samuel H. Steele, a promissory note for two thousand dollars, due thirty days from said date. On the 22d day of April, 1884, he, together with Westover and Williams, and as surety for them, executed and delivered to Sumner & Co. a promissory note for two thousand dollars, due thirty days from said date, and on the 22d day of August, 1884, he, together with said J. Robert Williams and W. H. Westover, and as surety for them, executed and delivered to the First National Bank of Seward a promissory note for fifteen hundred dollars, due on the 22d day of October, 1884. These notes were afterwards reduced to judgment by the respective holders thereof as against the said Archibald F. Coon, and which judgments are sought to be enforced by the respective creditor's bills in this action. (The note to the Platte Valley Bank passed into the hands and became the property of the plaintiff, David Belsley.)

It further appears that some time between the first and thirteenth days of October, 1884, the said J. Robert Williams and W. H. Westover, who were engaged in business as copartners under the firm name and style of

Westover & Williams, failed in business, became and were insolvent, and one of them absconded. Thereupon some of the said creditors began to press the said Archibald F. Coon for payment.

It further appears that on the 13th day of October, 1884, Archibald F. Coon and Rebecca Coon executed another deed to J. G. Ross of the said farm, and Ross executed another deed of the same property to Rebecca Coon and Frank Coon. At the same time Rebecca Coon and Archibald F. Coon executed to said J. G. Ross another deed of the homestead and Ross executed another deed of the homestead to Archibald F. Coon. All of these last mentioned deeds were immediately placed upon record. After the recording of the above conveyances Archibald F. Coon had no property standing in his name out of which the said judgments or any of them could be made or collected.

It is one, though not the principal, ground of contention, on the part of the defendants, that the case turns upon the consideration of the conveyances made on the 27th day of March, 1883, and that as at that time the defendant, Archibald F. Coon, was not indebted to any one, and especially not indebted to any or either of the plaintiffs, and did not purpose or contemplate entering upon or engaging in any hazardous enterprise, and especially not those which resulted in the indebtedness upon which plaintiffs' judgments were rendered, the conveyance of the farm made on that day, even if voluntary and without consideration, was not nor could have been fraudulent. The other and principal ground is applicable to both sets of conveyances, that Rebecca Coon was a *bona fide* creditor to the extent of about nineteen hundred dollars for money actually loaned to him by her, which she had received from her father and from her father's estate; that this indebtedness, together with five hundred dollars which she then had in hand, derived also from her father's estate, and which she paid to Archibald F. Coon on the day of the

Steele v. Coon.

execution of the first set of deeds, and the homestead, which was worth and had actually cost her sixteen hundred and fifty dollars, and was conveyed to Archibald F. Coon, as for that sum as a consideration, constituted a full and fair consideration for the conveyance of the farm from Archibald F. Coon to Rebecca Coon and Frank Coon; so that as to the last set of conveyances, although at the date of their execution Archibald F. Coon had incurred the obligation upon which the several plaintiffs' judgments were afterwards rendered, as none of the liens had then attached, the conveyance of the farm was free from fraud either in fact or in law.

Neither of the conveyances of the farm can be upheld as a voluntary conveyance. The second conveyance, for the obvious reason that at its date the grantor, Archibald F. Coon, had already incurred the obligations upon and for which the several judgments of the plaintiffs were afterwards rendered against him; and the first conveyance, for the reason that the deed was in law concealed and not pursued in not being placed upon record, in the due and ordinary course of business in like transactions, nor until after the incurring of the obligations by the grantor which are now sought to be enforced against said farm—indeed never was recorded.

"A deed not fraudulent at first, may become so afterwards by being concealed or not pursued, by which means creditors have been drawn in to lend their money." (*Hildreth v. Sands*, 2 Johns. Ch., 35.) "A deed concealed from the public, the grantor remaining in possession and acquiring credit on the strength of his supposed ownership of the property, is fraudulent." (*Barker v. Barker's Assignee*, 2 Woods [U. S. C. C.], 87.) In addition to cases cited in the brief of counsel for appellants see also *Sexton v. Wheaton*, 8 Wheat. [U. S.], 229; *Worsley v. DeMattos*, 1 Burr. [Eng. K. B.], 467; *Leukner v. Freeman*, Freem. [Eng. Ch.], 236.)

But the conveyance of the farm made on the 13th day of October, 1884, will be upheld to the extent of the actual consideration which passed therefor between the Coons, husband and wife.

In the case of *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb., 260, this court, in the opinion, said: "Transactions between husband and wife, in relation to the transfer of property from one to the other, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and the *bona fides* of such transactions will have to be established beyond question in order to be sustained by a court of equity." Said case was cited and the above from the opinion quoted in the opinion in the case of *First National Bank v. Bartlett*, 8 Neb., 319, and to the quotation is added "The reason is, that there is such a community of interest between husband and wife, that such transfers are often resorted to for the purpose of withdrawing the debtor's property from the reach of his creditors, and preserving it for his own use. Therefore, in a contest between the wife and the creditors of her husband, there is a presumption against her which she must overcome by affirmative proof." The above was reiterated in the case of *Thompson v. Loenig*, 13 Id., 386, and again in that of *Lipscomb v. Lyon*, 19 Id., 511.

But admitting the presumption to be against Mrs. Coon and subjecting the facts of the case, as shown by the bill of exceptions, to the severest scrutiny and closest examination, it appears that she has invested in the farm about twenty-four hundred dollars in money derived from her father, and from his estate, in the farm in question, and that she did this in good faith. True, this investment was consummated by the first conveyance, which was never recorded, but this was not a voluntary conveyance, but made upon a good and valuable, if not upon a full, consideration. The failure to record the deed was not intentional on the part of the grantee, although there is some evidence tending to

prove that she kept the deed off of the records lest a knowledge of the conveyance might cause uneasiness on the part of the bondsmen of Archibald F. Coon as postmaster. This evidence is sufficiently rebutted. But be that as it may, although the first deed was not recorded until after the incurring of the obligations by Archibald F. Coon, upon which plaintiffs' judgments were rendered, Mrs. Coon was placed in no worse condition than though it had never been made; and it having been lost or accidentally destroyed, there was no fraud on her part in receiving a new conveyance to replace it to the extent of the money which she had actually advanced or paid to her husband as a consideration therefor. How was it on the part of Archibald F. Coon at the date of the last conveyance? He had become obligated to the plaintiffs to pay them large sums of money; he had also received from his wife a much larger sum. None of the former had become liens upon the farm; the latter, by reason of the last conveyance, was, to say the least of it, an equitable lien upon the farm. It was, therefore, as I conceive, no fraud against the plaintiffs for him to pay or secure the money received from and due to his wife by a reconveyance of the farm.

In speaking of the amount of the consideration advanced and paid to Archibald F. Coon by Rebecca Coon for the conveyance of the farm, I do not include the value of the homestead. The former as the husband of the latter, and being in the actual possession of this property, they, together as one family, residing upon and occupying it as a homestead, although the general title was in the wife, had an indefeasible estate in it; and while I do not say that the conveyance of such general title by her to him was no consideration for the conveyance of the farm by him to her, it is obvious that the general value of the homestead as property in the market furnishes no measure or *index* of the value of a conveyance of such general title from the wife to the husband. Before such conveyance, as well as

after, no conveyance of the homestead to a third person, without the assent and signatures of both husband and wife, would be effective or binding upon either, nor would any incumbrance sought to be created or suffered, and upon the death of either, at least a life estate therein will vest in the survivor. I therefore conclude that while, under the facts and circumstances of this case, the legal title of the farm passed to Rebecca Coon and Frank Coon by virtue of the deed of October 13, 1884, they took and hold such title subject to the equities and liens of the plaintiffs, or those of them whose claims or judgments became liens against the property of Archibald F. Coon prior, in point of time, to the extent of the fair market value of said farm over and above the sum of \$2,400.

The decree of the district court is reversed and a decree will be entered in this court for the plaintiffs, establishing their several and respective liens upon the said farm in the order of their several and respective priorities, as herein-after stated, subject nevertheless to the prior lien and title of the said Rebecca Coon and Frank Coon to the sum, amount, and value of \$2,400 thereon.

The several and respective amounts and priorities of said liens are fixed and declared as follows:

1. Rebecca Coon and Frank Coon, amount, \$2,400. Date, March 27, 1883.
2. Samuel H. Steele, amount, \$1,548.11. Date, October 25, 1884.
3. First National Bank of Seward, amount, \$1,669.53. Date, November 17, 1885.
4. David Belsley, amount, \$1,264.30. Date, June 6, 1887.
5. Sumner & Co., amount, \$2,658.16. Date, June 6, 1887.

For the purposes of such decree the value of said farm is found and fixed at \$5,285.

Upon the payment by the defendants, Rebecca Coon and

State v. Ball.

Frank R. Coon, to the clerk of this court, within six months from the date of the entry of this decree herein, of the sum of \$2,885, with interest thereon from the date of said decree at seven per cent, and the costs of this action in both courts, to be distributed to the plaintiffs according to the priorities of their several and respective liens, the said farm will be fully and entirely discharged of and from said liens and each and all of them.

DECREE ACCORDINGLY.

THE other Judges concur.

27	601
32	184

STATE OF NEBRASKA V. JAMISON BALL.

[FILED OCTOBER 16, 1889.]

1. **Liquors: GIFT: STATUTORY CONSTRUCTION: INDICTMENT.**

Where an indictment for the violation of section 11 of chapter 50 of the Compiled Statutes contains the charge that the person accused did on a certain day sell and give away intoxicating liquors, it was *held* that the words "give away" did not charge the offense of giving away upon a pretext under the provisions of the section, and that they were mere surplusage and to be ignored by the court to which the indictment was returned; also, that the language of the indictment did not necessarily charge the defendant with selling and giving away upon a pretext the particular liquor described in the indictment, and that the only office of the words "give away" in the indictment was in substance a charge of the delivery of the liquor sold.

2. ———: ———. The mere giving away of intoxicating liquors when not upon a pretext or with any intention or purpose to violate the law is not necessarily a crime, without reference to the circumstances, condition, or necessity under which the gift was made.

EXCEPTIONS from Gage county, BROADY, J., presiding.
Filed under the provisions of sec. 515 of the Criminal Code.

Hugh J. Dobbs, for plaintiff in error, cited: *State v. Pischel*, 16 Neb., 491; *Kruger v. State*, 1 Neb., 371; 1 Bish. Cr. Proc. (3d Ed.), secs. 440, 478, 480; *State v. Freeman*, 8 Iowa, 428; *State v. Ansaleme*, 15 Id., 44; *McKinney v. State*, 25 Wis., 378; *State v. Coffey*, 41 Tex., 46.

Rickards & Prout, for defendant in error, cited: *State v. Pischel*, 16 Neb., 491; 1 Bish. Cr. Proc. (3d Ed.), sec. 432.

REESE, CH. J.

At the February term, 1889, of the district court of Gage county an indictment was returned by the grand jury against Jamison Ball, the material averments of which were as follows: "That Jamison Ball, late of the county aforesaid, on the 28th day of November, in the year of our Lord one thousand eight hundred and eighty-eight, in the county of Gage and state of Nebraska aforesaid, then and there being, did then and there knowingly, willfully, and unlawfully sell and give away to one Syd L. Ellis intoxicating drinks or liquors, to-wit, about one gill of whisky, without having first obtained a license to sell intoxicating drinks or liquors and given a bond to the state of Nebraska as is required by law."

To this indictment a motion to quash was filed by the accused, the ground thereof being that it was vague, uncertain, and indefinite, and that more than one offense was attempted to be charged therein. The motion was sustained and the indictment quashed, to which the county attorney excepted and brings the case to this court for review under the provisions of sec. 515 of the Criminal Code. The case calls for a construction of section 11 of chapter 50 of the Compiled Statutes, entitled "Liquors." The section is as follows:

"All persons who shall sell or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicat-

ing drinks, without having first complied with the provisions of this act, and obtained a license as herein set forth, shall for each offense be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, or be imprisoned not to exceed one month in the county jail, and shall be liable in all respects to the public, and to individuals, the same as he would have been had he given bonds and obtained license as herein provided: *Provided*, That any person or persons shall be allowed to sell wine made from grapes grown or raised by said person or persons on land belonging to or occupied by said person or persons in the state of Nebraska, the same to be sold in quantities not less than one gallon, without procuring the license provided for in this chapter."

It is contended by counsel representing the district court that the indictment is bad for duplicity, in that it sufficiently charges the accused with a violation of the section both in *selling* and in *giving away* the liquor described; that it is a crime to give away as well as to sell the liquors named in the indictment, and both being charged, the indictment is bad; that if the words "give away" were eliminated, the indictment for selling in violation of law would remain; and that if the word "sell" were stricken out, the crime of giving away would be as fully charged. It is also contended that as the indictment stands the selling and giving away are both charged with reference to the same liquors and therefore the indictment is indefinite, uncertain, and ambiguous, as both charges cannot be true of the same act.

Upon the other hand it is contended by the county attorney that the words "and give away" must be treated as surplusage, and that the indictment charges only the crime of selling, the giving not having been alleged to have been upon a pretext and no such pretext being described in the indictment.

The section under consideration was evidently intended to prohibit the *sale* of intoxicating liquors by those having no license to engage in the traffic. This is the primary object of the law. In order to make the prohibition effective the legislature saw proper to provide against its evasion by subterfuge or pretext in giving away — as by the sale of articles of no value accompanied by a gift of the liquor or by any ostensible or colorable transaction by which the liquor could be disposed of without a sale and yet constitute the principal element of the sale or barter.

Webster in his Unabridged Dictionary defines the word pretext as “ostensible reason or motion assigned or assumed as a color or cover for the real reason or motive; false appearance; pretense.”

It was evidently not the intention of the legislature to make the simple act of giving away intoxicating liquors a crime without reference to the circumstances, necessities, or conditions attending the giving; and therefore the giving of intoxicating liquors when wholly unaccompanied by an intention to evade the law is not necessarily a crime. We are strengthened in this view by reference to section 31 of the same chapter, which makes it a crime for any person to treat another or to give away any liquor, beer, wine, or intoxicating beverages whatever, purchased and to be drunk in any saloon or other public place where such liquors or beverages are kept for sale. If it had been the intention of the legislature to make the giving away of intoxicating liquors a crime in all cases, then the enactment of the section above referred to would have been wholly useless, as the offense would have been completely covered by section 11 above quoted. If the giving “was upon any pretext” for the purpose of evading the law, the pretext under which it was given would have to be set out substantially in the indictment. The indictment in this case, therefore, did not charge the crime of “giving away” under the

provisions of the section quoted, and did not charge a violation of the law in that particular.

We think also that the contention of counsel for the district court, that the indictment was vague and uncertain as charging both the selling and giving away, within the meaning of the statute, of the same article of intoxicating liquors, cannot be maintained. As we have seen, in order to constitute a crime the giving must be upon some pretext for the purpose of evading the law, and the term "give away" does not import such an act. This being true, the allegation of the indictment can charge nothing more than the sale and delivery of the liquor to the person named. That it might have been better pleading to charge in direct terms the sale and delivery of the liquor is perhaps true (although the term sale probably includes both), yet we cannot see that more than this was charged.

This being true, the learned district court erred in his ruling upon the motion to quash. As no further proceeding can be had upon this indictment, the case will not be remanded.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

L. F. GRIMES ET AL. V. C. K. CHAMBERLAIN ET AL.

[FILED OCTOBER 16, 1889.]

1. **Practice: DISMISSAL WITHOUT PREJUDICE.** An action may be dismissed without prejudice to a future action by a plaintiff before the final submission of the case to the jury or court where the trial is to the court (sec. 430 of the Civil Code); and such dismissal may be made at the option of the plaintiff without leave of the court. It is a right specially given by statute which the court has no power to refuse. An entry of dismissal

27	605
43	285
27	605
54	69

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terminates the jurisdiction of the court over the cause of action presented by such plaintiff, except for the purpose of entering the order of dismissal and rendering judgment for costs.

2. **Supreme Court: JURISDICTION.** The supreme court, in the exercise of its appellate jurisdiction, has no authority to reinstate a cause in the district court which has been there voluntarily dismissed by the plaintiff. Where it is claimed that a dismissal was obtained by fraud, an application to reinstate must be made in the court where the cause was pending at the time the dismissal was entered.
3. ———: ———. An order of the district court refusing to dismiss a cause upon the motion of a defendant is not a final order which can be reviewed upon error to the supreme court.

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

S. P. Davidson, for plaintiff in error:

The agreement between Wright and Chamberlain, under which the latter's interest in the suit arose, was champertous and void. (*Backus v. Byron*, 4 Mich., 535; *Barker v. Barker*, 14 Wis., 131*; *Allard v. Lamirande*, 29 Wis., 502; *Willey v. Crane*, 63 Mich., 720; Crim. Code, sec. 159; *Key v. Vattier*, 1 O., 142; *Poe v. Davis*, 29 Ala., 676; *Lathrop v. Bank*, 9 Metc. [Mass.], 489; *Lytle v. State*, 17 Ark., 663, 679; *McDonald v. R. Co.*, 29 Ia., 170-4; *Boardman v. Thompson*, 25 Id., 487; *Ackert v. Barker*, 131 Mass., 436; *Belding v. Smythe*, 138 Id., 530-2; *Miller v. Larson*, 19 Wis., 463.) There is nothing in this case upon which a lien for fees could attach. (Comp. Stats., ch. 7, sec. 8; *Lavender v. Atkins*, 20 Neb., 206.)

A. M. Appelget, and *C. K. Chamberlain*, for defendants in error. No brief filed.

REESE, CH. J.

This action was instituted in the district court of Johnson county in the name of William R. Wright and Sytha

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Phillips, formerly Sytha Wright, as the heir at law and widow of Henry R. Wright (the said William R. Wright being the sole heir), as plaintiffs, and against L. F. Grimes, as defendant, to quiet the title to certain real estate described in the petition. The petition was filed on the 8th day of December, 1888, and on the 7th day of January, 1889, Grimes filed a demurrer to said petition. On the 4th day of May, 1889, defendant in error, Chamberlain, filed his petition by which he sought to be made a party defendant in the action, alleging that he had an interest in the subject-matter of the suit and a legal estate in the land in dispute and adverse to both plaintiff and defendant. On the 6th day of May the plaintiffs, William R. Wright and Sytha E. Phillips, filed a "motion for dismissal of the action," which, omitting the formal parts, was as follows: "The above suit having been commenced by reason of inducements held out to us and before we were fully advised of our rights in the premises, we therefore of our own motion dismiss the above entitled cause and ask that the court enter an order herein dismissing the same." This instrument was signed by the parties themselves, and not by an attorney for them. It bore date January 1st, 1889. On the 18th day of May the application of Chamberlain to be made a party defendant was argued and submitted to the court; and on the 22d day of the same month defendant Grimes, by his attorney, filed his motion to dismiss the case, assigning as grounds therefor the following:

1. Said plaintiffs were induced to institute said cause before they fully understood whether such suit was necessary or not and before they understood the facts.
2. Said plaintiffs, before any answer was filed in said cause, asked that said cause be dismissed.
3. Said plaintiffs still ask for a dismissal of said cause.
4. Defendant Chamberlain has no such interest in this controversy as should be litigated in this suit.

5. All other parties in this suit ask that this cause be dismissed.

The petition and numerous exhibits attached to said motion, including the dismissal filed by the plaintiff, were referred to as a part of it and for the purpose of that hearing were included in it. On the same day A. M. Appelget filed his petition for leave to intervene, alleging that he was a duly authorized attorney of the district court, and as such was employed by and on behalf of the plaintiffs in the action at the time of the commencement of the suit; that prior to the filing of the dismissal of the suit by plaintiffs, which was filed without the knowledge of the said attorney, the applicant filed, in connection with C. K. Chamberlain, also an attorney for plaintiff in said cause, his lien as attorney for services rendered plaintiff, in the sum of \$2,000, and gave notice to the attorneys of the defendant in writing of the filing thereof; that no part of the said \$2,000 had been paid, and that he had an interest in the subject-matter in litigation to the extent of the said lien and adverse to both plaintiff and defendant. He therefore asked to be made a party defendant and to be permitted to defend as against defendant Grimes and prosecute the suit as against the plaintiff. On the same day, to-wit, May 22, 1889, the following order was made in the case, being the only one shown by this transcript:

"And now on this 22d day of May, A. D. 1889, this cause coming on further to be heard upon the application of defendant A. M. Appelget to be made a party defendant, and after the introduction of the proofs and the arguments of counsel, it is considered and ordered that said application of said A. M. Appelget to be made a party be and the same is sustained and he is made a party defendant, to which defendant Grimes excepts. And the court, having had the cause under advisement, upon the application of Clarence K. Chamberlain to be made a party defendant, and being advised in the premises, it is

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considered and ordered that said application be sustained, and said Clarence K. Chamberlain be made a party defendant, to which defendant Grimes excepts, and is allowed forty days from the rising of court to reduce exceptions to writing, and defendants Appelget and Chamberlain allowed thirty days in which to plead. And thereupon this cause coming on further to be heard, upon the motion of defendant Grimes to dismiss this cause, and after the introduction of the evidence and argument of counsel, it is considered and adjudged that said motion be and the same is hereby overruled and denied, to which defendant Grimes excepts, and is allowed forty days from rising of court to reduce his exceptions to writing."

For the purpose of a review plaintiff in error, who was defendant in the district court, brings the case here by proceedings in error.

Since the filing of the case in this court William R. Wright presents his motion, by which he "moves the court for an order declaring his dismissal of the action in the district court to be fraudulent and void, and striking the same from the files in the case, or that the cause be remanded to the district court for action in the premises." Certain affidavits and other exhibits attached to the transcript are referred to in support of his motion. "He further tenders to the said Grimes the sum of \$210, being the sum paid by said Grimes and refused by reason of the fraudulent representation of said Grimes, as more fully set out in said exhibits. He asks to be restored to his rights in the premises as fully as though said papers purporting to be a dismissal had not been executed or filed."

The defendants in error, Chamberlain and Appelget, also filed their motion to dismiss the proceedings in error, assigning as a ground for such motion that neither the ruling of the court upon the motion of plaintiff in error to dismiss the action in the court below, nor its ruling upon the application of Chamberlain and Appelget to be made

parties defendant, was a final order which could be reviewed by proceedings in error, and asking that the cause be remanded to the district court for further proceedings.

The cause is submitted upon these motions and generally.

As we view the case, there is no question presented by the motion of Wright which can be decided by this court.

Section 430 of the Civil Code provides that "An action may be dismissed without prejudice to future action; first, by the plaintiff, before the final submission of the case to the jury, or to the court, where the trial is by the court." As is shown by the dates hereinbefore given on which the various proceedings were had, the dismissal of the case was made by Wright and Phillips pending the demurrer, and before answer filed. By the filing of his dismissal in the district court his case was at an end, and in so far as he was concerned the court could do nothing more than render judgment against him for costs.

This court, in the exercise of its appellate jurisdiction, can take no action on this motion to have his dismissal declared fraudulent or to remand the case. He did not bring it here and he cannot cause it to be remanded. The court therefore declines to enter upon an investigation of the manner in which the dismissal was procured or to undertake to settle any questions growing out of it. His remedy is in the district court.

The next question presented is upon the motion of defendants in error, Chamberlain and Appelget, to dismiss the proceeding in error, the contention being that neither the ruling of the court upon the motion of plaintiff in error to dismiss, nor upon the application of defendant in error to intervene, was a final order from which error would lie.

By sec. 581 of the Civil Code a final order which may be reviewed upon error is defined, and is said to be "An order affecting a substantial right in an action when such

Eckman v. Hammond.

order in effect determines the action and prevents a judgment and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment."

In view of the many decisions of this court construing this section it would seem hardly necessary to enter upon its consideration here. The order made was not final because, whether right or wrong, the case remains upon the docket of the district court for further hearing. The order does not prevent a judgment or determine a right. It cannot therefore be reviewed upon error until after a final judgment is rendered in the case which remains in the district court.

The motion to dismiss the proceeding in error is sustained.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

J. M. ECKMAN V. M. HAMMOND.

[FILED OCTOBER 16, 1889.]

27	611
48	33
27	611
50	186
50	191

1. **Attachment: UNDERTAKING: PARTIES.** An undertaking in attachment signed by the sureties alone and not signed by the plaintiff in the action is not void. And where an attachment is wrongfully issued a suit can be maintained on such undertaking, without making the attachment plaintiff a party to the action.
2. **—: DISSOLUTION.** Where service of summons is had upon an attachment defendant, and he appears to the action, he cannot maintain a suit upon the attachment undertaking upon the ground that the attachment was wrongfully issued, without having obtained a judgment of the court in which the attachment proceeding was pending discharging the attachment.

ERROR to the district court for Pawnee county. Tried below before APPELGET, J.

Story & Story, for plaintiff in error :

The law requiring an undertaking forms a part of the contract. (*Cutler v. Roberts*, 7 Neb., 13.) The undertaking must be executed by one or more sureties. (Code, 926.) If plaintiff in attachment were not required to sign the undertaking but did so, his signature would be null; whereas when he does sign, he is held liable as principal. (*Raymond v. Green*, 12 Neb., 215; *Tessier v. Crowley*, 17 Neb., 207.) The undertaking must therefore be executed by attaching plaintiff as principal, unless the surety waive that requirement. (*Gregory v. Cameron*, 7 Neb., 419; *Bollman v. Pasewalk*, 22 Neb., 761.) Where attachment defendant appears, no action upon the undertaking lies unless attachment has been dissolved. (*McReady v. Rogers*, 1 Neb., 124; *Pixley v. Reed*, 26 Minn., 80; *Nolle v. Thompson*, 3 Metc. [Ky.], 121; *Sloan v. McOracken*, 7 Lea [Tenn.], 626; *State v. Beldsmeier*, 56 Mo., 226; *Bump v. Betts*, 19 Wend. [N. Y.], 421; *Alexander v. Jacoby*, 23 O. S., 358.)

C. M. Corlett, for defendant in error :

Suit must be brought on the bond alone, unless the attachment be malicious. (*Tallant v. Gas Light Co.*, 36 Ia., 262.) Right of action accrues on the bond, as attachment defendant is disturbed in the possession of his property. (*Campbell v. Chamberlain*, 10 Ia., 337.)

REESE, CH. J.

This is a proceeding in error to the district court of Pawnee county.

It appears from the record that an attachment was insti-

tuted against defendant in error by the Bank of Burchard and an undertaking in attachment was filed, signed by plaintiff in error alone.

A proceeding in garnishment was instituted and the garnishee was summoned to appear in court and answer as to property, moneys, or credits held by him belonging to the defendant in the action. He was the county clerk of Pawnee county, and in his answer disclosed that he held no property or money belonging to the defendant in the action, but as county clerk he had possession of a county warrant, which was issued to defendant and would be for delivery in a short time. A motion was filed to dissolve the attachment on the ground that the facts stated in the affidavit were untrue. This motion was filed prior to the answer of the garnishee, but the court declined to act upon it until after the answer of said garnishee had been taken. When the garnishee disclosed the fact that he was in possession of the county warrant as county clerk he was discharged and no order made against him. The cause then came on for trial, when judgment was rendered in favor of the bank but no order at any time was made with reference to the attachment proceeding. This action was brought upon the attachment undertaking.

A number of questions are presented by the briefs of plaintiff in error, but we will notice but two. The first of which is that the suit could not be maintained against him for the reason that the undertaking in attachment was not signed by the plaintiff in the action and was therefore void.

Sec. 926 of the Civil Code, under which the undertaking in attachment was filed, is as follows: "When the ground of attachment is that the defendant is a foreign corporation, or a non-resident of the state, the order of attachment may be issued without an undertaking, but in all other cases the order of attachment shall not be issued by the justice until there has been executed in his office, by

one or more sufficient sureties of the plaintiff, to be approved by the justice, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained."

It will be seen by reference to this section that there is no requirement that the undertaking should be signed by the plaintiff in the case, but that an undertaking not exceeding double the amount of the plaintiff's claim, executed by one or more sufficient sureties of the plaintiff, must be filed in the office of the justice. The undertaking, therefore, was not void.

The next contention of plaintiff in error which it is deemed necessary to notice is, that the suit could not be maintained upon the undertaking in attachment without the attachment having been discharged as wrongfully issued, by the court in which the attachment proceedings were pending.

This question was presented to the district court by instructions to the trial jury asked by plaintiff in error and which were refused. We think the law is pretty well settled, that where an attachment proceeding is instituted against a party upon whom service of summons is made and who appears or might have appeared in the action in order to maintain an action upon an attachment bond, it is necessary that he allege in his petition and prove upon the trial that the attachment has been discharged. (See Maxwell's Practice in Justices' Courts, 334; also Maxwell on Pleading and Practice, 497; Drake on Attachment, sec. 162a.) The decision of a court in an attachment proceeding upon a motion to discharge the attachment being a final order, which either party might have reviewed by proper proceeding in error, it was necessary that a judgment be had upon the motion. This was not done and the action cannot, therefore, be maintained.

Seward v. Klenk.

The judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other Judges concur.

CITY OF SEWARD V. CATHERINE KLENK.

[FILED OCTOBER 16, 1889.]

Bill of Exceptions: FAILURE TO SERVE IN TIME. A jury trial was had in the district court at the March term thereof, 1888, the verdict being returned on the 7th day of the month. Within three days thereafter plaintiff in error filed a motion for a new trial. On the 30th of April the court adjourned *sine die*, without having passed upon the motion for a new trial. The next regular term convened on the 28th day of May, the same year. On the 30th day of July the motion for a new trial was argued and submitted to the court and on August 8 it was overruled. On the 26th day of September a bill of exceptions was served on defendant in error, who returned it October 11 without suggestion of amendment, and on the same day filed a protest with the judge against the allowance of the bill. On motion to quash it was *held*, that the bill was not served upon defendant in error within the time required by sec. 311 of the Civil Code, and the motion was sustained.

MOTION to quash bill of exceptions.

D. C. McKillip, and E. P. Smith, for the motion.

R. S. Norval, and R. P. Anderson, *contra*.

Cases cited by counsel are referred to in opinion.

REESE, CH. J.

This is a motion filed by defendant in error to quash the bill of exceptions, the principal ground being that the

27	615
42	273
27	615
46	863
27	615
47	241
48	667

bill of exceptions was not reduced to writing and served upon defendant in error within the time required by law. It appears from the record that the cause was tried to a jury at the regular March, 1888, term of the district court and a verdict was rendered in favor of defendant in error on the 7th day of that month. On the 9th day, and within three days after the return of the verdict, plaintiff in error filed its motion for a new trial. No order was asked by plaintiff in error, nor was any made by the court, allowing time, in addition to that fixed by law, within which to perfect a bill of exceptions. The court adjourned *sine die* on the 30th day of April without ruling upon the motion for a new trial. The next regular term of the district court convened on the 28th day of the following May, and continued by adjournment from time to time until the 17th day of September, when it again adjourned *sine die*. During that term, and on the 30th day of July, the motion for a new trial was argued and submitted to the court, and on the 6th day of August was overruled and judgment was rendered on the verdict. On the 26th day of September plaintiff in error submitted to defendant in error for examination and amendment the proposed bill of exceptions, which is now on file in this court. The bill of exceptions was retained by counsel for defendant in error until the 11th day of October, when it was returned to the attorneys for plaintiff in error, and a protest against the allowance of the bill on account of its having been served too late was filed with the judge. This, it may be observed, was fifteen days after the receipt of the bill. The bill was received by the attorney for defendant in error one hundred and forty-nine days after the final adjournment of the March term of court. Under the rule stated in *Donovan v. Sherwin*, 16 Neb., 129, construing section 311 of the Civil Code, it is apparent that the bill of exceptions was not served upon counsel for defendant in error within the time required by that section. The only

remaining question then is, Did the attorneys for defendant in error, by holding the bill of exceptions more than the ten days in which they were entitled to examine it, waive this objection to the bill?

In the examination of this question it must be borne in mind that the bill was not served upon defendant in error until after the expiration of the time fixed by law for such service, for it is said in *Donovan v. Sherwin* that "the bill is to be prepared by the party excepting at the trial term or within forty days thereafter." An order of the court continuing "causes, motions, and matters pending" at the adjournment could not dispense with the provisions of the law as to the time within which bills of exceptions are to be served. As has been heretofore said by this court, prior to the passage of our present law for the allowance of bills of exceptions, all exceptions must be reduced to writing at the time of the trial and during the term and prior to its final adjournment. (*Munroe v. Elburt*, 1 Neb., 174.) The time thus fixed was extended by the present provisions of the Code to fifteen days after the term and provision was made for such extension for eighty days by order of the court or judge. But there is no provision in the statute which would justify the conclusion that any longer time was intended. While it has always seemed to the writer that the proper rule for the legislature to have adopted was that the time should begin to run after the overruling of a motion for a new trial instead of after a verdict, yet that matter is, of course, for the legislature and not for the court. We must accept the law as we find it. It is insisted by plaintiff in error that this case is exactly parallel with the case of *Dodge v. Runnels*, 20 Neb., 33. Upon a re-examination of the doctrine of that case the writer is not entirely satisfied that it is wholly consistent with the rulings of the court in other cases and with the statutes. But that case is distinguished from others by reason of the fact that when the time arrived for the rul-

ing of the district court in the motion for a new trial, the attorneys for the defendant in error filed a remittitur of \$449.99 damages, whereupon the motion for a new trial was overruled and the case is made to turn upon that concession by the attorneys for the plaintiff in the case that the verdict was, to that extent at least, wrong. While this distinction is clearly made in the opinion, yet it is the belief of the writer that the decision of that branch of the case was not in harmony with the statute and the prior decisions of this court, and should a similar case arise it should be overruled. But this distinction does not arise in this case, as no such concession has ever been made by defendant in error and it will, therefore, not be discussed. The cases cited by plaintiff will be noticed in the order of their occurrence in the reports.

Wineland v. Cochran, 8 Neb., 528, was where a trial was had to the district court in an equity case and after the submission of the evidence the cause was taken under advisement by the court until the next term, when the finding was announced and decree entered. It was held that the trial continued until a decision was rendered. In that case the then Chief Justice, MAXWELL, in delivering the opinion of the court said:

"In actions at law, where a trial is had and a verdict rendered in the case, it has been held that exceptions must be reduced to writing and signed during the term in which the trial is had, even though a motion for a new trial be made and continued to the next term. The reason is that there is a finding in the case, and the party objecting to that finding must take the necessary steps to preserve his exceptions in case the motion for a new trial is overruled. But these reasons do not apply in cases where no decision is made at the term at which the trial was had. In such case the trial may be said to continue until a decision is rendered;" thereby recognizing the rule here stated.

In *Scott v. Waldeck*, 11 Id., 525, it was held that "excep-

tions must be reduced to writing at the term at which the verdict was rendered or within the time fixed by statute therefor." The reason for the rule being that "the statute fixes the time within which the exceptions are to be reduced to writing and limits it to forty days after the trial term." But it was held in that case "by the court" that where one of the errors assigned was that the verdict was not supported by the evidence, the court would examine the testimony for the purpose of determining that fact, and a bill of exceptions signed by the judge *at the term at which the motion for a new trial was overruled* and which contained all the evidence would be considered for that purpose alone.

Deck v. Smith, 12 Id., 205, was where a judgment was rendered in February, 1880. Court adjourned *sine die* on the 21st day of the following March, giving forty days to the losing party in which to reduce his exceptions to writing. The bill was prepared, and on April 24 served on the attorney for the other party, who permitted it to remain in his office until the 7th day of June and proposed no amendment. On the 8th day of June the bill was presented to the judge, who signed it. The bill of exceptions was saved upon the ground that there were no laches upon the part of the party desiring the bill and that he served it upon the defendant in error within the time fixed by the order of the court and that the defendant in error retained it in his office not only for the ten days, but for a much longer time, when he returned it to the party seeking the settling of the bill. The court says in the opinion: "He cannot close his office or place the bill where it will be overlooked and forgotten, and then plead his own neglect to deprive the party excepting, of his rights."

Fitzgerald v. Hollingsworth, 13 Neb., 199, is very similar in its facts. The bill of exceptions, with the exception of an exhibit, was properly served within the time fixed by the trial court, but was retained by the counsel upon whom

it was served about 100 days, when it was returned to the plaintiff in error. The court in the opinion says: "As the delay in signing the bill was caused by the neglect of the defendant's attorneys, the motion must be overruled."

In *The Omaha, etc., Railroad Co. v. Redick*, 14 Neb., 55, the cause was tried to the district court without the intervention of a jury on the 1st day of March, 1882, and a decision was rendered on the 10th of that month, when a motion for a new trial was filed within legal time and taken under advisement by the court. On the 7th of April the court adjourned *sine die*. At the next term of the court and on the 10th of July the decision was rendered overruling the motion for a new trial, and time was given in which to settle the bill of exceptions, when court again adjourned *sine die* on the 11th of July. On the 21st the bill of exceptions was submitted to the defendant in error for correction; *he proposed various amendments and they were returned with and incorporated into the bill, which was signed by the judge without objection.* The court said: "When a party without objection proposes amendments to a bill of exceptions, thereby treating the same as valid and making no objection to the same being signed by the judge, he will waive all objection to the time within which the bill was presented to him for examination and amendment." The bill of exceptions was sustained.

Smith v. Kaiser, 17 Id., 184, was substantially to the same effect.

Morehead v. Adams, 18 Id., 571, is not in point upon the question now under consideration. In all the cases referred to, with one exception, the party presenting the bill of exceptions to the defendant in error was within the time allowed by law and the order of the court, and in that case it was held that the objection was waived. The rule, therefore, seems to be that when a bill of exceptions is served within the time required by law, the party upon whom it is served cannot retain it until after the expiration of the

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time in which it should be signed and thus by his own act deprive the opposite party of the bill; and that if a bill is served after the time within which it should have been served, the failure to serve in time may be waived; and that accepting the bill and offering amendments will be held to be such waiver.

This being true, plaintiff in error having served the bill after the expiration of the time within which it could have been legally served, and not being in such condition as to be deprived of any existing rights and no amendment having been offered or other act done which would amount to a waiver, the mere fact that the bill was not returned within ten days after its receipt (when received out of time) would not be a waiver of the default on the part of plaintiff in error. The bill of exceptions, having been signed after the adjournment of the term at which the motion for a new trial was overruled, cannot be retained for any purpose. The motion is therefore sustained.*

MOTION SUSTAINED.

THE other Judges concur.

GEORGE E. EMERY ET AL. V. J. E. COBBEY.

[FILED OCTOBER 16, 1889.]

Contract: RATIFICATION BY SILENCE: ATTORNEY: COMPENSATION. Prior to the year 1884 plaintiffs' intestate was the owner of school lands in Gage county and paid taxes thereon. In January of that year defendant in error notified plaintiffs that he was proceeding to recover the amount of taxes paid upon school lands under the provisions of an act of the legislature passed

* Modified May 13, 1890, so as to allow bill of exceptions to be retained, to apply to the question of the sufficiency of the evidence to sustain the verdict and judgment, only.

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before that time, for a contingent fee of one-half of what he could recover, and offering to make an effort to recover the amount due plaintiffs in error if they so desired. Receiving no answer to his letter he soon thereafter addressed them again to substantially the same effect. They telegraphed him to proceed, providing he would do so for a fee of ten per cent upon the amount recovered. He answered by telegraph, declining their offer, but soon thereafter wrote them a letter saying that he was not in a position to dictate terms, and that he had included their claim with others in his hands for collection, and had presented it to the county board. Subsequent to that time he frequently notified them of the proceedings which he was taking and finally of his success in recovering the money from the county. No objections were made by them to his action, although they were at all times advised of the efforts being made by him in their behalf. In an action instituted by him for one-half of the amount recovered of the county it was *held*, that the evidence fully justified the finding of the district court, that he was entitled to ten per cent of the amount recovered, and a judgment to that effect was affirmed.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hazlett & Bates, for plaintiffs in error:

Defendant in error not only did not accept but even declined the only offer made by the Crosses. The testimony shows that Ellis, through whom defendant claims the Crosses became indebted to him, was not a general agent and was not authorized to employ counsel. There is no precedent or rule of law under the facts by which defendant could become entitled to the possession of the warrant.

J. E. Cobbey, pro se:

The attorney's lien allowed by our statute is paramount to the rights of the parties. (*Boyer v. Clark*, 3 Neb., 168; *Griggs v. White*, 5 Id., 467; *Reynolds v. Reynolds*, 10 Id., 574; *Aspinwall v. Sabin*, 22 Id., 73; *Van Elten v. State*, 24 Id., 734.) Such lien covers a sum awarded to the client

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other than, as well as, a judgment. (Weeks, Attorneys, sec. 384.) If money comes into an attorney's hands, he may retain it to the amount of his claim. (Id., 368.) The prosecution of the claims was no small task, and deserves compensation. The silence of the Crosses was a ratification of their attorney's acts. (Weeks, sec. 247.) A right to possession is sufficient to maintain replevin (*Saunders v. Jordan*, 54 Miss., 428; *Corbitt v. Heisey*, 15 Ia., 296; *Parlman v. Young*, 2 Dak., 175; *Prater v. Frazier*, 6 Eng. [Ark.], 249); so also is a special property. (*Rich v. Ryder*, 105 Mass., 306.) Cross never had possession of the warrant and its return cannot be awarded to him. The plea of title in defendant must be for the entire interest. (*McIlvaine v. Holland*, 5 Har. [Del.], 10.)

REESE, CH. J.

This is a proceeding in error to the district court of Gage county.

The action was in replevin against the county clerk of said county for the possession of a county warrant for the sum of \$426.27 in favor of the estate of Hugh M. Cross, deceased, held by the clerk for delivery to the executors of said estate as due it upon a claim previously allowed, and which had been duly signed by the county clerk and the chairman of the county board. After the institution of the suit the executors of the estate of Cross appeared and made application to be made defendants and filed their answer, claiming the possession of the warrant as against both the clerk and defendant in error. The clerk disclaimed all interest in the property, and the contest in the district court was between defendant in error and the Crosses, each claiming the right to the possession of the warrant. A trial was had to the district court without the intervention of a jury, which resulted in a finding that "At the commencement of this suit the plaintiff, J. E. Cobbey, was en-

titled to the warrant replevied, and that such right of possession is of the value of \$43.86, and that the value of the property replevied is of the value of \$438.67; that defendants are entitled to said property subject to plaintiff's right of possession; the right of defendant is of the value of \$394.81."

By the issues presented to the district court the question as to the right of defendant in error to maintain replevin as against the clerk is eliminated from the case, and the only question presented is whether or not the executors of the estate of Cross were indebted to defendant in error in any sum for services alleged to have been rendered in procuring the allowance of the claim against the county and the issuance of the warrant, as it must probably be conceded that if such indebtedness did exist, defendant in error would be entitled to an attorney's lien under the provisions of section 8, chapter 7, Compiled Statutes of 1887, as against the Crosses, who are the real plaintiffs in error.

There is no proof in the record that there was any express contract of employment made between the parties in direct terms; but it was contended by defendant in error upon the trial—and is so contended here—that from the correspondence between the parties, and the action subsequently taken by them, a contract is implied, and that under such implied contract defendant in error performed the services (which were actually rendered by him) and for which plaintiff in error is legally bound to pay.

It appears from the evidence that on the 26th day of July, 1884, defendant in error wrote plaintiffs a letter calling their attention to the fact that the legislature of this state had passed an act providing for the repayment by the counties of a portion of the taxes paid upon school lands within the state, and of which plaintiffs' testator had considerable quantity in Gage county, and offering to collect from the county the amount due plaintiffs in error for a contingent fee of one-half. To this letter no response was

made by plaintiffs in error, and on the 9th of the following January he wrote again, calling attention to the matter, and saying that he proposed filing other claims against the county on the following Tuesday, and that if plaintiffs desired him to include their claim to telegraph him. In response to this letter the following dispatch was sent by plaintiffs in error and received by defendant: "Jerseyville, Ill., January 12, 1885.—J. E. Cobbey, Beatrice, Nebraska: Go on, provided your fees shall not exceed 10 per cent of the amount collected. A. W. Cross." To this defendant replied by telegraph: "January 12, 1885.—Cannot take the claim on your terms. J. E. Cobbey." No communication, either verbal or written, was afterward made by plaintiffs in error to defendant in error.

On the 13th day of January, 1885, defendant again addressed a letter to plaintiffs in error declining to accept their proposition, saying that he had made his application to the county board and that they had taken his demand for special levy under advisement, but that he might yet get their claim in by stipulation if so desired, and if it was their wish to have it included to telegraph him. Again, on the 27th day of January he wrote them that at the last moment before filing the claims for his other clients he had included theirs, and that the commissioners, after considering the matter for some days, had made an estimate of one-half mill to meet the claims so filed; that he did not like to leave their claim unprovided for lest it should be lost and so put it in, fearing they might not have received his letter. In this letter he says: "I think I should have the same fee from you as from the others, but am not now in position to dictate terms as I was. Send me your receipts at once as they must be filed with the commissioners. I will prepare affidavits for you."

Again, on the 17th of April of the same year he addressed them a letter saying that he had called at the bank to get tax receipts from it, and that he had been told

that plaintiffs in error talked of sending theirs, and as he had not received them he suggested that if they would profit by work already done they should send them at once. This suggestion was also repeated on a postal card of April 30th. On May 10th he again wrote them in regard to the claim, saying that the levy of taxes was exhausted before their claim was reached, but that he would have another levy made and would get it in in time, though it would cause a delay of nearly two years. On the 20th day of April, 1886, he again wrote them, informing them that the claim had been allowed for the sum of \$426.27, and that under their agreement the fees would be \$213.13, and asking direction as to how the matter should be closed up, whether by sending them the warrant and they sending him the money or whether he should deduct the fees out of the warrant when collected, which would be some little time in the future. On the 8th day of July, 1887, he wrote them that he had finally succeeded in getting the matter closed up and that the warrant was ready for delivery, but that the clerk claimed that he had a lien on it for \$7 for recording done for them, and refused to let him have it; and that he had instituted an action for its possession. He again stated his demand for fees to be \$213.

None of these letters were answered by plaintiffs in error, although they were all received by them and are attached to their deposition as exhibits.

By this it conclusively appears that defendant in error was instructed by plaintiffs in error to proceed with the demand against the county, but upon condition that he would transact the business for ten per cent of the amount actually received by him. He at first declined to enter into this agreement, but in his letter of January 27, 1885, a part of which we have hereinbefore quoted, he clearly gave them to understand that he was proceeding in the case in their behalf and was not in a position to insist upon the full fee which he had previously demanded; that no

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objection was made to this by plaintiffs in error and that they allowed him to proceed to the final settlement of the business, knowing that they had directed him to do so upon the terms contained in their dispatch. Had they not been willing for him to so proceed it was their duty to have notified him at once upon being informed of his action.

This evidence was amply sufficient to sustain the finding of the district court and to warrant the rendition of the judgment entered. It was clearly insufficient to sustain a finding and judgment in favor of defendant in error for the full sum of \$213 claimed by him, but there was ample proof of the proposition made by plaintiffs in error and of its final acceptance by defendant in error and the rendering of the services by him with their knowledge and consent under such acceptance.

After having submitted the proposition made by them, and having been informed that the defendant in error was proceeding to the transaction of the business in their behalf, if they did not desire his services they should have notified him that the offer contained in their dispatch had been withdrawn and that they did not desire him to proceed. Instead of doing so, however, they silently permitted him to go on, knowing at all times what he was doing, for he kept them fully apprised of the facts, and, as the sequel shows, were quite willing to receive the benefit of his labor.

The finding and judgment of the district court was right, and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

MARSHAL A. THURMAN V. STATE OF NEBRASKA.

[FILED OCTOBER 16, 1889.]

JURORS : COMPETENCY: CHALLENGE. Plaintiff in error was placed on trial upon an indictment for shooting one P. with the intent to kill him; a juror was called who, upon his *voir dire* examination, testified that he had such an opinion as to the guilt or innocence of the accused as would take considerable of evidence to remove; that if what he had heard was true, he was prejudiced; that he could not say whether he could sit as a fair and impartial juror and render an impartial verdict upon the evidence and law or not; that he had formed a pretty strong opinion about the case. It was *held*, that the juror was incompetent and that the decision of the district court in overruling a challenge to him for cause was prejudicial error. *Held*, also, that the fact that the juror was peremptorily challenged by plaintiff in error, did not cure the error and that he was entitled to a new trial.

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

D. F. Osgood, for plaintiff in error.

William Leese, Attorney General, for defendant in error.

REESE, CH. J.

This is a proceeding in error to the district court of Johnson county.

Plaintiff in error was convicted by said court of shooting one Thomas B. Parker, with the intent to kill. A jury trial was had which resulted in a verdict of guilty. And after a motion for a new trial had been filed and overruled, defendant was sentenced to imprisonment in the penitentiary. He now brings the case to this court, alleging as error the ruling of the district court upon his challenge for cause, to some of the jurors, a failure of the

evidence to sustain the verdict, and the ruling of the court in refusing certain instructions asked by him to be given to the jury.

It is not deemed necessary to notice all of the questions presented by plaintiff in error, as those omitted will not probably arise upon another trial; and therefore our investigations will be confined to the first assignment of error hereinbefore referred to.

A Mr. Young was called as a juror, and from his *voir dire* examination we extract the following:

By Mr. Osgood: You stated you had talked with persons who claimed to know the facts; did they tell you what they claimed to be the facts in this case?

A. I know all about it; I live up near there; about three miles from this party.

Q. You have an opinion from what you have heard and know as to the guilt or innocence of the defendant.

A. Yes.

Q. And such an opinion as would take considerable evidence to remove, would it not?

A. Yes.

Q. You are prejudiced at the present time?

A. If it is true what I heard.

Defendant challenges for cause.

Re-examination by the court: Did you ever talk with any one who pretended to know the facts in this case?

A. I was introduced to Parker one day and spoke to him and told him he had a close call.

Q. Did he delineate any of the facts or the transaction to you?

A. No, sir.

Q. You didn't say any more than that about it?

A. No, sir.

Q. He is the only man you talked with who pretended to know the facts about it?

A. There was a lot of neighbors—

Q. All you know is simply neighborhood talk?

A. Yes.

Q. Notwithstanding the opinion you have formed could you sit as a fair and impartial juror and render a fair and impartial verdict upon the evidence and law as adduced in court?

A. I cannot hardly say whether I could or not.

Q. Don't you know whether you think you could or not?

A. I have formed a pretty strong opinion about the case.

Q. How far do you live from the party where that matter happened?

A. About three miles and a half, I think.

Q. Do you think you could render a fair and impartial verdict upon the law and the evidence?

A. I don't know but what I could.

Challenge overruled; defendant excepts.

By section 11 of article 1 of our constitution it is provided that in all criminal prosecutions the accused shall have a public trial by an impartial jury of the county in which the offense is committed; and by sec. 468 of the Criminal Code it is provided that "If a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine on oath such juror as to the grounds of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay and not upon conversations with witnesses of the transaction, or reading reports of their testimony or hearing them testify, and the juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror is impartial and will render such verdict, may in its discretion admit such juror as competent to serve in such case." By

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this it appears that the discretion of the district court must be founded upon the statement of the juror that he feels able, notwithstanding his opinion, to render a fair and impartial verdict in the cause about to be tried. In other words, if he has formed the opinion referred to he is an incompetent juror unless he states upon oath that he can render a fair and impartial verdict.

It must appear at a glance that the juror did not bring himself within this rule. His answers were no doubt candid and truthful. He resided in the neighborhood in which the alleged assault was made. He stated that he knew all about it; that he had formed an opinion as to the guilt or innocence of the defendant which it would take considerable of evidence to remove. And that if the statements which he had heard were true, he was prejudiced at the time of his examination. He had been introduced to the man upon whom the assault was alleged to have been made, and stated to him that he had had a "close call." His answer to the question as to whether he had talked with any who pretended to know the facts seems to have been cut short by another question. He simply says there were a lot of neighbors; that what he knew was neighborhood talk; that he could not hardly say whether he could render a fair and impartial verdict from the evidence and law or not; that he had formed a pretty strong opinion about the case, but did not know but what he could render a fair and impartial verdict. It will be observed that no single answer of this juror brings him within the rule laid down by the section from which the above quotation is made.

This subject received a pretty full examination in *Curry v. The State*, 4 Neb., 545, and according to the rule there stated, which need not be further elaborated here, the juror was clearly incompetent, and the decision of the district court in overruling the challenge of the plaintiff in error for cause, was error.

The juror was then challenged peremptorily by plaintiff in error and did not sit in the case. It is contended by the attorney general that as there were no objections made to the jurors who did sit in the case, and so far as appears by the record plaintiff in error was tried by an impartial jury, even were there error in the decision of the district court it would be without prejudice, and that the constitutional requirement above referred to has been literally fulfilled and therefore the judgment should not be reversed.

By sec. 467 of the Criminal Code, every person arraigned for the crime with which plaintiff in error was charged shall be admitted to a peremptory challenge of eight jurors.

A peremptory challenge is one which may be exercised by the accused upon his own volition, and for which he need not give any reason and which is not subject to the control of the court.

Plaintiff in error exhausted all his peremptory challenges upon the trial, one of which was to the juror hereinbefore mentioned. By being compelled to dispose of this juror upon his peremptory challenge, he was in fact limited to seven. Our statute provides no method of challenging jurors peremptorily in excess of the number provided by the section above referred to. It would be unwise perhaps for a party placed upon trial, charged with a crime, to make objections to jurors which must necessarily be futile and which could have no other effect than that of, in some degree at least, prejudicing the minds of the jurors against his cause. The law does not require the performance of an unnecessary act. It guarantees to an accused in the first instance a trial by a *fair* and *impartial* jury, and to this he is clearly entitled. There are some cases which hold to the doctrine contended for by the attorney general, but we have examined them and they do not meet with our approval.

In the case of *Holt v. The State*, 9 Texas Court of Ap-

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peals, 571, this rule is adopted and is followed in *Loggins v. The State*, 12 Id., 65. These two cases are followed in *Spies v. The People*, 122 Ill., 1; but that decision is founded solely upon the other two. The rule can also be found in 1 Thompson on Trials, section 120, but in its support the cases above referred to alone are cited.

In *Curry v. The State*, 5 Neb., 412, Judge LAKE in writing the opinion of the court upon this question, in referring to a juror, says: "But he was retained against the challenge of the accused, who was compelled to resort to one of his peremptory challenges for his removal. In this there was error to the prejudice of the prisoner."

To the same effect is *State v. Brown*, 15 Kan., 400.

A moment's reflection must satisfy the mind that this is and must be the correct rule. Suppose eight jurors were called, each of whom upon his *voir dire* examination showed himself incompetent and subject to challenge for cause, and was so challenged, but that the trial court for reasons satisfactory to itself overruled the challenge in each case and the eight incompetent jurors were held, the accused would be compelled to resort to his peremptory challenges in order to remove them. No provision is made by law or the constitution for any other challenges or objections to the jurors than those named. Jurors might then be called who, to the knowledge of the accused, were prejudiced against him and even might deny prejudice or bias or the formation of opinion (as the writer has seen done) for the express purpose of being retained upon the jury in order that a conviction might be secured. Could it be said that the constitutional provisions, that an accused should have a fair and impartial trial, had been complied with? Most certainly not. And it is for the purpose of guarding against this very contingency that the peremptory challenge is retained by our law. The ruling of the district court was therefore prejudicial, and for that reason the verdict must be set aside.

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The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

The other Judges concur.

JOHN H. DUNDAS, ADMINISTRATOR, ETC., v. JOHN L. CARSON ET AL., ADMINISTRATORS, ETC.

[FILED OCTOBER 16, 1889.]

Administrators: MAY MAINTAIN EJECTMENT. Under section 202 of chapter 23 of Compiled Statutes, *held*, that an administrator of an intestate's estate may maintain an action of ejectment for the recovery and possession of real property for the necessary purposes of administration.

ERROR to the district court for Nemaha county. Tried below before BROADY, J.

W. H. Kelligar, for plaintiff in error:

Under statutes like ours the courts of various states have held that an administrator might maintain ejectment. (*Miller v. Hoberg*, 22 Minn., 249; *Edwards v. Evans*, 16 Wis., 197; *Jones v. Bills'ein*, 28 Id., 227; *Streeter v. Paton*, 7 Mich., 351; *Kline v. Moulton*, 11 Id., 370; *Marvin v. Schilling*, 12 Id., 361; *Campau v. Campau*, 19 Id., 125; 25 Id., 130; *Meeks v. Hahn*, 20 Cal., 620; *Chapman v. Hollister*, 42 Id., 462; *Meeks v. Kirby*, 47 Id., 169; *McRea v. Haraszthy*, 51 Id., 146; *Page v. Tucker*, 54 Id., 121; *Golding v. Golding*, 24 Ala., 129; *McRae v. McDonald*, 57 Id., 423.)

G. W. Covell, and *R. W. Patrick*, for defendants in error:

As a general rule an executor or administrator represents the personal estate only, and cannot maintain eject-

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ment. (*Brown v. Strickland*, 32 Me., 174; *Burdyne v. Mackey*, 7 Mo., 374; *Heirs of Ludlow v. Johnson*, 3 O., 553; *Hathaway v. Valentine*, 14 Mass., 501; *Humphreys v. Taylor*, 5 Or., 260; *Morrill v. Menifee*, 5 Ark., 629; *Sedg. & W.*, Title, sec. 207.) Upon the death of an ancestor the title to realty vests at once in the heirs or devisees. (Schouler, *Ex'rs & Adm'rs*, sec. 212; *Drinkwater v. Drinkwater*, 4 Mass., 355; *Lucy v. Lucy*, 55 N. H., 9; *Laidley v. Kline*, 8 W. Va., 218; *Hawkins v. Kimball*, 57 Ind., 42; *Mopike v. Wells*, 54 Miss., 136; *Lemoyne v. Quincy*, 70 Ill., 399; *Sheldon v. Rice*, 30 Mich., 296.) An administrator has no concern with the realty save for the benefit of creditors. (*G'adson v. Whitney*, 9 Ia., 267; *Crocker v. Smith*, 32 Me., 244.) Plaintiff in ejectment must show legal title to lands claimed (*Morton v. Green*, 2 Neb., 451); and must recover on the strength of his own title (*Butler v. Davis*, 5 Neb., 511); and must have a legal estate in and be entitled to the possession of the premises. (*Dale v. Hunneman*, 12 Neb., 221; Tyler, *Eject.*, 36; *Wright v. Douglas*, 3 Barb. [N. Y.], 554; *Williams v. Hartshorn*, 30 Ala., 211; *Armstrong v. Pierson*, 4 G. Greene [Ia.], 45; *Lathrop v. Emig. Co.*, 41 Ia., 547; *Warren v. Tobey*, 32 Mich., 45; *Lannay v. Wilson*, 30 Md., 536; *Fenn v. Holme*, 21 How. [U. S.], 481.) The administrator's authority is a mere naked power. (*Floyd v. Herring*, 64 N. C., 409; *Womble v. George*, Id., 759.) The Montana court held that an administrator, under a statute authorizing him to take possession of all evidence of title, to make an inventory of the realty, could not maintain ejectment. (*Carrhart v. Land Co.*, 1 Mont., 245.)

COBB, J.

This cause is brought to this court on error to review the judgment of the district court of Nemaha county.

The plaintiff in error, John H. Dundas, administrator of the estate of Peter B. Borst, on November 4, 1885, com-

menced an action in the court below, alleging that his decedent died intestate in Page county, in the state of Virginia, April 24, 1882; that his estate was insolvent, and was duly administered in accordance with the *lex loci*, and that plaintiff was on September 5, 1884, duly appointed and qualified as administrator of said estate in the county court of Nemaha county; that as such administrator he has a legal estate in and is entitled to the possession of the N. W. fractional $\frac{1}{4}$ of section 4, township 4 north, range 14 east, in Nemaha county; that John L. Carson, as administrator of the estate of Matthew A. Handley, deceased, McFarland Campbell, and Albert Gillen, who were made defendants, since the 1st day of March, 1879, have unlawfully and wrongfully kept the plaintiff out of possession; that while unlawfully in possession of the premises the defendants have received the rents and profits thereof from March 1, 1879, to the commencement of this suit, amounting to \$1,000, applying the same to their own use, to the damage of the plaintiff of \$1,000, for which the plaintiff prays judgment of possession and damages; that the plaintiff has a legal estate in and is entitled to the possession of the N. E. fractional $\frac{1}{4}$ of section 4, township 4 north, range 14 east, in Nemaha county, and that the defendants, since the 1st day of March, 1876, have unlawfully and wrongfully kept the plaintiff out of possession; that while unlawfully in possession of the last described premises the defendants have received the rents and profits thereof from March 1, 1876, to the commencement of this suit, amounting to \$1,500, applying the same to their own use, to the damage of the plaintiff \$1,500, for which the plaintiff prays judgment of possession and damages. *Mesne* process was issued against the defendants November 4, 1885, and was served on John L. Carson, administrator, and on Albert Gillen, and returned according to law.

On December 7, 1885, the defendants, Carson and Gillen, filed demurrers to the petition, because the court had

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no jurisdiction of the subject of the action, and the plaintiff no legal capacity to sue the defendants, as administrator, or otherwise; because there is a defect of parties plaintiff and a defect of parties defendant; because different causes of action are improperly joined, and because sufficient facts are not stated to constitute a cause of action against either defendant. Subsequently, on March 29, 1886, on motion and application of the heirs at law of Matthew Handley, deceased, to be admitted and made parties defendant, to-wit, John M. Handley, Margaret Harmon, Joseph Handley, Cassander Bennett, William Millsops, Mary M. Millsops, Russell Millsops, Robert Millsops, Joseph Millsops, John Millsops, Samuel Millsops, Emily Millsops, Sarah A. Millsops, Julia Hays, Franklin L. Handley, George W. Handley, John Handley, Archibald Handley, Strander Handley, Mary Handley, Mrs. Joseph Stiles, William Handley, Joseph Carpenter, Harvey Handley, Mary Jackson, and Eliza Young, were each and all made parties defendant with leave to answer.

On March 31, following, they demurred to the petition as follows:

1. That it does not state facts sufficient to constitute a cause of action against defendants.
2. That the plaintiff has no legal capacity to sue herein.
3. That this court has no jurisdiction of the action.

Upon the argument of the demurrers to the petition they were sustained by the court and judgment against the plaintiff for costs, to which exceptions were duly taken, and errors were assigned:

First—That the court erred in sustaining the demurrer.

Second—In rendering judgment against the plaintiff.

It is admitted by the pleadings, in the issue in the court below, that the allegations of the petition are to be taken as true; that the plaintiff in error is the administrator, under the laws of Nebraska, of the estate of Peter B. Borst, late of Page county, Virginia, who died intestate and in-

solvent on the 24th of April, 1882, and whose personal estate was found insufficient to pay his debts, after administration, under the *lex loci*. It is not doubted that as such administrator the plaintiff in error has a legal estate in and is entitled to the possession of the real estate in the petition described.

But it is denied by the defendants that the court below had jurisdiction of the plaintiff's action at law, in the nature of ejectment, for the recovery of his intestate's real estate, or that the plaintiff could maintain such an action, or that a sufficient cause of action had been set up.

It is not to be disputed that at common law the defendants' arguments would prevail; that the title to the real estate would descend at once to the heirs and next of kin, and the right of possession follow, subject to any paramount lien for the debts of the deceased which might exist, and that the administrator could have no concern with it.

But that rule of the common law has been changed in this state by the statute providing for the settlement of the estates of deceased persons: "That if the goods, chattels, rights, and credits in the hands of the executor or administrator shall not be sufficient to pay the debts of the deceased and the expenses of administration, the whole of his real estate, except the widow's dower, or so much thereof as may be necessary, may be sold for that purpose by the executor or administrator, after obtaining license therefor, in the manner provided by law." (Sec. 201, ch. 23, Comp. Stats. 1887.) The succeeding section of the law (202) further provides that "the executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents, issues, and profits of the real estate until the estate shall have been settled, or until delivered over, by order of the probate court, to the heirs or devisees, and shall keep in good tenantable repair all houses, buildings, and fences thereon which are under his control." Taking the

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provisions of these sections, as to the powers and duties of executors and administrators, their intent and meaning cannot readily be mistaken, nor can they be consistently misconstrued that such right and title as the deceased had, in his lifetime and at his death, his administrator shall *not* have, as to all the real as well as personal estate, in order to "receive the rents, issues, and profits," and keep in "tenantable repair all houses, buildings, and fences thereon," as required by this section. These duties could not always be exercised, as in the present instance, without the right of recovery and possession of the real estate under this law. If the title of any one of the defendants be superior, or valuable, or colorable, they are not barred from setting it up on the trial of the general issue.

This view of the case is supported by the decisions of the courts of other states where the same statutory provisions are found. In California, during administration of an estate, and until distribution, the executor or administrator is entitled to the possession of the real property, and may recover it from the heir or devisee. (*Page v. Tucker*, 54 Cal., 121.) In Michigan the statutory right of the administrator, before final settlement, to the possession and to the rents and profits of the real property may be enforced by ejectment. (*Kline v. Moulton*, 11 Mich., 370.) The same prevails in Minnesota. In the case of *Miller v. Hoberg*, reported in 22 Minn., 249, the court held that, under sec. 6, chap. 52, of the statutes of that state, (which is precisely the same as sec. 203 of our statute, above quoted,) "The plaintiff's legal capacity to sue depends on his character as administrator, and not on his right to recover for the cause alleged in the complaint. His right to the possession, if he has any, is sole, and exclusive of the right of the heirs, and is not a joint right. * * * The heirs have the right to the possession as against every one but the administrator or his tenants. He has the right to the possession as against the heirs, or any other persons, until

the estate is settled, or until delivered over by order of the probate court, and the right to sue follows as a necessary consequence." In Alabama an administrator has such a right to the possession of land of his intestate that he may bring ejectment without reference to the solvency of the estate, and it was held where the plaintiff brought an action as an individual that the complaint might be amended to sue as an administrator. (*McRae v. McDonald*, 57 Ala., 423; *Agee v. Williams*, 30 Id., 636.) In the state of Florida an administrator may maintain ejectment to recover possession of the real estate of his intestate. (*Sanchez v. Hart*, 17 Fla., 507.) In the state of Wisconsin, under sec. 7 of chap. 100 of the Rev. Stat. of that state, identical with sec. 202 of our statute quoted, the supreme court held "that an administrator was entitled to maintain ejectment for lands of the estate he represented, if he saw fit." (*Edwards v. Evans*, 16 Wis., 197; *Jones v. Billstein*, 28 Id., 227.)

Section 2904 of the Comp. Statutes of Michigan is in like terms of sec. 202, in this case, and was frequently reviewed by the supreme court of that state. In *Marvin v. Schilling*, 12 Mich., 361, the court said: "In *Streeter v. Paton* [7 Id., 341] we had occasion to consider the effect of this statute on the rights of the heir, and came to the conclusion that the statute did not interfere with the descent of the real estate to the heir, and his right to take possession, or bring ejectment therefor against any one, except the administrator or some one in possession under him, and that the object of the statute was to permit the personal representative of the deceased to take possession of the real estate and hold it until it should be sold by him under a license of the probate court, or the final settlement of the estate if he thought proper to do so, unless ordered to deliver it over to the heir by the probate court."

Again, in considering the same question, in *Campau's case*, 19 Id., 116, the court said: "It is a mere statute

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power given to him [the administrator] only for the benefit of creditors, and properly to be exercised only as he shall find the exigencies of the estate may require. Doubtless if he should refuse to exercise the powers when the condition of the estate required it, he might, at the instance of creditors, be compelled to do so, or be removed."

While the legal construction of section 202 of chapter 23 has not heretofore been brought to this court for consideration, the authorities cited, and that construction given to the same provision in other states, may be regarded as a settlement of the question here—of the legal authority of the administrator of an insolvent estate to maintain ejectment, for the purposes of administration, against all occupying claimants of the real estate of which his intestate died seized.

The demurrer is upon the grounds that the plaintiff has no legal capacity to sue; that the court is without jurisdiction; that there is a defect of parties in the omission of heirs of the intestate; and that the facts stated do not constitute a cause of action.

There is nothing in these grounds, if the views expressed and adopted in this opinion are correct, and therefore the demurrer in the court below should have been overruled.

The judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other Judges concur.

E. F. DAVIS V. GEORGE R. SCOTT.

[FILED OCTOBER 16, 1889.]

Insolvency: PREFERENCES: CHATTEL MORTGAGE: ATTACHMENT.

A debtor in failing circumstances gave his promissory notes to certain creditors and a chattel mortgage upon all his goods to secure the same. On the next day the sheriff levied certain attachments upon the goods thus mortgaged and took possession. An assignee of the mortgagee thereupon brought an action of replevin and recovered possession of the property. The trial court having found in favor of the mortgagee, *held*, that as the evidence established the good faith of the transaction, and the lien of the mortgage being prior to the attachments, the assignee was entitled to the possession of the property; at least until his claim was satisfied.

ERROR to the district court for Gage county. Tried below before BROADY, J.

J. E. Cobbey, for plaintiff in error:

The burden was on plaintiff below to show the good faith of the transaction. (*Fitzgerald v. Meyers*, 25 Neb., 77.) "There are no preponderating equities in favor of either party" and the lien of the mortgages does not attach until delivery, which does not take place until acceptance. (*Bank v. Morse*, 73 Ia., 174.) The attachment was an equitable lien covering the surplus, to which mortgagees had no right. (*Liningier v. Herron*, 18 Neb., 450; 23 Id., 97.)

Hazlett & Bates, and *Pemberton & Bush*, for defendant in error:

Every point made by plaintiff in error was decided against him on the former hearing. The *bona fides* of mortgage and indebtedness was a question of fact which the court below passed upon. The surplus was applied to satisfy the claims of parties who had garnished the mortgagees.

MAXWELL, J.

This case was before this court in 1887, the judgment of the district court being reversed because of an erroneous instruction and the cause remanded for further proceedings. (*Davis v. Scott*, 22 Neb., 154.) On the second trial a jury was waived and the cause submitted to the court on the evidence in the former bill of exceptions. The court found for the defendant and rendered judgment accordingly.

The facts briefly are these: The firm of R. N. Townsend & Co., being pressed by certain creditors represented by the plaintiff, undertook to defeat such creditors by preferring other creditors, and accordingly gave the latter seven notes, due in thirty days, secured by a chattel mortgage on the firm property. On the next day the plaintiff levied attachments upon the mortgaged property and took possession. Soon after this levy the defendant in error, as the assignee of the above chattel mortgage, brought an action in replevin and regained the possession of the goods. That this mortgage was given to secure *bona fide* debts seems to be fully established, and in this state, under the holdings of this court, a creditor in failing circumstances may prefer his creditors. Justice would be subserved by requiring an equitable distribution of the property between all creditors in such cases, and a change in the law on that subject is worthy of the consideration of the legislature. But the common law in regard to preferences is in full force in this state, and as that law recognizes the right of a failing debtor to prefer his creditors, error cannot be assigned because of such preference. The mortgagee, therefore, being a *bona fide* creditor and having a prior lien to that of the attaching creditors, was entitled to the possession of the property until a sufficient amount had been sold to satisfy his claims. It also appears that certain proceedings in garnishment were instituted against the mort-

gagee, and that the surplus over the amount required to pay the mortgagee has been applied in such proceedings. The plaintiff, no doubt, has a right to contest the right of other creditors to such surplus, and if the liens held by him are prior to theirs, secure it; but that question is not before the court.

There is no error apparent in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

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ABIJAH RICHARDSON, APPELLANT, v. JAMES A. CAMPBELL, APPELLEE.

[FILED OCTOBER 16, 1889.]

1. **Negotiable Instruments: INTEREST.** A promissory note was given to be due five years after date with interest from maturity at twelve per cent; coupon notes were given for the interest on said note. When the note was given, the highest rate of interest allowed by statute was twelve per cent, but before it became due the maximum rate had been reduced to ten per cent. *Held*, That the holder was entitled to the contract rate of interest.
2. **Coupons: INTEREST.** Where the interest provided for in a promissory note is the maximum rate allowed by law, and is represented by coupon notes providing that interest shall be allowed thereon after maturity at the maximum rate, no interest will be allowed on such coupons.

APPEAL from the district court for Johnson county.
Heard below before BROADY, J.

L. C. Chapman, for appellant:

All money paid to protect the title was added to and barred only with the debt itself. (*Southard v. Dorrington*,

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18 Neb., 122; *Schoenheit v. Nelson*, 16 Id., 237; *Miller v. Hurford*, 11 Id., 385.) The principle is also applied to the case of a mortgagee purchasing an outstanding title. (*Comstock v. Michael*, 17 Neb., 300.) Taxes are not debts in the ordinary sense of the term. (*Nebraska City v. Gas Co.*, 9 Neb., 339; *Millett v. Early*, 16 Id., 268.) Land taxes in this state are a perpetual lien, even though a supposed tax title may fail. (Gen. Stats., ch. 66, sec. 118; *Merriam v. Hemple*, 17 Neb., 347.) The rights of the parties must be determined by the legal rate of interest at the time of making the contract. (*Bond v. Dolby*, 17 Neb., 494; *Kellogg v. Lavender*, 15 Id., 262.) There is a substantial difference between this case and *Mathews v. Toogood*, 25 Neb., 99. As to attorneys' fees: *Towle v. Shelly*, 19 Neb., 638; *Hand v. Phillips*, 18 Id., 595.

S. P. Davidson, for appellee:

The ruling of the trial court allowing Richardson the face of the principal note and ten per cent to date of decree, with face only of four interest notes, is in conformity with final holding in *Mathews v. Toogood*, 25 Neb., 99. The statute of limitations bars all recovery for taxes claimed to have been paid by plaintiff.

MAXWELL, J.

On February 11, 1888, the plaintiff filed a petition in the district court of Johnson county and afterwards, on May 10, 1888, filed an amended petition stating his cause of action to be: That on February 29, 1876, James A. Campbell, defendant, executed for value and delivered to Ann M. Shephard five promissory notes, one for \$600, due five years after date, and four other notes for \$60 each, due in two, three, four, and five years after date; that on the same date defendant, James A. Campbell, duly executed unto said Shephard a mortgage on N. $\frac{1}{2}$ of section 20,

T. 4, R. 12, to secure said notes, which mortgage was duly recorded; that by a stipulation in said mortgage, in case of foreclosure an attorney's fee of ten per cent on recovery, which was agreed to be a reasonable fee, should be paid by defendant and included in the decree; that by stipulation contained in said mortgage, if the land was sold for taxes said mortgagee might redeem the same and pay taxes and add the same to the debt secured by the mortgage with agent's fees of ten per cent; that before any of said notes became due the same were indorsed by said Shephard to plaintiff, who has ever since been the owner and holder thereof; that default has been made in the payment of said notes; that default has been made in payment of taxes on said land; that plaintiff has advanced and paid out of his own funds the money necessary to redeem said land from tax sales, and in the purchase of an outstanding tax title against said land; that all said indebtedness for said notes and for taxes paid, and for outstanding title purchased, is due and unpaid. The plaintiff prays that said mortgage may be foreclosed, the land sold and proceeds applied to the payment of said indebtedness, costs, and attorney's fees.

On July 13, 1888, James A. Campbell filed his separate answer, setting up a defense as follows: He admits the execution of the notes and mortgage, but avers that they were given on a usurious contract for a loan of \$600, at the rate of twenty per cent, entered into between P. D. Cheney and Ann M. Shephard, by B. F. Perkins, their agent; and this defendant denies that plaintiff purchased said notes before due; denies each allegation in the petition not admitted or answered. For a second defense denies that plaintiff has redeemed said land for taxes mentioned, or that he has paid the taxes or any part thereof; alleges that the tax deed was fraudulent and void because no seal was attached to it; that the land was sold for taxes of 1875 only when other taxes were due; that all claims

for taxes paid are barred by the statute of limitations as well as all claim upon said notes and mortgage.

The plaintiff filed a reply which need not be noticed.

The court rendered judgment for plaintiff for \$1,305 upon the notes sued on, being interest at the rate of ten per cent on the principal note, also the face of the interest notes without interest, also for \$379.40 upon three tax sale certificates, being the amount of their face less fifty cents and interest thereon at seven per cent from their date, being a total of \$1,684.40 due plaintiff; also an attorney's fee of \$95. In all other respects the court found for the defendant.

The defendant Campbell excepts to finding on tax sale certificates, and the attorney's fee. Plaintiff excepts to findings and appeal.

In *Southard v. Dorrington*, 10 Neb., 122, it was held that "When the payment of taxes assessed on real estate is necessary to protect the security, the mortgagee may pay the same and have the amount paid added to the mortgage debt as expenses necessarily incurred in protecting the security. (*Godfrey v. Watson*, 3 Atk., 517; *Mix v. Hotchkiss*, 14 Conn., 32; *Williams v. Hilton*, 35 Me., 547; *Page v. Foster*, 7 N. H., 392; *Kortright v. Cady*, 23 Barb., 497; *Brown v. Simons*, 3 Am. Law Reg. [N. S.], 154 (44 N. H., 475); [*Johnson v. Payne*, 11 Neb., 269].) But the courts look with jealousy upon the demands of the mortgagee beyond the payment of his debt as increasing the difficulties in the way of the right to redeem. But where the land is liable to taxation, and taxes, if legally assessed, would be a lawful charge upon the same, and there are no special circumstances showing the tax to be unjust or inequitable, a court of equity will not declare such tax void because some of the formalities necessary to make a tax deed valid have not been complied with."

It is impossible from the record before us to say that the purchase of the tax title in question was necessary to pro-

tect the plaintiff's security, and therefore, so far as appears, there was no error of the court below in rejecting the same.

The principal note in the case is as follows:

"\$600. TECUMSEH, NEB., Feb'y 29, 1876.

"Five years after date, for value received, I promise to pay to the order of Mrs. Ann M. Shephard, six hundred dollars, payable at the office of P. D. Cheney, in Jerseyville, Ill., without interest before maturity, with twelve per cent per annum after maturity. JAMES A. CAMPBELL."

Twelve per cent was the highest rate of interest permissible under our statute when the note was made, but before it became due the statute had been changed, reducing the rate to 10 per cent by agreement and 7 per cent where there was no contract to pay a higher rate. The promise in the note is considered as an agreement to pay 12 per cent interest after maturity; and the contract being lawful when made, the courts will enforce the same, notwithstanding the subsequent change of the statute when the note became due.

In *Kellogg v. Lavender*, 15 Neb., 256, in a carefully considered opinion by Judge COBB, it was held that in case of contract for a particular rate of interest that rate continued after the note became due, as well as before. This rule is subject to the limitation that the rate agreed upon be within the statute.

The coupon notes are in the following form:

"\$60. TECUMSEH, NEB., Feb'y 29, 1876.

"Five years after date, for value received, I promise to pay to the order of Ann M. Shephard, sixty dollars, payable at the office of P. D. Cheney, in Jerseyville, Ill., without interest before maturity, and twelve per cent per annum after maturity. JAMES A. CAMPBELL."

These notes were attached to the principal note, and are, in fact, coupons. Had they been separated and sold as independent notes to a *bona fide* purchaser for value before maturity, there is but little doubt that such purchaser

would have been entitled to interest after the notes became due, but being mere coupons for the payment of interest they cannot, under the former holdings of this court, draw interest. (*Mathews v. Toogood*, 23 Neb., 536; *Mathews v. Toogood*, 25 Neb., 99.) The reasons for this rule are very fully set forth by Chief Justice REESE in the cases above cited, and the rule thus established will necessarily be adhered to, and if changed it should be done by the legislature. The decree will therefore be affirmed as modified.

DECREE AFFIRMED.

THE other Judges concur.

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SPRINGFIELD FIRE & MARINE INSURANCE COMPANY
V. J. W. WINN ET AL.

[FILED OCTOBER 16, 1889.]

1. **Insurance: PERJURY: FORFEITURE.** A was the owner of a general stock of merchandise and insured the same with the plaintiff in error, with leave to make concurrent insurance thereon so that the aggregate amount thereof should not exceed \$7,000. Insurance in various companies was effected for this amount. Sometime afterwards the stock was burned, there being a total loss, and notice thereof was duly given. The proof tended to show that the amount of goods destroyed exceeded \$7,000, and that there was no fraud by the insured in any matter affecting the risk prior to the loss. In making his proof of loss, however, the insured increased the amount of his claim about \$1,700 in excess of the actual loss, and changed the bills of purchase made for some time before the loss to conform to the proof thereof. *Held*, That as the rights of the parties were fixed by the contract of insurance and loss, a provision in the policy that "all fraud or attempts at fraud, by false swearing or otherwise, shall forfeit all claim on this company and shall be a complete bar to any recovery for loss under this policy," as it

did not affect the risk, was not cause for declaring the policy void.

2. Instruction, held, to be based on the testimony and properly given.

ERROR to the district court for Johnson county. Tried below before CHAPMAN, J.

S. P. Davidson, and *Harwood, Ames & Kelly*, for plaintiff in error:

Even if Winn's claim be true, that the exaggeration was made to secure a more favorable settlement, the policy is void for breach of condition. (*Sleeper v. Ins. Co.*, 56 N. H., 401; *Weide v. Ins. Co.*, 1 Dill. [U. S. C. C.], 441; *Geib v. Ins. Co.*, Id., 443; *Ferriss v. Ins. Co.*, 1 Hill [N. Y.], 71; *Wall v. Ins. Co.*, 51 Me., 32; *Regnier v. Ins. Co.*, 12 La. [O. S.], 336; *Lewis v. Ins. Co.*, 63 Ia., 193; *Smith v. Ins. Co.*, 1 Hannay [N. B.], 311; *Longley v. Ins. Co.*, 3 Russ. & Ches. [N. S.], 516; *Sibley v. Ins. Co.*, 9 Biss. [U. S. C. C.], 31; *Leach v. Ins. Co.*, 58 N. H., 245; *Hansen v. Ins. Co.*, 57 Ia., 741; *Mullin v. Ins. Co.*, 58 Vt., 113; *Clafin v. Ins. Co.*, 110 U. S., 81; *Moore v. Ins. Co.*, 28 Gratt. [Va.], 508.) The court, in its instruction, lost sight of the distinction between a waiver before forfeiture and one after the contract was void; for the conditions of a void contract cannot be waived. (*Underwood v. Ins. Co.*, 57 N. Y., 500; *Blossom v. Ins. Co.*, 64 N. Y., 162; *Brink v. Ins. Co.*, 70 N. Y., 593; *Ripley v. Ins. Co.*, 30 N. Y., 164; *Phoenix Ins. Co. v. Stevenson*, 78 Ky., 150; *Ins. Co. v. Fay*, 22 Mich., 467; *Ins. Co. v. Watson*, 23 Id., 487; *Smith v. Ins. Co.*, 3 Hill [N. Y.], 508; *Neely v. Ins. Co.*, 7 Id., 49; *Diehl v. Ins. Co.*, 58 Pa. St., 443.) A preponderance, only, of evidence was required. (*Search v. Miller*, 9 Neb., 26; *Marx v. Kilpatrick*, 25 Id., 170.)

A. M. Appelget, and *C. K. Chamberlain*, for defendant in error:

A clear preponderance of testimony was required in this case, first, because of the imputation of the crime of arson (*Ellis v. Buzzell*, 60 Me., 209; *Knowles v. Scribner*, 57 Id., 497); second, because of the defense of fraud. (*Ahlman v. Meyer*, 19 Neb., 63; *Clemens v. Brillhart*, 17 Id., 337; *Clark v. Tennant*, 5 Id., 549.) Admitting that the first proofs were incorrect, they do not show fraud, the burden of proving which is upon the party pleading it. (2 Wood, Fire Ins., 1004, and cases cited; *Marion v. Ins. Co.*, 35 Mo., 148; *Franklin Ins. Co. v. Updegraff*, 43 Pa. St., 350.) The perjury must be on a matter affecting the risk (*Clafin v. Ins. Co.*, 101 U. S., 81; *Little v. Ins. Co.*, 123 Mass., 380; *Ins. Co. v. Weides*, 14 Wall. [U. S.], 375); and must be with fraudulent intent (*Parker v. Ins. Co.*, 34 Wis., 363; *Jones v. Ins. Co.*, 36 N. J. Law, 29); and these are questions of fact for the jury. (*Ins. Co. v. Fay*, 22 Mich., 467; *Ins. Co. v. Weides*, *supra*; *Helbing v. Ins. Co.*, 54 Cal., 156.) Corrections in proofs of loss may be made at any time before trial. (2 Wood, Fire Ins., 995 f; *McMaster v. Ins. Co.*, 55 N. Y., 222.) Findings similar to the one in this case have been sustained by various courts. (*Gerhauser v. Ins. Co.*, 7 Nev., 174; *Unger v. Ins. Co.*, 4 Daly [N. Y.], 96; *Moore v. Ins. Co.*, 29 Me., 97; *Jones v. Ins. Co.*, *supra*; *Britton v. Ins. Co.*, 4 F. & F., 905; *Planters' Ins. Co. v. Deford*, 38 Md., 382; *Bonham v. Ins. Co.*, 25 Ia., 328; *Clark v. Ins. Co.*, 36 Cal., 168; *Wolf v. Ins. Co.*, 43 Barb. [N. Y.], 406; *Sims v. Ins. Co.*, 47 Mo., 54; *Williams v. Ins. Co.*, 61 Me., 67.) A denial of liability on other grounds than want of notice is a waiver of notice. (2 Wood, Fire Ins., 981, 982, 940 N.; *Franklin v. Coates*, 14 Md., 285; *Rogers v. Ins. Co.*, 6 Paige Ch. [N. Y.], 583; *McBride v. Ins. Co.*, 30 Wis., 562; *Lycoming Ins. Co. v. Dunmore*, 75 Ill., 14.) An examination of the assured under oath, concerning the loss, is a waiver of proof. (2 Wood, Fire Ins., 951.) A party desiring to rescind on ground of fraud, must place the other party in

statu quo (*Clark v. Tennant*, 5 Neb., 549; *Bank v. Yocum*, 11 Neb., 328; *Kerr, Fraud & Mis.*, 52); and this principle has been applied to forfeiture of fire policies. (*Fishbeck v. Ins. Co.*, 54 Cal., 422.)

MAXWELL, J.

On the 26th day of May, 1886, the plaintiff in error issued to the defendant in error a policy of insurance, against loss or damage by fire for one year, upon the general stock of merchandise carried by the latter as retail merchants in their store at Elk Creek, Neb. The policy contained permission for four thousand dollars concurrent insurance and a clause limiting the company's liability in case of loss to its *pro rata* share of the total loss with other companies insuring; and afterwards, on the 29th day of October, 1886, the amount of concurrent insurance permitted was increased to six thousand dollars. The policy contained the usual provision requiring notice and preliminary proofs in case of loss, and the submission by the insured of their books, papers, vouchers, etc., to the inspection of the underwriters, and the submission of themselves to examination under oath if required by the latter. It also contained a clause in the following words: "All fraud or attempt at fraud, by false swearing or otherwise, shall forfeit all claim on this company, and shall be a complete bar to any recovery for loss under this policy."

Concurrent insurance amounting in the aggregate, together with the policy in suit, to seven thousand dollars was procured, and was in force when on the 21st day of December, 1886, a fire occurred, entirely destroying the property insured. One S. F. Holmes was the local agent of the companies and had notice of the fire at the time of its occurrence, and no formal notice seems to have been given to or required by the insurers, but Winn, who was apparently the sole owner of the property insured, and of the business connected therewith—Nail, who represented the

"Co.," being a nominal partner only—testified that at the suggestion of one Dale, who was an adjuster of one of the companies interested, he came to Lincoln, two or three weeks after the fire, and submitted his books, or a part of them, to Dale and to Wm. Fulton, the adjuster of the plaintiff in error.

Upon inspection of the books, discrepancies were found therein which, it is claimed, aroused the suspicions of both Dale and Fulton, who represented all the interested companies directly and indirectly, to such a degree that they expressly declined to pay the loss or recognize any liability under the policies until their suspicions should be removed by subsequent investigation. The parties separated with an understanding that there was to be a future meeting at Atchison, Kansas, at which Winn was requested to furnish copies of papers, vouchers, invoices, etc., and make fuller and more satisfactory proof of the amount and value of the property burned. Fulton attended at the time and place appointed for this meeting, but Winn then professed to be unprepared to comply with what had been required of him, and the matter was again postponed, to be taken up again at some future time at Plattsburg, Missouri.

On or about the 21st day of March, 1887, Fulton met Winn at Plattsburg, at which time and place the latter made a statement under oath showing that according to an inventory made February 1, 1886, witness then had on hand, of the stock insured, \$8,245.35, and that he had afterwards purchased goods to the amount in value of \$8,028.43. From the aggregate of these two sums the amount of sales was given, to be deducted so as to show the value of the goods burned. The items of the several purchases purporting to give dates, amounts, and names of persons and firms from whom purchased were included in this sworn statement. There was a verdict and judgment for the plaintiff below, from which the cause is brought into this court by petition in error.

The proof clearly shows that at the time of the fire the defendant in error had in his store at Elk Creek property covered by the policies in this case of greater value than \$7,000, and that a notice of the loss was given to a local agent of the insurance company immediately after the fire and that the adjusters of the insurance companies appeared to endeavor to adjust the loss. Up to this point no fraud is claimed, and had the proof of loss conformed to the facts no objection would be made by the insurance companies, so far as we can see, to the payment of the loss. The fraud which is claimed to vitiate the policies is as follows: The defendant in error in making out his first proof of loss increased the amount of a number of the bills of goods purchased by him for some months before the fire, in the aggregate about \$1,700. This proof was duly sworn to and cannot be justified, and probably would subject the affiant to a prosecution for perjury; but does it forfeit the insurance? If so, why? So far as the testimony shows the design was not to defraud the companies, but to exaggerate the loss and thereby secure, if possible, prompt payment. This is reprehensible, but if no one is defrauded thereby it is difficult to perceive any just ground upon which to base a forfeiture. Such exaggeration may furnish a just cause for suspicion that the property burned was not of the value claimed for it; but that question is one of fact to be submitted to a jury, who are the judges of the credibility of the witnesses.

This is a new question in this state, and we desire to establish a rule which, while it will protect insurance companies in their just rights, will also shield the insured from the confiscation of their property upon fanciful or insufficient grounds. In *Marion v. Great Republic Ins. Co.*, 35 Mo., 148, a case in many respects resembling this, the policy provided that "If there appear any fraud or false swearing, the insured shall forfeit all claim under this policy." At the trial, evidence was given tending to prove

that the statement of loss made to the defendant by the plaintiff was false in regard to the amount of the loss. An instruction that the company was not liable in such case was refused by the trial court, and the refusal to give the same assigned for error. The supreme court says: "The clause in the policy in respect to false swearing is to be viewed in connection with all the other parts of the policy and the general nature of the contract; and so viewing it, it is obvious that it was intended thereby to require the insured to give the insurer real and reliable information as to the amount of the loss, and that a mistake or unintentional error; or misstatement of an immaterial matter, in the sworn statement would not avoid the policy, but the false statement must be willfully made in respect to a material matter, and with the purpose to deceive the insurer. Now, this instruction requires that the false statement (that is, the statement made in ignorance of its truth) shall have been knowingly made, but does not require that the jury shall find that it was in respect to a material matter, or made with an intention to deceive the defendant. It might probably be inferred that the matter was material; but under that instruction, if given; the jury would have been required to find for the defendant, notwithstanding that the false statement was not intended to deceive the defendant and did not deceive it, and that the plaintiff derived and could derive no advantage from it, and the defendant received and could receive no detriment from it. (*Hoffman v. Western Marine and Fire Ins. Co.*, 1 Lou., 216.)

"No doubt an indictment for perjury might be supported by proof of a swearing to the truth of matters of which the accused was ignorant (and which might in fact be true), but the prosecution for perjury is distinctly for the offense of false swearing, irrespective of the effect of the falsehood; whilst here the clause as to false swearing is a part of a contract between two persons and is important only in its effect, actual, presumed, or intended. It is

no part of the intention of the parties to punish one of them for an immoral or illegal act; but the provisions of the contract have reference only to their interests in respect to the subject-matter of the contract."

In *Marchesseau v. Merchants Ins. Co.*, 1 Rob. [La.], 438, the person insured swore that the property was worth \$15,549, and the jury found it to be worth \$8,000, and in *Gerhauser v. N. B. Merchants Ins. Co.*, 7 Nev., 174, he swore that the value of the property destroyed was \$6,000, but the jury found it to be but \$3,000; yet in both of those cases verdicts in favor of the insured were sustained.

To the same effect are *Wolf v. Goodhue Ins. Co.*, 43 Barb., 400; *Williams v. Phoenix Ins. Co.*, 61 Me., 67; *Unger v. People's Ins. Co.*, 4 Daly [N. Y.], 96; Wood on Fire Insurance, 1007-8. In all these cases the court held that the disparity between the value as sworn to by the insured and as found by the jury did not furnish evidence of fraud within the conditions of the policies, although it is evident in some of them that the insured must knowingly have overstated the value of the property destroyed.

In *Wolf v. Goodhue Ins. Co.*, *supra*, the defenses were that the insured set fire to the property himself, and that he was guilty of fraud and perjury in preparing the preliminary proofs. It was held that the fact that the jury found a sum much less than the amount claimed was no evidence that the jury found the issue of fraud against the plaintiff. In the case cited the proof of loss stated the value to be \$3,041.36, while the jury found the value to be \$675.06.

In *Unger v. People's Ins. Co.*, *supra*, the insured swore in the preliminary proof of loss that the cash value of the goods insured was \$16,336.23 and that his loss of goods totally destroyed was \$9,989.03, and \$6,347.20 on property damaged. The referee found the value of the goods totally destroyed to be \$6,500, and the damage to other goods to be \$2,600.15. Daly, J., in delivering the opin-

ion of the court, says: "The fact that the plaintiffs in their preliminary proofs and in their testimony on the trial swore that the loss was about \$3,489.03 more than the referee found it to be, is not even evidence of false swearing or fraud." Fraud is a question for the jury to determine from the evidence. To constitute fraud as against the insurance companies there must have been misrepresentations before the fire, in regard to a material fact or material facts by reason of which the policies were fraudulently procured or other matter of a fraudulent nature which would compel the companies in case of loss to pay for property which was not destroyed or not in existence. But if there is no fraud up to the time of the loss and the rights of the parties were thereby fixed, it is the duty of the insurer, upon due notice and proof thereof, unless these are waived, to perform its contract by paying the insured what is justly due, and a willful misrepresentation by the insured as to the amount of his loss, provided the actual amount of the same is in excess of the policy, will not cause a forfeiture thereof.

A contract of insurance, like any other, is made to be performed. A loss is liable to occur when least expected. The insurer has received and retains the consideration for the contract, and unless there are good and sufficient reasons for exemption, should perform the same; and any matter which did not affect the risk should not be permitted to work a forfeiture. There is some objection to the final proof of loss—that it was not served in time, and it is claimed that an instruction on that point is erroneous, as not based on the evidence.

There is sufficient in the evidence from which the jury were justified in finding such waiver and the jury were properly instructed. It is apparent that justice has been done and there is no error in the record. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JOHN WILHELMSON V. MATTHEW R. BENTLEY ET AL.

[FILED OCTOBER 16, 1889.]

Usury: INJUNCTION: PAYMENT AS CONDITION OF RELIEF: PLEADING. A brought an action against B for the cancellation of certain notes and to enjoin the transfer of the same upon the ground that they were tainted with usury. On the trial the court found usury in the contract and ordered the cancellation of two of said notes and enjoined the transfer thereof. This decree was afterwards affirmed by the supreme court. Afterwards the mortgagee applied to the court to so modify the decree as to require the mortgagor as a condition of relief to pay the amount which was found to be due. *Held*, That as the granting of such relief had not been sought in the original action and would require a reconstruction of the pleadings, it would be denied.

MOTION to modify decree.

J. S. Gilham, and *Case & McNeny*, for the motion:

Proceedings to enforce usurious contracts are usually enjoined only if payment is made of amount due. (High, Inj., sec. 1116; Pom., Eq. Jur., sec. 937; *Fanning v. Dunham*, 5 Johns. Ch., 122, 146; *Eiseman v. Gallagher*, 24 Neb., 79.) The statute corresponding to ours was not enforced by the New York courts (*Livingston v. Harris*, 11 Wend. [N. Y.], 329); nor favored by the Minnesota court.

G. R. Chaney, *contra*:

Under the New York usury statute, of which ours is a modification, tender is not essential to relief in equity. (*Livingston v. Harris*, 11 Wend. [N. Y.], 335; *Gervig v. Shetterly*, 64 Barb. [N. Y.], 626; *Bissell v. Kellogg*, 60 Id., 631; *Allerton v. Belden*, 49 N. Y., 376.) A like construction was made by the Minnesota court of a similar statute. (*Scott v. Austin*, 36 Minn., 460 (dissenting opinion); *Esley v. Berryhill*, 37 Minn., 182.) *Fanning v. Dunham* was

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decided before the enactment of the New York statute in question. Pomeroy and High wrote without reference to a statute like ours.

MAXWELL, J.

This case was before this court at the January, 1888, term thereof, and an opinion filed therein, which is reported in 25 Nebraska Reports, 473, in which the facts are stated.

The defendants now move to modify the decree by requiring the plaintiffs to pay into the court for their use and benefit the sum of \$335, with interest thereon; otherwise that the injunction be dissolved. An examination of the case will show that the court found that the contract was tainted with usury and that the amount thereof was represented by two of said notes. The court thereupon ordered the first and second notes canceled and enjoined the collection of the same, but dissolved the injunction as to the others.

Where a party goes into a court of equity to seek relief from a contract which is deemed to be usurious, he must propose to do equity by offering to pay what is justly due. (*Eiseman v. Gallagher*, 24 Neb., 79); and had the notes all been due in this case when the action was brought, and the defendants, by appropriate allegations in their cross-petition, set up the necessary facts to entitle them to relief—the payment of the amount justly due—there is but little doubt that the relief would have been adapted to the facts pleaded and proved. No such relief, however, was sought in this case, the object of the action being merely to enjoin the transfer of certain notes and thereby prevent the defense of usury being pleaded in the action. The right of action to foreclose for the notes not canceled and enjoined still remains, and the property may be applied in satisfaction of the amount still due and unpaid, and we can-

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not, without requiring a reconstruction of the pleadings, modify the decree. The motion to modify is therefore overruled.

MOTION OVERRULED.

THE other Judges concur.

LOUIS FINK v. REPUBLICAN VALLEY R. R. Co.

[FILED OCTOBER 23, 1889.]

Railroads: EMINENT DOMAIN: DAMAGES. There is no question of law presented for decision, the only contention of plaintiff in error being that the verdict of the jury was not supported by the evidence. The oral evidence submitted to the jury was conflicting, and the action being for damages to real estate by reason of the construction of a railroad thereon, the jury were sent to examine the premises. It was *held*, upon an examination of the evidence, that the verdict could not be set aside as unsupported thereby.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Pemberton & Bush, for plaintiff in error.

Marquett & Deweese, for defendant in error.

REESE, CH. J.

This is a proceeding in error to the district court of Gage county.

The action in that court was an appeal from the award of appraisers duly appointed by the county court of that county to assess the damages sustained by plaintiff in error by reason of the construction of the railroad of defendant in error through his land. A jury trial was had, result-

ing in a verdict and judgment in favor of the plaintiff in error for the sum of \$173.22. From this judgment he brings error, alleging that the verdict was not supported by the evidence submitted, the amount found due being too small.

We have carefully examined the oral evidence submitted to the jury and find sufficient to justify a finding that there were four acres of plaintiff's land taken by the railroad company, including about one acre and a half which was cut off from his farm, and rendered substantially useless by being separated therefrom by the railroad track. The value placed upon this four acres of ground by the witnesses on behalf of plaintiff in error was from \$40 to \$50 per acre, those fixing it at \$50 being plaintiff in error, L. H. Fink, Aaron Horn, Albert Howell, John Loible, and those putting it at \$40 per acre were H. Lacey, Fennis Lefevre, and J. J. Scribner. On the part of defendant in error, E. Cutshaw testified that the land was worth from \$30 to \$35 per acre; G. B. James, from \$35 to \$40; James F. Colgrove and G. M. Murdock, \$35 per acre. Some of the witnesses introduced by plaintiff in error testified that the portion of the farm immediately injured by the construction of the railroad was a very desirable building spot and the most suitable of any of the land included in the farm for the erection of a residence, and by the destruction of this ground as such building spot the whole farm was damaged to the extent of \$10 per acre, there being 160 acres in the farm; while, upon the other hand, the witnesses introduced by defendant in error testified that the farm was not in any way injured except to the extent of the value of the land actually taken and used by the railroad and the small portion of the corner separated from the remainder of the farm by the construction of the track. By order of the court the jury were sent out to the farm and viewed the land. This was after the construction of the railroad.

While it is true that a verdict for a much larger amount than that returned by the jury upon the trial would have been sustained by the evidence, yet we are unable to see that it should be molested. All presumptions are in favor of the conclusion reached by the jury, and their verdict cannot be set aside unless clearly and manifestly wrong. If they adopted the testimony of the witnesses on the part of defendant in error as a basis for their finding, we must be content therewith.

Another difficulty under which we find ourselves placed is, that upon the trial certain plats were introduced in evidence and referred to by the witnesses in their examination, almost all the testimony having been introduced with reference to them. Having been introduced in evidence they should have been made a part of the record of the case. But we are unable to find any of them attached to the bill of exceptions.

The judgment of the district court must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

27	662
138	314
27	662
52	275

L. L. LINDSEY V. JAMES HEATON.

[FILED OCTOBER 23, 1889.]

1. **Contract: ORIGINAL UNDERTAKING.** The evidence examined, and held, to sustain the finding of the trial jury that a direct and unconditional promise had been made by plaintiff in error to pay for certain goods, furnished a third party prior to their delivery, and upon the faith of which the property was delivered to the purchaser.
2. ——— : **STATUTE OF FRAUDS.** In such case the promise was not a conditional one to answer for the debt of another, but an original undertaking, which was not within the statute of frauds.

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3. ———: CONSIDERATION. The promise, having been made prior to the delivery of any of the property sold, and such sale and delivery having been made upon the faith of the agreement of the promisor, it was sustained by sufficient consideration and the promisor was liable thereon.

ERROR to the district court for Lancaster county.
Tried below before FIELD, J.

Billingsley & Woodward, for plaintiff in error:

Even had there been a promise to pay there was no consideration. (*Nelson v. Boynton*, 3 Metc. [Mass.], 396; *Morrissey v. Kinsey*, 16 Neb., 17; *Langdon v. Richardson*, 58 Ia., 610; *Easter v. White*, 12 O. S., 219; *Rose v. O'Linn*, 10 Neb., 364.) As to the doctrine of original and collateral promises: *Clopper v. Poland*, 12 Neb., 70; *Fitzgerald v. Morrissey*, 14 Id., 201; *Crawford v. Edison*, 45 O. S., 239; *Birchell v. Neaster*, 36 Id., 331. There is no privity of contract between the parties, as the evidence shows that the account was charged to Clark. (Browne, Statute of Frauds, secs. 173-4.) The case falls clearly within the statute of frauds.

H. J. Whitmore, for defendant in error:

The statute of frauds has no application to the facts of this case, and even if it had, the payment of \$20 would be considered as part performance. The case is similar to *Waters v. Shafer*, 25 Neb., 225, which is one of the latest utterances of this court on the statute of frauds.

REESE, CH. J.

This is a proceeding in error to the district court of Lancaster county. It was alleged in the petition in that court that on the 13th day of May, 1887, defendant in error sold and delivered to plaintiff in error one burial case, robe, and box, and furnished certain livery and per-

formed certain labor under an oral contract between plaintiff and defendant for which plaintiff in error agreed to pay to defendant in error the sum of \$100, and upon which plaintiff in error had paid the sum of \$20 and no more, leaving due and unpaid the sum of \$80, for which, with interest, judgment was demanded.

The answer consisted, first, of a general denial of all the allegations of the petition, except as to the payment of the \$20. For a second defense it was alleged "That one John Clark purchased the property described in plaintiff's petition from the plaintiff and not this defendant; that at the time said purchase was made as aforesaid the said Clark was in the employ of defendant, and that defendant, without any consideration whatever, agreed with plaintiff that he, defendant, would pay him, plaintiff, out of said Clark's wages the sum of \$30 per month, and no more, during the time that said Clark remained in defendant's employ, until said \$100 was duly paid to plaintiff; that immediately thereafter the said Clark left the employ of defendant and has not returned to the same; that at the time Clark left the employ of defendant as aforesaid defendant was indebted to him, the said Clark, in the sum of \$20, which sum was duly paid to plaintiff by this defendant in good faith, in furtherance of said arrangement with plaintiff as aforesaid and not on any contract between plaintiff and defendant as alleged in plaintiff's petition. Defendant is ready and willing, and has at all times been ready and willing, to do and perform each and every undertaking made with plaintiff as aforesaid." For a third defense it was alleged that the goods described in plaintiff's petition were purchased "by one John Clark, and not this defendant; and that if defendant made any contract to pay for the same, it was a promise to pay the debt of the said John Clark and not defendant's debt, and therefore the enforcement of payment of the same is avoided by the statute of frauds and perjuries."

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A jury trial was had which resulted in a verdict in favor of defendant in error for the sum of \$90, and upon which judgment was duly rendered.

It appears from the evidence that defendant in error was engaged in the undertaking business in the city of Lincoln, and that one Henrietta Ricks, who was a friend or acquaintance of the said John Clark, died in the city prior to the making of the contract and that Clark applied to defendant in error for a suitable burial case in which she might be transported to Louisville, Kentucky, for interment; that defendant in error refused to furnish the burial case and other property required upon the credit of Clark alone; and that the name of plaintiff in error was suggested as security for the payment of the purchase price in case the goods were furnished. As to the contract between plaintiff in error and defendant in error the evidence submitted to the jury was conflicting, and the only question presented upon this part of the case is whether or not the evidence offered on behalf of defendant in error was sufficient to sustain the verdict, the jury being the judges of the weight of the testimony of the various witnesses. Defendant in error testified in substance that he received a telephone message from Hyatt's barn to go to Lindsey's saloon; that he went and a man in the back part of the room came and told him that a young woman by the name of Henrietta Ricks had died down on O street; that he went to the house and put her on the board, and was informed that it was the purpose to take the remains to Louisville, Kentucky, for burial; that he remarked that in order to do so the body would have to be embalmed and they said that they would come to his place of business and see about it; that he then went back to his store, having been informed in the meantime that Clark was irresponsible. We quote the following from the testimony:

I did not do anything when I went down there but just put her on the board and went back to my place, and

John Clark and these two ladies came there. They selected a casket, I think \$60 or \$65, and a robe, all of the best; I took Clark into the back room and asked him who was to pay for it; I said I wanted it secured before they went out of the house. He said Mr. "Bud" Lindsey was to pay for it; I might go and see "Bud." I went to the saloon, but he was not in there and I came out and met him ten or twelve feet from the door and told him that Clark had been with me and the woman and selected an outfit. He asked me how much it amounted to; I said \$100 it would be, the body being put in the box lined with zinc and delivered at the depot. He asked me the terms and I told him \$50 cash and \$50 in thirty days. He studied a minute and said if I would make it thirty, sixty and ninety days, equal payments—\$33 $\frac{1}{3}$ —"I will pay it and charge it to him." That is what he told me. I then went to the bank and asked about him.

Q. What bank did you go to?

A. I went to C. C. Boggs, cashier of the Lincoln National Bank.

Q. Then you furnished the goods?

A. I did.

Q. One hundred dollars worth?

A. Yes, sir.

Q. State whether or not you have received any portion of that.

A. I have. When the thirty days were out I took a bill to him for \$33.30 or \$33.35; I made it even money, I did not make it \$33 $\frac{1}{3}$; I think \$33.30. When the sixty days were out I took a bill and he did not pay that; did not say why, but would not. When the ninety days were out, then I presented the bill for \$100.

Q. Did he pay you at that time?

A. No, sir. I kept after him then every time I saw him almost. He kept putting me off, saying he was awful hard up. I went once and told him I was going away

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and if he could not get it next week. I asked him what he was going to do and he said he did not have the money to spare and he could not do it. But just before I went to Denver he promised to let me have part of it any way. The day before I went to Denver he let me have a check for \$20.

The books of account of defendant in error which were introduced in evidence show that the charges were made to "John Clark and 'Bud' Lindsey." The witness also testified that at the time the goods were furnished, there was not and had not been anything said by plaintiff in error about the price being taken out of the wages of Clark, who was in the employ of plaintiff in error, if Clark continued to work there. The testimony of this witness was not changed in any material part by the cross-examination.

On the part of the defendant in error the deposition of Clark was taken and read in evidence, in which he testified substantially that the contract between defendant in error and plaintiff in error was that plaintiff in error would retain \$20 per month out of his (Clark's) wages during the time that he should work for plaintiff in error, but that he had not worked for plaintiff in error since the goods were furnished. The testimony of plaintiff in error was to the same effect.

In support of the verdict of the jury it must be held that the testimony of defendant in error was sufficient to sustain it to the extent of the facts detailed in his evidence. The only question, therefore, remaining for decision is whether or not the promise of the plaintiff in error, if made as testified to by defendant in error, was within the statute of frauds.

In this examination two questions are presented which may be stated to be: First, was the alleged promise an undertaking to pay the debt of another; and if so, Second, was it supported by a sufficient consideration?

It must be conceded that if the promise was made at the time and under the circumstances as testified to by defendant in error, it was not a promise to pay a debt then in existence and was therefore not a collateral, but an original undertaking. (1 Reed on Statute of Frauds, secs. 30 and 31.) The property had not been sold and was still in the storehouse of defendant in error. There was no debt against Clark. It may be also stated as fundamental that if the credit was given contemporaneously with or after, and upon the faith of, the promise of plaintiff in error to pay for the goods, the fact that the goods were delivered to or the benefit received by Clark would not bring the promise within the statute and it would be binding. (*Id.*, sec. 87 *et seq.*) The question as to who was the party to whom the credit was given was for the jury. (*Id.*, 89.) The property having been delivered upon the faith of the promise, would be a sufficient consideration to create the liability. No part of the property had been delivered to Clark, and if the testimony of defendant in error was true, of which the jury were the sole judges, such delivery would not have been made had it not been for the promise of plaintiff in error.

Assuming, as we must, that upon all these questions the jury found for defendant in error, the verdict was sustained by the evidence.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

HORACE A. GREENWOOD, V. SARAH A. CRAIG.

[FILED OCTOBER 23, 1889.]

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48	690
27	689
49	855

Bill of Exceptions. The decision of the district court was made March 9, 1889, the motion for a new trial being overruled on the same day. Court adjourned *sine die* on the 16th day of the same month without granting an extension of time within which to prepare and serve a bill of exceptions. On the 18th day of April, and more than fifteen days after the final adjournment of court, the bill of exceptions was served upon defendant in error, who refused to acknowledge service on account of the expiration of time. On the 22d day of May plaintiff in error notified defendant in error to appear forthwith before the judge of the district court before whom the case was tried and show cause against the allowance of the bill. On that day the judge refused "to correct the record" so as to make it appear that the additional time was granted, but signed the bill, giving as a reason therefor that the attorney for plaintiff in error was laboring under the wrong impression that an extension had been granted. It was *held*, that the judge had no authority to sign the bill, and upon the motion of plaintiff in error the exceptions were quashed.

MOTION to quash bill of exceptions.

T. D. Cobbey, for the motion.

Pemberton & Bush, A. D. McCandless, and Winter & Kaufman, contra.

REESE, CH. J.

This case is submitted upon a motion to quash the bill of exceptions. The motion is based upon the following grounds.

"First—Said bill of exceptions was not presented to adverse counsel within fifteen days from the rising of court, as by statute provided (no extension having been granted).

"Second—The said bill was not presented to the judge for his signature for more than sixty days after the rising of the court, court having adjourned *sine die* March 16, 1889, and said bill was not presented to the district judge until May 22, when he signed and allowed the same over the protest of this defendant."

It appears from the record that the cause was tried in the district court and decided March 9, 1889, when a motion for a new trial was filed and overruled. Court adjourned *sine die* March 16, and no extension of time was granted in which to prepare the bill of exceptions.

On the 18th day of April the bill of exceptions was served upon the attorney for defendant in error; but an acknowledgment of the service was refused and the bill of exceptions returned, the reason assigned for the refusal being that the statutory time in which to serve the same had expired, and that no extension had been granted by the court. On the 22d day of May the attorneys for plaintiff in error notified the defendant in error to appear before the Honorable J. H. Broady, the judge of the district court, before whom the case was tried, forthwith, to show cause, if any, why the bill of exceptions should not be allowed in the case, and why the records should not be amended to show that forty days were allowed in which to present the bill of exceptions.

We are unable to find in the case any motion to have the record corrected, so as to show the facts suggested in the notice. But in the certificate of the judge the following appears: "The motion to correct entry overruled." In addition to the words above quoted, the certificate is as follows:

"It appears from McCandless' affidavit that he was under the wrong impression that he had forty days from rising of court to prepare this bill; and that he was under such wrong impression until the expiration of the fifteen days allowed by law. The time is extended forty days addi-

tional to the time heretofore limited to reduce exceptions to writing.

"The above bill contains all the evidence and is hereby allowed and made part of the record. Plaintiff excepts.

"May 22, 1889.

J. H. BROADY, *Judge.*"

Attached to the bill of exceptions is an affidavit made by Mr. McCandless, the attorney for plaintiff in error, but it not having been made a part of the bill of exceptions it cannot be here considered. (*Tessier v. Crowley*, 16 Neb., 369.) However, had it been so preserved, it could not have been considered, for the reason that, as decided in *Greenwood v. Cobbey*, 24 Neb., 648, this court will not go back of the action of the judge of the district court and investigate as to the grounds upon which an extension was granted.

The question here presented is as to the authority of the judge of the district court to make the extension at the time at which the order was made, the reason therefor being as stated in the certificate of the judge.

By sec. 311 of the Civil Code it is provided that the party excepting must reduce his exceptions to writing within fifteen days, or in such time as the court may direct, not exceeding forty days from the adjournment of the court *sine die*, and submit the same to the adverse party or his attorney of record for examination and amendment if desired. The court not having extended the time during its session from fifteen to forty days, it then became necessary for plaintiff in error to prepare the bill within the time fixed by statute, to-wit, fifteen days from the final adjournment of the court. This he did not do. It is claimed by him in his brief that by the affidavit which he filed with the judge it is made to appear that he asked the extension of time; that the same was granted in open court, but that the presiding judge failed to cause it to be entered upon the record. Had this been so understood by the judge, and had the order granting the extension been made in open court, the record might have been so amended

as to show that fact. But after the submission of the affidavit to the judge he refused to order a correction of the record. Whether this refusal was based upon the supposition that the court only had jurisdiction to make the correction, or whether the judge was not satisfied from the evidence that the order had been orally announced in court, it is not necessary here to inquire; it is sufficient to say that the record does not show the extension of time, the judge preferring to sign the bill and make it a part of the record upon the grounds that the attorney for plaintiff in error was laboring under a wrong impression as to his rights. This under the statute is not a sufficient reason for granting the extension. As we have seen, court adjourned March 16th; the fifteen days allowed by law for serving the bill of exceptions expired March 31st; the bill was presented to counsel for defendant in error on the 18th day of April, when he refused to acknowledge service; it was allowed by the judge on the 22d day of May, which was thirty-four days after its return and sixty-seven days after the adjournment of court *sine die*. It must also be remembered that the extension was made after the bill had been served upon the attorney of plaintiff in error and on the date of its allowance, and that it was never served upon him after the extension of time was granted. Had the extension been lawful, it would then have been necessary to serve the bill of exceptions upon the attorney for plaintiff in error in order that he might make suggestions of amendment if necessary. But no such service was made. As has been frequently said, the whole matter of the extension of time for the settling of bills of exceptions is regulated by statute, and in order to procure the settling of a bill of exceptions parties desiring such settlement must bring themselves within the law upon that subject. As said in *Bank v. Bartlett*, 8 Neb., 319, the design of the law was to allow a fixed period for the presentation of bills of exceptions. And when the law is not complied with,

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the signing of the bill will not legalize it if not signed according to the provisions of the statute. The motion to quash the bill is therefore sustained.

MOTION SUSTAINED.

THE other Judges concur.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. MAGGIE SULLIVAN, ADMINISTRATRIX.

[FILED OCTOBER 23, 1889.]

1. **Master and Servant: NEGLIGENCE: FELLOW SERVANTS: VICE-PRINCIPALS.** In an action by an administratrix to recover damages for the death of the decedent, a charge to the jury that "if they believe from the evidence that the deceased, James Sullivan, came to his death through the wrongful act, default, or negligence of defendant or its servants or employees, and not through his own wrongful act or negligence, then they will find for plaintiff and assess her damages at such sum as they believe from the evidence she should recover, not exceeding the sum claimed in her petition," is too broad and indefinite, and fails to distinguish between the acts of a vice-principal and fellow servant.
2. **Corporations: VICE-PRINCIPAL.** A person who is clothed by a corporation with the control and management of a distinct department in which his duty is that of direction and superintendence is a vice-principal.

ERROR to the district court for Richardson county. Tried below before BROADY, J.

T. M. Marquett, and *J. W. Deweese*, for plaintiff in error:

Under a similar state of facts it has been held in Missouri that a car repairer could not recover. (*Renfro v. R. Co.*, 86 Mo., 302; *Cagney v. R. Co.*, 69 Id., 416; *Smith v. R. Co.*, Id., 32.) An employee accepting, knowingly, the risks of a situation, cannot complain if subsequently in-

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jured by exposure to them. (Wharton on Negligence, 214.) That one is directed by a foreman to do what is his duty and is injured, does not render the company liable. (*Fraker v. R. Co.*, 30 Minn., 103.) The carelessness of other servants, including the foreman, is one of the risks assumed. (*Valtez v. R. Co.*, 85 Ill., 500.) If a railroad employe knows that the work is being done in an unsafe manner, and still continues it without complaint, he cannot recover for injury. (*I. B., etc., R. Co. v. Flanigan*, 77 Ill., 365; *Penn. Co. v. Lynch*, 90 Id., 333; *Dillon v. R. Co.*, 3 Dill. [U. S. C. C.], 320; *Hughes v. R. Co.*, 27 Minn., 137; *Porter v. H., etc., R. Co.*, 71 Mo., 67; *O'Rorke v. R. Co.*, 18 Am. & Eng. R. R. Cases, 19.) Sullivan and the foreman were engaged directly in the same line of work and the master is not liable. (*Laning v. R. Co.*, 49 N. Y., 524; *Farwell v. R. Co.*, 4 Metc. [Mass.], 49; *Lawler v. R. Co.*, 62 Me., 463; *Peterson v. R. Co.*, 67 Mich., 102; *McBride v. R. Co.*, 21 Pac. Rep., 687; *Wilson v. Quarry Co.*, 42 N. W. Rep., 360; *Central R. Co. v. Kitchen*, 9 S. E. Rep., 827; *McCosker v. R. Co.*, 84 N. Y., 77.) If railroad employes disregard regulations in running trains and other employes are injured thereby, the negligence is that of fellow servants. (*Rose v. R. Co.*, 58 N. Y., 221.) The master need not personally oversee the work, and negligence by other servants is a risk of the employment. (*Slater v. Jewett*, 85 N. Y., 61; *Gardner v. R. Co.*, 58 Mich., 584.) The rank of the servants is of little consequence. (Cooley, Torts, 544*; *Halahan v. R. Co.*, 71 Mo., 113; *Smith v. Potter*, 46 Mich., 258.) The foreman in this case was one of the workmen. (*B. & M. R. Co. v. Crockett*, 19 Neb., 146.) The case was thrown to the jury with no definite rule to guide them. (*B. & O. R. Co. v. Carr*, 17 Atl. Rep., 1053.)

Frank Martin, for defendant in error:

The company is liable for the foreman's negligence. (*R. Co. v. Salmon*, 14 Kas., 512; *H., etc., R. Co. v. Fox*, 31

Id., 586; *R. Co. v. Lewis*, 33 O. S., 196; *R. Co. v. Lralley*, 36 Id., 221; *C., etc., R. Co. v. Lundstrom*, 16 Neb., 262.) Sullivan was inexperienced and it was negligence for the company to place him, without warning, in a dangerous situation. (*Parkhurst v. Johnson*, 50 Mich., 70; *Coombs v. Cordage Co.*, 102 Mass., 572 *L., etc., R. Co. v. Collins*, 2 Duv. [Ky.], 114.) The question of whether or not a servant is subordinate, is one of fact for the jury. (*R. Co. v. Lewis, supra.*) In many of the cases cited by counsel for plaintiff in error great stress is laid on the fact that the injured party was experienced and must have known of the dangers.

MAXWELL, J.

This action was brought by the defendant in error in the district court of Richardson county to recover damages for the death of James Sullivan, who was killed by the cars of the plaintiff in error through the alleged negligence of the railway company.

On the trial of the cause the jury returned a verdict in favor of the plaintiff below (defendant in error) for the sum of \$1,500, upon which judgment was rendered. It appears from the testimony that early in March, 1888, one James Sullivan entered into the employment of the plaintiff in error as car repairer at Falls City. It also appears that Sullivan was inexperienced in that business, and that he was placed by the master workman under the care of one McCarty to learn his duties, as McCarty had given the company notice that he intended to quit on April 1, and Sullivan was to take his place. The direct examination of McCarty is as follows:

Q. Do you remember the time of his (Sullivan's) death?

A. Yes, sir.

Q. Do you know the cause of his death?

A. Yes, sir.

Q. Tell the jury.

A. Well, he was killed by the cars. He was crushed between two cars.

Q. Whereabouts?

A. On the east end of the stock track.

Q. How many railroad tracks are there at the place you speak of?

A. There are five or six, I don't just remember which.

Q. Beginning at the south side of the railroad tracks, which one was it he was injured on?

A. The second one.

Q. The second one from the south?

A. Yes, sir.

Q. Tell the jury where he was and what he was doing when he was hurt.

A. He was working between two cars. The cars were apart probably three feet on the east end of the stock track and the train came in on the passenger track and pulled up and set the cars in from the west end on the stock track. There were several spaces along on the track between the cars, I don't remember just how many, and they struck them at that end and run the cars down, and he was at work in between the cars and it caught him right in across here somewhere. (Witness indicates.)

Q. Were you along in there between the cars when he was hurt?

A. No, sir; I was standing up.

Q. How far apart were the cars — the one he was working at and the one next him?

A. About three feet.

Q. What was his business?

A. Car repairer.

Q. How long had he been engaged at that?

A. Ten, twelve, or fourteen days; I don't know just how long?

Q. What was he required to do? -

A. He was required to do anything there was to do.

Q. Was he the judge of what was to be done, or what was his situation?

A. No, sir; he was under my orders as long as I was there; I intended to quit the first of the month and the foreman told me to learn him all I could so he could take my place.

Q. Had he any experience on railroads before that?

A. Not to my knowledge.

Q. When he was fixing that car where he was hurt, who had told him what to do; who had put him there?

A. I had told him.

Q. Now, what was the condition of the cars on that track west of where you were at work, so far as having brakes set?

A. I think the first car west of us—there were five or six west of us and then a space of five or six feet; and I think the cars didn't have any of the brakes set, and I know the first car on the east end didn't have the brakes set, because I set the brakes myself.

Q. When you and he went to work there was there any connection between the track you were working on and any other track so a car could get in?

A. No, sir; because the old main line was blocked. There was a train standing on it, as there wasn't room in the yard to put it on the side track.

Q. What do you know about the cars being set in on that track that caused the other cars to move?

A. They struck them at the west end with the engine.

Q. How did they set them in?

A. The train came from Atchison, from the east, and pulled up over the Pacific track and backed the train right in.

Q. Did they have to open any tracks?

A. Yes; they had to open one switch.

Q. How far was it from where you were at work?

A. A half mile I guess.

Q. What do you know about them setting the cars in on that track?

A. I don't know; only they struck the cars at that end and the cars, not having the brakes set, run down the track and struck the cars next us, and they didn't have the brakes on.

Q. Do you know whether there was anyone on the cars that were set in at that time to set the brakes or stop the cars?

A. No, sir; I think not. When I got him out, and laid him down by the cars, I ran up along the track and I met a brakeman, but he was on the ground.

Q. Which brakeman was it?

A. I don't know which one.

Q. Where did he come from?

A. He was on that train.

Q. A brakeman on the train that set the cars in on the track?

A. Yes, sir; and he afterwards said he never would set cars in again without setting brakes.

Q. How long was it, after he was injured, till he died?

A. He got hurt somewhere between one and two o'clock and he died the next morning between eight and nine, I believe.

Q. Do you know about his condition before that; whether he was a reasonably stout, hearty, young man?

A. He was, as far as I know, and I knew him for several years.

Q. Had you been there with him all that night?

A. Yes, sir.

Q. What had he to do when you were there in regard to any of the work, or anything to be done.

A. He was to help do all the work there was to be done.

Q. Under whose directions?

A. The foreman's.

Q. Who was the foreman?

A. Culper was.

Q. Was he there at night?

A. No; he was under my charge at night. Mr. Culper told him to do whatever I would tell him, because I was to quit at the end of the month and he was to take my place.

In the case of the *C. M. & St. P. R. Co. v. Ross*, 5 Sup. Court Reporter, 190, the question as to a vice-principal of a railway company was involved, and in a carefully prepared and elaborate opinion it was held in effect that one who is clothed by the corporation with the control and management of a distinct department, in which his duty is that of direction and superintendence, is a vice-principal. Justice Field, in his opinion in that case, said: "There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great

distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation.

"As observed by Mr. Wharton, in his valuable treatise on the law of Negligence: 'It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But if this be true, it would relieve corporations from all liability to servants. The true view is, that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation' (sec. 232a)."

The above case is reported in 17 Am. & Eng. R. R. Cases, 501, and in a note it is said: "No rule has yet been laid down which can be applied with entirely satisfactory result. Whether or not a foreman or superintendent has the power to employ and discharge those acting under him, has been in some cases proposed as the crucial test of whether he is a vice-principal or not. (*Chapman v. Erie R. Co.*, 55 N. Y., 579; *Kansas Pacific R. Co. v. Little*, 19 Kas., 267; *Stoddart v. St. Louis, etc., R. Co.*, 65 Mo., 514; *Hofnagle v. N. Y., etc., R. Co.*, 55 N. Y., 608; *Cook v. Hannibal & St. Joe R. Co.*, 63 Mo., 397; *Huntingdon & Broad Top R. Co.*

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v. Decker, 82 Pa. St., 119; S. C., 84 Pa. St., 419; *Cumberland & P. R. Co. v. State*, 44 Md., 283; *Kansas P. R. Co. v. Salmon*, 11 Kas., 83; *Chicago & Alton R. Co. v. May*, 15 Am. & Eng. R. R. Cases, 320.)

"But this test is unsatisfactory. It is, we believe, true that in every case where the power to employ and discharge exists, the relation established has been held to be not that of a fellow servant, but of vice-principal. The correlative of this proposition does not, however, obtain. There are many cases where the right to employ and discharge is absent, in which, notwithstanding, the relation of vice-principal has been held to be established and liability has been imposed upon the company accordingly.

"(2) It is in some cases held that servants who are engaged entirely in different branches of railroad employment are not to be regarded as fellow servants within the meaning of the law. Accordingly some authorities are to the effect that a company is liable for injuries to train hands occasioned by the negligence of a repairman upon the track and *vice versa*. * * (*Nashville & D. R. Co. v. Jones*, 9 Heisk., 27; *Ryan v. Chicago & N. W. R. Co.*, 60 Ill., 171; *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill., 341; *Toledo, W. & W. R. Co. v. O'Connor*, 77 Ill., 391; *Dick v. Indianapolis, etc., R. Co.*, 8 Am. & Eng. R. R. Cases, 101.)"

The cases relating to the subjects of vice-principal and fellow servants are involved in great conflict and confusion and it is impossible to harmonize them. Some of these cases seem to make distinctions without an essential difference in the facts. The subject is very fully discussed in the 7 Am. & Eng. Encyclopædia of Law, 838-844—and the general rule to be deduced from the later decisions is that it is not the rank of the employe but the nature of the duty with which he is clothed that is decisive, and in our view the classification made by the supreme court of the United States is correct and in consonance with our own decisions.

The above testimony of McCarty, therefore, if true—and that is a question for the jury—was sufficient to constitute him a vice-principal as to Sullivan under the rule stated by this court in *C., St. P., M. & O. R. R. Co. v. Lundstrom*, 16 Neb., 254; *S. C. & P. R. R. Co. v. Smith*, 22 Id., 780; *B. & M. R. R. Co. v. Crockett*, 19 Id., 145.

The court, however, at the request of the attorney for the defendant in error, gave the following instruction: "The jury are instructed that if they believe from the evidence that the deceased, James Sullivan, came to his death through the wrongful act, default, or negligence of defendant or its servants or employes, and not through his own wrongful act or negligence, then they will find for plaintiff and assess her damages at such sum as they believe from the evidence she should recover, not exceeding the sum claimed in her petition."

This was duly excepted to and is now assigned for error. It will be observed that the instruction is entirely too broad and general in its terms and fails to distinguish the acts of a vice-principal from those of a fellow servant, and was well calculated to mislead the jury and fails to state the law correctly. The other questions in the case are questions of fact upon which, to some extent, there is a conflict of testimony, and as there must be a new trial, they will not be discussed.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

COBB, J., concurs.

REESE, CH. J., dissenting.

I do not agree to the conclusion reached by my associates, that the giving of the instruction quoted in the opinion of the majority was necessarily prejudicial error; and will briefly state my reasons for such dissent.

I think it is true that the instruction, if taken alone and without qualification, would be insufficient as not fully stating the rule of negligence as applicable to cases of this kind. It must be conceded that the negligence of the "servants and employes" of the defendant would be its own negligence, for it acts only through its servants and employes. It can act in no other way. In addition to the instruction above referred to, the court, upon the request of defendant in error, gave instruction number four, and instruction number two given upon its own motion, both of which we here copy :

"4. You are instructed that the negligence of the defendant that would make it liable must be the negligence of the company itself or some superior agent who stood in place of the company as between it and the deceased Sullivan; and if you find that a car repairer, as a fellow laborer, worked with Sullivan, who had more experience and on that account was showing Sullivan how to do the work, was negligent and this negligence caused or contributed to the injury, the defendant would not be liable.

"2. The law of negligence as applied to this case is given in the instruction given at the request of the parties, to such an extent that but little need be added. The defendant railroad company is liable for the negligence of its servants superior in employment to the deceased at the time of his death, if the negligence of such superior servant caused the injury complained of and there was no contributory negligence on the part of deceased; but the defendant would not be liable for negligence of a fellow servant of deceased. A fellow servant, within the meaning of this proposition, means an associate employe with the deceased, in the same line of employment with the deceased, and without authority over the deceased more than the deceased had over such fellow servant in the work in which deceased was engaged at the time of the injury. The authority of a fellow servant to instruct another fellow servant less ex-

perienched as to the duties and dangers of the employment of itself does not prevent their being fellow servants within the meaning of the rule of law above mentioned."

It is a well established rule of law, and one which has been repeatedly recognized in this state, that the whole of the instructions given to a trial jury must be considered together, and if none of them mistake the law as applicable to the case on trial and they are susceptible of being harmonized, when so considered, they could not mislead the jury and a new trial will not be granted. Stated differently, if an instruction only partially states the rule to be applied, it will not be held to constitute reversible error if the rule is fully and correctly stated in another portion of the charge, and the whole instruction, when thus considered together, presents a correct and consistent statement of the law. (*Parish v. The State*, 14 Neb., 67; *S. C. & P. R. R. Co. v. Finlayson*, 16 Id., 584; *Gray v. Farmer*, 19 Id., 71.)

Applying this well recognized rule to this case, I can see no difficulty growing out of the instructions. The first one instructed the jury that if they found that the injury was caused by negligence of defendant, its servants or employes, and not by that of the deceased, the plaintiffs in the action should recover, and by the others they were informed what servants and employes were referred to and that all others should be excluded. I think this could work no prejudice.

JOHN KLOSTERMAN ET AL. V. GEORGE OLCOTT.

[FILED OCTOBER 23, 1889.]

Instructions. Where the court in instructing the jury as to the issues in the case stated them much more broadly than was warranted by the bond which was the foundation of the action, *held*, that the error was prejudicial and cause for a new trial.

REHEARING of case reported in 25 Neb., 382.

Marquett, Deweese & Hall, and *S. H. Steele*, for plaintiff in error:

As to the first instruction, the error is not cured by a subsequent instruction committing the question to the jury (*McPherson v. Wiswell*, 19 Neb., 117); and the court made no statement to the jury of the issues as raised by the pleadings, which was error. (*Potter v. R. Co.*, 46 Ia., 399; *Dassler v. Wisley*, 32 Mo., 498; *McKinney v. Hartman*, 4 Ia., 153; *Sandwich Mfg Co. v. Shiley*, 15 Neb., 111.)

O. P. Mason, *Robert Ryan*, and *F. W. Lewis*, for defendant in error.

MAXWELL, J.

This action was brought before this court at the January, 1889, term thereof and an opinion filed which is reported in 25 Neb., 382. A rehearing was afterwards granted and the cause again submitted.

Particular objections are urged to the first instruction, which is as follows: "This action is brought by the plaintiff against the defendants upon a written contract entered into between the defendants and one Henry E. Lewis, by the terms of which defendants, in substance, agreed to pay to said Lewis, or his assigns, the amount due upon the sev-

eral promissory notes introduced in evidence upon this trial, within thirty days after their maturity, in the event the same were not paid by the makers thereof."

In the former opinion it is said: "We see no error in this instruction." A more careful scrutiny of the bond which is the foundation of the action however convinces us that in this we erred. The condition of the bond is that "the said W. H. Westover and J. Robert Williams are about to *sell* to the said Henry E. Lewis, within the next two years, promissory notes secured by chattel or real estate mortgages, and to indorse such notes to the said Lewis, and have entered into an agreement as parties of the first part, with said Lewis as party of the second part, for good and sufficient consideration therein expressed, to guarantee to the said Lewis and his assigns payment within thirty days after maturity of each and every one of the said promissory notes so sold to said Lewis by them, and indorsed as aforesaid, with accrued interest, and to collect the said notes without expense or charge therefor to the said Lewis, or the assignees thereof."

It will be observed that the bond is to guarantee notes which Westover and Williams should *sell* to Lewis. This element is entirely left out of the instruction above given and it must have been prejudicial, as the right to recover is much more broadly stated than in the bond.

One of the defenses in the case is usury and one of the questions for determination is whether or not the alleged sale of the notes was not a device to evade the usury laws. This error could not be cured by another instruction on behalf of the plaintiffs in error.

The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

SAMUEL W. JOHNSON V. STATE OF NEBRASKA.

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[FILED OCTOBER 23, 1889.]

1. **Rape: EVIDENCE: SUFFICIENCY.** To justify or sustain a verdict of guilty the proof must reach such degree of certainty as to exclude reasonable doubt. It is not sufficient to show that the accused may be guilty, but it must clearly appear that he is guilty of the specific offense charged.
2. **Proof** *held* insufficient to sustain the verdict.
3. **Instruction** set out in the opinion, *held* to be erroneous.

ERROR to the district court for Burt county. Tried below before WAKELEY, J.

George B. Lake, and *H. Wade Gillis*, for plaintiff in error:

The evidence is insufficient to sustain the verdict, especially as to intent to commit rape. (*Thompson v. State*, 43 Tex., 583.) An assault with intent to persuade a woman to submit to intercourse is not an assault with intent to commit rape. (*Pleasant v. State*, 8 Eng. [Ark.], 372; *Charles v. State*, 6 Id., 390; *Thomas v. State*, 16 Tex. App., 539; *Peterson v. State*, 14 Id., 162; *Saddler v. State*, 12 Id., 194; *Krum v. State*, 19 Neb., 732.) The testimony of those who had known plaintiff in error for many years, that they had never heard his reputation questioned, is the best evidence of good character. (*Fiske v. State*, 9 Neb., 66.)

William Leese, Attorney General, for defendant in error.

MAXWELL, J.

The plaintiff in error was convicted in the district court of Burt county of an assault with intent to commit a rape on his daughter, Constance Johnson, and sentenced to imprisonment in the penitentiary. The offense is alleged to

have been committed on the 24th of December, 1887, upstairs at the house of the accused near Oakland, in Burt county, between five and six o'clock P. M. of that day. The complaining witness made no mention of the alleged assault to any person for several months after it was said to have occurred. There were no marks upon her person nor any evidence that an assault had been made, except her naked, unsupported statement made many months after the time above set forth. She claims to have called her sister Annie from the kitchen, a child nine years of age, to the door of her room and when she reached that point to have requested her to return to the kitchen. This witness, Annie, had evidently been instructed by some one in regard to her testimony, as she testifies with particularity to certain dates that a child of tender years would not notice or remember unless instructed thereon. If the testimony of the prosecuting witness is true, her mother was in the room below, and a stove pipe extended from a stove in her mother's room through the floor of the room upstairs in which she alleges she and her father were, but she made no outcry. She also testifies that during the evening of that day she played on the organ and sang for the entertainment of company till about 11 o'clock P. M.

The plaintiff in error testified in his own behalf and denies that he was upstairs at the time stated or that his daughter was there, or that he there, or at any other time or place, attempted to commit the offense charged. Being the evening before Christmas, a number of persons were at the house of the accused, who testify that he returned home about 5 P. M. of the day named, and that both he and his daughter were in the kitchen and were not upstairs at the time alleged. In addition to this a large number of neighbors and acquaintances of the plaintiff in error, who have known him intimately for years, testified that his character for virtue and morality was good. Upon such testimony as this it is difficult to see upon what ground the

jury could find a verdict of guilty. It is evident that they were misled or allowed their prejudices to influence their action. The evidence required to authorize and sustain a conviction is not that the accused *may* be guilty, but it must reach such degree of certainty as to exclude reasonable doubt.

This rule neither courts nor juries have a right to disregard. Every person is presumed to be innocent until proved to be guilty, and the degree of proof of guilt must be such as to render it morally certain that the accused committed the offense charged. In other words, to justify the laying of the heavy hand of the law upon a person and brand him as a felon, and bring disgrace upon him and his kindred, the proof must be of such a character as clearly to establish his guilt; and if it falls below that it is not sufficient. In the case at bar, if we give the testimony of the prosecutrix its full force and effect, there is a failure of proof of the degree of force necessary to constitute the offense; neither is there proof of such an attempt as is contemplated by the statute.

In *Hicks v. Com.*, 29 Central Law Journal, 305, the supreme court of Virginia, in considering an indictment charging the defendant with attempting to poison with intent to kill one A. by buying the poison and delivering it to one L. and soliciting her to administer it in coffee to A., says: "An attempt to commit a crime is compounded of two elements: (1) The attempt to commit it; and (2) a direct, ineffectual act done toward its commission (Code, sec. 3888; 2 Bish., Crim. Proc., sec. 71); or, as Wharton defines it, 'An attempt is an intended, apparent, unfinished crime.' Therefore the act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently

near to it to stand either as the first or some subsequent step in a direct movement toward the commission of the offense after the preparations are made. (*Uhl's Case*, 6 Gratt., 706; *McDade v. People*, 29 Mich., 50; Bouv. Law Dict., 'Attempt.')

Thus it has been often held, under statutes similar to our own, that the purchase of a gun, with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offense, because the act done in either case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent. "To make the act an indictable offense," says Wharton, "it must be a cause, as distinguished from a condition; and it must go so far that it would result in the crime, unless frustrated by extraneous circumstances." (1 Whart., Crim. Law, sec. 181.) This is well illustrated by the case of *People v. Murray*, 14 Cal., 159. In that case the defendant was indicted for an attempt to contract an incestuous marriage with his niece. It was shown that after declaring his intention to marry her he actually eloped with her, and sent for a magistrate to perform the ceremony, and at the trial he was convicted. But on appeal the judgment was reversed, the appellate court holding that these were mere preparations, and did not constitute an attempt within the meaning of the statute. In delivering the unanimous opinion of the court, Field, C. J., said: "It [the evidence] shows very clearly the intention of the defendant; but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made. To illustrate: A party may purchase and load

a gun, with the declared intention to shoot his neighbor ; but until some movement is made to use the weapon upon the person of his intended victim there is only preparation and not an attempt. For the preparation he may be held to keep the peace, but he is not chargeable with any intent to kill. So, in the present case, the declarations and elopement and request for a magistrate were preparatory to the marriage, but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said in strictness [*i. e.*, in a legal sense] that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party."

The same principle was recognized by the supreme court of Pennsylvania in a recent case, and one which bears a striking resemblance to the case before us. There the defendant was indicted and convicted for an attempt to administer poison, under a statute the provisions of which are substantially the same as those of our own statute. It was proved at the trial that the defendant, in a conversation with the witness Neyer, stated his grievance against his intended victim, Waring, and his determination to be revenged, and then solicited Neyer to put poison in Waring's spring, so that he and his family would be poisoned, offering him a reward therefor. He also gave him directions how to administer the poison, and gave him the poison to be administered. But the witness refused to have anything to do with it, and handed it back to the defendant, and testified that he never intended to administer it. Upon these facts the supreme court held that all that occurred at the interview with the witness, and the legal inferences deducible therefrom, followed by no other act, were not sufficient to warrant a conviction for an attempt to commit the felony charged; that the act proved

did not approximate sufficiently near to the commission of murder to establish an attempt to commit it, within the meaning of the statute; and the judgment was accordingly reversed. "Merely soliciting one to do an act," said the court, "is not attempt to do that act. * * * In a high moral sense, it may be true that solicitation is attempt; but in a legal sense it is not. (*Stabler v. Com.*, 95 Pa. St., 321.)" The court in its opinion also referred to the case of *Reg. v. Williams*, 1 Car. & K., 589; 1 Denison, Cr. Cas., 39, which was a prosecution under the third section of the act of 1 Vict., from which the Pennsylvania statute was substantially copied, and in that case "it was held that the delivery of poison to an agent, with directions to him to cause it to be administered to another, was insufficient to establish an attempt to murder." In that case the agent was actually given money for his services, and immediately proceeded with the poison to the house of the intended victims, but upon his arrival there he gave up the poison to them and told them all about it. The prisoners were convicted, but at the ensuing term the case was considered by the fifteen judges, who held the conviction wrong.

This we regard as a correct statement of the law, at least so far as a distinction is drawn between intention and attempt. The testimony of the prosecutrix therefore, if given its full effect, fails to show an attempt within the meaning of the statute to commit the offense charged. Besides no sufficient reason is given by the prosecutrix for her failure to make complaint at an earlier period. Great delay in making complaint in a case of this kind is a strong circumstance tending to show that the charge is a fabrication, made in many instances as a means to accomplish the personal objects of the prosecutrix or other person, who may possess influence over her. In such cases the court should require sufficient testimony in corroboration to show that a crime was in fact committed. The offense charged when

in fact committed is of such a nature as to be well calculated to shock the sensibilities of the woman attacked. It would seem to be well nigh impossible for her to treat it as a light and trifling matter which made so little impression on her mind that immediately thereafter and for several hours she could play on a musical instrument and sing to those assembled at her father's house. She evidently was free and unrestrained, yet her sensibilities were so little affected that for months she disclosed the alleged charge to no one.

We cannot believe this to be true when an offense has actually been committed. An offense of this character, when clearly established, should be severely punished, but stale charges will be scrutinized very closely and the commission of the alleged crime must be fully established.

There evidently is a secret history to this case not shown by the testimony, and there is not a very friendly feeling between the prosecutrix and her father, hence the unnatural charge.

The court instructed the jury as follows: "If the assault was made, and with the intent to have sexual intercourse with the prosecutrix, the intent may have been to effect the purpose by prevailing upon her to submit, if this could be accomplished, or to carry out the purpose if necessary by force and violence, and against her will, and it is this latter mentioned purpose which must be shown beyond a reasonable doubt to warrant a conviction. But if the assault and such intent have been proven to your satisfaction, beyond a reasonable doubt, it is your duty to find the prisoner guilty, however unpleasant it may be." In this we think the court erred.

The blending of the two propositions together, one of which would not authorize a conviction, and referring to *such intent* in the manner set forth must have misled the jury and is erroneous.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

STATE OF NEBRASKA, EX REL. GEORGE W. FARMER,
V. GRAND ISLAND & WYOMING CENTRAL RAIL-
ROAD COMPANY.

[FILED OCTOBER 23, 1889.]

Railroads: EMINENT DOMAIN: DAMAGES: MANDAMUS. In a petition for a *mandamus* to compel a railway company to deposit with the county judge the amount of an award for damages assessed to the relator by reason of the location and operation of the defendant's railway across his premises all the necessary facts were alleged to show that the right of way had been lawfully condemned and the award duly made, from which no appeal had been taken, but that the amount thereof had not been deposited with the county judge as required by statute. *Held*, That an action by *mandamus* will lie to enforce the duty.

ORIGINAL application for *mandamus*.

Robert Ryan, for relator:

Mandamus lies to compel payment of damages for property taken by a *municipal* corporation. (*People v. Lowell*, 9 Mich., 144; *Higgins v. Chicago*, 18 Ill., 279; *Johnston v. Supervisors*, 19 Johns. [N. Y.], 275; *Treat v. Middleton*, 8 Conn., 243; *People v. Supervisors*, 4 Barb., 64; *Harrington v. Com'rs*, 22 Pick. [Mass.], 263; *State, ex rel. Van Vliet, v. Wilson*, 17 Wis., 688; *Justices v. Jefferson*, 1 Cold. [Tenn.], 419.) The distinction between a public and a private corporation is that the former does not and

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the latter does need a franchise from the state to carry on its business. (*Allegheny County v. Diamond Market*, 123 Pa. St., 164; *Pittsburg's Appeal*, Id., 374.) The railway company takes by the same right as a municipal corporation, and its exercise of the right is that of a trust. (*State v. R. Co.*, 17 Neb., 659.) *Mandamus* is the proper remedy in this case and it is not necessary that no other action would lie. (*State v. Stearns*, 11 Neb., 107; *State v. R. Co.*, 22 Id., 331; *Webster Telephone Case*, 17 Id., 126; *O., etc., R. Co. v. People*, 121 Ill., 483; *C., etc., R. Co. v. People*, 56 Id., 379.)

Marquett & Deweese, for respondent:

Mandamus does not lie where there is an adequate remedy at law. (High, Ex. Rem., sec. 283; *Regina v. R. Co.*, 6 A. & E. [Q. B.], N. S., 70.) Relator has three distinct remedies at law: to sue for the amount of the award; to enjoin the operation of the road across his premises until payment; to sue in trespass for the unauthorized entry. (*O., etc., R. Co. v. Menk*, 4 Neb., 21.) The cases cited in relator's brief apply to public corporations; where the writ of execution or an adequate remedy at law to collect money does not avail. (*State, ex rel. Van Vliet, v. Wilson*, 17 Wis., 694.)

MAXWELL, J.

This action was brought by the plaintiff against the defendant to compel the depositing with the county judge of certain money, to which the relator claims to be entitled for damages for right of way.

The defendant demurred to the petition on three grounds, viz.:

First—That the relator has not legal capacity to sue.

Second—That the petition fails to state a cause of action.

Third—That he has a complete remedy at law.

The petition is as follows: "Your relator, George W. Farmer, makes known that he is a resident and citizen of the state of Nebraska and has been such for the last four years.

"That your relator is and has continuously for the last four years past been in the possession of the south half of the southeast quarter of the southwest quarter and lot seven, all of and in section six, in township twenty-two north, range twenty-five west, 6th principal meridian. That on the 9th day of March, 1885, your relator filed upon said lands under and by virtue of the laws of the United States of America for a timber culture claim and has ever since remained in possession of the same, in all respects complying with the federal laws in respect to such claims and fully intends to perfect the title in the relator by a full compliance with the laws of the United States prescribed for that purpose.

"Your relator further makes known that while this relator was in possession of said premises as aforesaid, to-wit, on or about the 15th day of July, 1886, the Grand Island & Wyoming Central Railroad Company, a corporation organized and existing under and by virtue of the laws of the state of Nebraska, of its own wrong and without any right whatever entered upon said premises for the purpose of constructing its line of railroad and for general railroad purposes, and constructed its line of railroad and has ever since and now operates its line of railroad across and over said premises; and for the purpose of operating its said line of railroad said defendant for its use for depot grounds has appropriated through said premises a strip of land of a width not uniform, but of an area of about six acres.

"Your relator says the whole of said appropriation, use, and occupation by said railroad company of a strip through above premises was without any compensation to your relator, and without any *ad quod damnum* proceedings what-

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ever on the part of the said railroad company, the said railroad company doing said acts under the claim that it had the right to, and could justifiably by law deprive this relator of, the occupation, use, and possession of said strip without making compensation for the same and without resort to any *ad quod damnum* proceedings whatever.

"Your relator says that your relator demanded compensation for the above appropriation, use, and occupation of said strip through said premises, which said railroad company utterly refused to make or recognize, whereupon your relator filed his petition for the appointment of six qualified commissioners with the county judge of Blaine county, Nebraska, (said land being situated in said Blaine county); that said commissioners were thereupon duly selected, appointed, and qualified, and after notice of the contemplated assessment of damages by said appraisers to the defendant, said appraisers assessed the damages sustained by your relator by reason of the premises at four hundred dollars, no part of which has been paid.

"Your relator says said appraisalment was made by disinterested freeholders in the manner prescribed by law and has never been appealed from, reversed, or modified in any manner, notwithstanding which the defendant still persists in and still occupies, uses, and holds said strip of land for railroad purposes.

"Your relator herewith submits and hereto attaches a copy of the pleadings filed and proceedings had in *ad quod damnum* proceedings had at the instance of your relator, duly certified by the county judge of Blaine county, Nebraska, as 'Exhibit A,' and makes the same a part of this information and petition with the same effect as though fully set out herein.

"Your relator says that the duty to make said compensation results as a duty on the part of the defendant by reason of its assuming to act under the laws of the state of Nebraska governing railroad corporations, as the defend-

ant does, and availing itself of the delegated right of eminent domain.

"Wherefore your relator prays that this honorable court by *mandamus* require the defendant to pay the above award, with interest and incidental costs of the same, as a duty resulting from its exercise as a railroad corporation of the franchise of taking, using, and occupying real property for railroad purposes across your relator's premises, and for such other relief as the plaintiff may be entitled to, and for costs."

Section 97a of chapter 16, Compiled Statutes, provides: "That either party shall have the right to appeal to the district court of the county where the lands are situated from the assessment of damages allowed and mentioned in section ninety-seven (97) of chapter sixteen (16) of the Compiled Statutes (1885) of Nebraska, at the time and in the manner hereinafter specified and set forth."

If the allegations of the petition are true, the defendant's railway is located and in operation across the relator's premises, and the damages have been lawfully assessed, yet the defendant has not deposited the amount of the award with the county judge. This it is in duty bound to do.

The relator is alleged to have possession of the land in question as a timber claim. He does not possess the legal title, nor until his right to the same is complete under the statute is he entitled to recover as owner of the fee; but for injury to his possession he is entitled to compensation now and presumably the damages awarded were for injury to it.

The amount of the damages having been lawfully ascertained, it is unnecessary for the relator to bring an action against the defendant to recover the amount thereof as that has been duly ascertained. It being the duty of the defendant to deposit the amount of the award with the county judge, *mandamus* will lie to enforce the performance of that duty.

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The petition, therefore, states a cause of action, and the demurrer is overruled.

We will not issue a writ, however, until the facts are determined. The defendant has leave to answer within fifteen days from this date.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

HERMAN KOENIG, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY R. CO., APPELLEE.

[FILED OCTOBER 23, 1889.]

1. **Foreign Corporations: CANNOT ACQUIRE RIGHT OF WAY INDIRECTLY.** In an action to enjoin a railway company from laying a side-track across the plaintiff's lot it was alleged that the "defendant was a foreign and non-resident railroad corporation, organized and incorporated under the laws of Illinois," etc., which allegations the defendant in its answer and supplemental answer admitted to be true. *Held*, That under the issue made in the pleadings the defendant, unless it became a corporation under the laws of the state, was prohibited absolutely by the constitution from acquiring a right of way; and as it could not acquire the same directly, it could not do so indirectly through a corporation organized under the laws of the state, and might be enjoined from appropriating the property.
2. **Parties.** Where a party claiming right of way under a contract was not before the court below, and it is apparent that he has an interest in the subject-matter of the suit, he must be made a party before the court will determine his rights in the premises.

APPEAL from the district court for Lancaster county.
Heard below before FIELD, J.

Billingsley & Woodward, and *G. M. Lamberton*, for appellant:

The entry on appellant's land was unlawful, and injunction lies to prevent further occupancy. (1 High, Inj., secs. 622-626.) The record shows that the C., B. & Q. R. Co. is a foreign corporation; it cannot, therefore, acquire right of way directly, neither can it do so indirectly through the L. & N. W. R. Co. (*Hull v. R. Co.*, 21 Neb., 371; *Trester v. R. Co.*, 23 Id., 249; *State v. Scott*, 22 Id., 642.) The L. & N. W. R. Co. cannot exercise the right of eminent domain, because it has surrendered its franchise to appellee, and latter cannot acquire right of way through its lease of the L. & N. W. R. Co., because the same is void. (*State, ex rel. Leese, v. R. Co.*, 24 Neb., 144.) Right of way cannot be condemned for the use and benefit of a private person.

Pound & Burr, for appellee:

Under the terms of the contract between appellant and H. T. Clarke, the injunction should not be made perpetual. The C., B. & Q. R. Co., through the L. & N. W. R. Co., has duly condemned the property. The question of the right of the appellee, as a foreign corporation, to hold land in this state is not in the case.

MAXWELL, J.

This action was brought in the district court of Lancaster county, to enjoin the defendant from laying a side track across the plaintiff's lot to reach the warehouse of Henry T. Clarke in Lincoln. Mr. Clarke was not made a party to the suit and his rights will not be adjudicated in this action. On the trial of the cause the court found the issues in favor of the defendant and dismissed the case. It is alleged in the petition that "The plaintiff, Herman Koenig, a resident of Lincoln, Lancaster county, and state of Nebraska, complains of the said defendant, the Chicago, Burlington & Quincy R. R. Co., and alleges that said defendant is a foreign and non-resident railroad corporation, organized

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and incorporated under the laws of the state of Illinois and operating a line of railroad from the city of Chicago, in the state of Illinois, to the city of Lincoln, in the state of Nebraska, and from thence, either by lease or otherwise, various other railroads radiating in different directions from the said city of Lincoln, in said state of Nebraska. The said plaintiff alleges that he is the owner of, and has the legal title to, and is in the possession of, lot two, in block thirty-one, of the city of Lincoln, county of Lancaster, and state of Nebraska, that he has a house upon the same, wherein he resides, and that said property is of the value of \$8,000. Plaintiff avers that the said defendant has laid its railroad track across the west end of said lot two, in said block thirty-one aforesaid, and extended the same from its main track across said lot to the warehouse and store-building of one Henry T. Clarke, situated at the intersection of Eighth and P streets in said city of Lincoln; and the said plaintiff alleges that the said defendant unlawfully, and without the assent, knowledge, or permission of the said plaintiff, entered upon said lot of the plaintiff's and laid its track and railroad ties thereon and is now operating, hauling, and running its freight cars across, over said track and across the lot of this plaintiff to the said warehouse aforesaid of the said Henry T. Clarke, without having compensated this plaintiff for his damages or tendered payment for the use and occupation of said premises, and without having taken any steps to condemn said land under the laws of the state of Nebraska, or securing to this plaintiff compensation in any manner whatsoever for the damage occasioned by the occupancy of said lot, and the use thereof, and for the operation of trains and cars across the same. And the plaintiff avers that by reason of the building in the construction of said railroad across said lot, and the operation of engines, trains, and cars over the same, contrary to law, and without the consent and permission of this plaintiff, he has suffered great and irreparable injury

and has been deprived of the peaceful enjoyment of said premises and the life of himself and family has been and is daily endangered by the passing and repassing of cars over said track. Plaintiff also alleges that he has no adequate remedy at law, and that except for the interposition of this court he will be embroiled in a multiplicity of suits. Plaintiff further alleges that the said defendant threatens to continue the use of said track for said railroad purposes and operate trains over and across said lot, notwithstanding the request of this plaintiff to desist therefrom, unless restrained by the order of this court."

This petition was filed January 29, 1888. On the 28th of July, 1888, the defendant filed an answer in said action as follows :

"Now comes the defendant above named, and for answer to the petition filed by the plaintiff admits that it is a corporation organized under and by virtue of the laws of the state of Illinois, and that it is operating certain lines of railroad in the state of Nebraska. Further answering the said petition, the defendant denies each and every allegation therein contained."

On February 13, 1889, the defendant filed a supplemental answer in part as follows :

"Now comes the above named defendant, and for a supplemental answer to the petition herein, admits that it is a corporation duly organized under and by virtue of the laws of the state of Illinois, and that it is operating certain lines of railroad in the state of Nebraska. * * * And defendant had the right to construct, maintain, and use a track across the said lot by virtue of a contract duly executed, signed, and delivered by the plaintiff on the 22d day of June, 1887, wherein Henry T. Clarke was party of the second part, and which contract and the terms and condition thereof said Clarke had duly kept and performed, but said plaintiff now refuses to keep and perform." And after alleging certain condemnation proceedings by the

Lincoln & Northwestern railway in its behalf, it alleges that "Further answering the said petition, the defendant denies each and every allegation therein contained."

It will be observed that the defendant is charged in the petition with being "a foreign and non-resident railroad corporation, organized and incorporated under the laws of the state of Illinois," and in its answer and supplemental answer it in effect pleads the same facts.

Sec. 8, art. XI, of the constitution provides that "No railroad corporation organized under the laws of any other state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state."

Thus a foreign railroad corporation can neither exercise the right of eminent domain, nor does it possess power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of the state. In other words, a foreign railway corporation under our constitution can neither acquire nor hold a railroad in this state unless it becomes a corporation under the laws of the state in some of the forms pointed out in the statute. A railway corporation, being a creature of statute, possesses no powers except those conferred upon it by law.

This question was very fully considered in *State v. Scott*, 22 Neb., 628-9, and it was held that a foreign corporation is prohibited from acquiring right of way or real estate for depot or other uses, and that it cannot do indirectly what the constitution prohibits it from doing directly. In other words, that, as it cannot perform any of the acts named, therefore it cannot avail itself of the services of another corporation to accomplish this result. The denial to a foreign railroad corporation of the right of emi-

nent domain, and the power to acquire right of way or real estate for depot or other uses, is an absolute prohibition against such corporation either owning or holding a railroad in this state. The denial of the right to acquire right of way is very broad and comprehensive, and its meaning unmistakable. "No foreign corporation *can* exercise the right of eminent domain or (*can*) acquire right of way," etc. If it cannot acquire, then it is forbidden to hold what it is prohibited from acquiring, because the effect of the denial of the right of acquisition is to prevent it from taking the property. And as it cannot do indirectly what it is prohibited from doing directly, it cannot acquire and hold a leased line and thus evade a plain constitutional prohibition. These provisions were placed in the constitution not as a measure of hostility to railroads, but to protect the citizens of the state in the enforcement of the rights, and prevent corporate abuses. Therefore a foreign corporation, to own or operate a line of railway in this state, must become a corporation under the laws of the state in some of the modes pointed out in the statute. In *State v. C., B. & Q. R. R. Co.*, 25 Neb., 156, in a proceeding in *quo warranto*, the defendant filed an answer setting up the fact that it had become a domestic corporation under the laws of this state, and a decree was rendered to that effect. That decree was rendered at the July term of last year (1888), and after this action was brought. The first answer also was filed before the decree named. The supplemental answer, however, was filed two or more months after that decree. It would seem to have been the duty of defendant to set up this decree in its supplemental answer, and have amended its former answer. Why it failed to do so is uncertain. We cannot believe that it sought thereby to override the constitution of the state and thus seek to make the creature of the law greater than the creator thereof. But whatever the cause, on the pleadings, as we find them before us, the defendant cannot recover.

Hoagland v. Van Etten.

Mr. Clarke is not before the court, and we will not, in his absence, determine any matter affecting him ; neither will we, in the absence of proper parties before the court, investigate the right to lay the side-track in question. The judgment of the district court is reversed and the injunction made perpetual. This decision will not prevent the railroad company as a corporation organized under the laws of this state from condemning and acquiring the right of way for necessary side-tracks.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

GEORGE A. HOAGLAND, APPELLEE, V. EMMA L. VAN
ETTEN, APPELLANT.

27 705
50 520

[FILED OCTOBER 24, 1889.]

Practice: BILL OF EXCEPTIONS. When it is made to appear to the supreme court that there are errors and mistakes in the bill of exceptions, and that evidence is included therein which was not in the bill of exceptions at the time it was signed by the judge of the district court and that important evidence has been omitted in making up the bill, the supreme court will order the bill to be referred back to the judge before whom the case was tried, for examination and correction.

MOTION for diminution of record.

D. Van Etten, for the motion.

Nemo contra.

PER CURIAM.

This cause is submitted upon a motion by appellant to strike from the record in this case certain pages of the bill

of exceptions, which, it is claimed, are incorrect in fact and were inserted in the bill of exceptions after the same was signed by the judge of the district court. The motion is supported by an affidavit of the facts therein alleged.

The appellant also asks an order upon the appellee, requiring him to present to this court certain books of account, which, he alleges, were introduced in evidence on the trial in the district court, and which are not included in the bill of exceptions, it being alleged that they were omitted upon the express agreement of appellee that the books referred to would be presented to this court for inspection in connection with the bill of exceptions as certified to by the judge.

By the law of this state, the duty of settling bills of exceptions is imposed upon the judge of the district court before whom the cause was tried and the supreme court must accept the bill certified to as correct. This court, in the exercise of its appellate jurisdiction, can take no action looking toward a correction of bills of exceptions wherein mistakes of the kind referred to in the motion and affidavit are alleged to have occurred. That duty devolves upon the judge of the district court.

It having been shown by the affidavit referred to that the bill of exceptions is not as it was when signed by the judge of the district court, the appellant will be granted leave to withdraw the same in order that it may be submitted to said judge for inspection and correction, upon due notice being given to the appellee, and that said judge may certify the facts in regard to such exhibits as were not attached to the bill.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

JAMES L. GANDY V. STATE OF NEBRASKA.

[FILED OCTOBER 25, 1889.]

27	707
29	442
27	707
33	424
27	707
36	686
27	707
42	840

1. **Criminal Law : CONTINUANCE.** The facts stated in an affidavit in support of a motion for a continuance, for the purposes of the motion, will be taken as true; and where sufficient facts are stated, a continuance should be granted. (*Williams v. State*, 6 Neb., 334; *Hair v. State*, 14 Id., 503, adhered to.)
2. —: **COUNTER AFFIDAVITS,** or affidavits in resistance of an application for a continuance, made upon affidavits, should not be received. (Citations *supra*.)
3. —: **CHANGE OF VENUE.** The statute as to change of venue in criminal cases confers upon the district court in the county where the offense was committed power to order a change of venue to an adjoining county, but such power is confined to the jurisdiction of the county where the offense was committed. *State v. McGehan*, 27 O. St., 280.)
4. —: **PRIVATE COUNSEL.** The county attorney in a criminal prosecution may have the assistance of counsel employed on private account. (*Polin v. State*, 14 Neb., 540; *Bradshaw v. State*, 17 Id., 151.)
5. —: **COUNTY ATTORNEY: VENUE.** Upon the removal of a criminal prosecution from the county in which the offense was committed, to an adjoining county upon change of venue, it is not the duty of the county attorney of the former county to follow the case to the latter county, but it is the duty of the county attorney of such adjoining county to represent the state in the prosecution of the case; and in such case where the county attorney of the adjoining county is under the disability of having appeared in the case as counsel for the accused, it is the duty of the court to appoint an attorney to act as county attorney in the prosecution. REESE, Ch. J., dissents.
6. —: **JURORS: VOIR DIRE EXAMINATION.** The sole object of the preliminary examination of proposed jurors in a criminal prosecution upon their *voir dire* being to ascertain whether they have formed or expressed an opinion as to the guilt or innocence of the accused, and whether they are prejudiced for or against him, *held*, to be no error in the trial court to refuse to permit the counsel to examine such juror as to what certain remarks of

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his of and concerning the accused tended to show, or whether such juror would believe the testimony of all witnesses equally alike, etc.

7. ———: WITNESSES: ADDITION OF NAMES TO INFORMATION. In a criminal prosecution the names of witnesses cannot, against objection, be added to the information without a showing that they were not known earlier and in time to give the accused notice, in season to anticipate their presence before trial. (*People v. Hall*, 48 Mich., 482.) REESE, Ch. J., dissents.
8. Perjury: EVIDENCE REQUIRED. In a prosecution for perjury the falsity of the testimony or oath of the accused upon which the perjury is assigned cannot be established by the testimony of one witness alone. It may be proved by the testimony of one reliable witness, and such corroborative facts and circumstances as will give a clear preponderance of the evidence in favor of the state; if such preponderance excludes all reasonable doubt of the guilt of the accused, such corroborative facts or circumstances ought, at least, to equal the testimony of a single witness. (*Gandy v. State*, 23 Neb., 436.)
9. ———: ———. The testimony of the witness referred to must be positive and unequivocal, and no amount of corroboration will be sufficient to sustain a verdict of conviction where the testimony of the witness to be corroborated is in the alternative, doubtful and equivocal.
10. Information: VARIANCE. In a criminal prosecution on information alleging perjury in testifying falsely as a witness to the copy of a lease of farm and crop, signed John M. T., the prosecuting witness, who testified that his name was *Jeremiah* and he was not otherwise known, *held*, that the variance was fatal to a conviction.

ERROR to the district court for Pawnee county. Tried below before BROADY, J.

G. M. Humphrey, E. W. Thomas, and Darnall & Babcock, for plaintiff in error:

The accused was entitled to a continuance. (*Ingalls v. Nobles*, 14 Neb., 472; *Billings v. McCoy*, 5 Id., 190; *Johnson v. Dinsmore*, 11 Id., 393; *Newman v. State*, 22 Id., 355; *McDaniel v. State*, 47 Am. Dec., 93; *State v. Painter*, 40 Ia., 298.) Counter affidavits against the application should

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not have been received. (*Hair v. State*, 14 Neb., 204; *Williams v. State*, 6 Id., 337; *Newman v. State*, *supra*.) Plaintiff in error was entitled to a change of venue. (*Olive v. State*, 11 Neb., 18; Const., sec. 11, art. 1; *State v. Mooney*, 10 Ia., 511; *State v. Ostrander*, 18 Id., 435; *San Antonio v. Jones*, 28 Tex., 19; *Ott v. McHenry*, 2 W. Va., 78.) The county attorney is a county officer (*Bell v. Templin*, 26 Neb., 249); and cannot prosecute outside his own county. (*Clough v. Hart*, 8 Kas., 494; *Huffman v. Com'rs*, 23 Id., 283.) As to the overruling of the challenge for cause: *Ensign v. Harney*, 15 Neb., 331; *Bowman v. State*, 19 Id., 527; Maxwell, Crim. Proc., 571; *Garrison v. State*, 6 Neb., 285; *Olive v. State*, *supra*; *Curry v. State*, 4 Neb., 548; *Carroll v. State*, 5 Id., 31. As to the indorsement of the names of the witnesses upon the information: *Gandy v. State*, 24 Neb., 723; *Stevens v. State*, 19 Id., 647; *Parks v. State*, 20 Id., 515. The variance between allegations and proof as to the name of the witness Thayer is fatal. (*Haslip v. State*, 10 Neb., 592; *Davis v. People*, 19 Ill., 74; *Buck v. State*, 1 O. St., 61; *Davis v. State*, 7 O., 206; 1 Bish., Crim. Proc., secs. 488, 677; 1 Chitty's Crim. Law, 216; *McBeth v. State*, 50 Miss., 81; Maxwell, Crim. Proc., 66, 67.)

William Leese, Attorney General, (E. A. Tucker, Frank Martin, and Edwin Falloon, with him), for the state:

There was sufficient time before trial, without a continuance, to procure all necessary depositions. A continuance will not be granted to obtain merely cumulative evidence. (*Tucker v. State*, 5 S. W. Rep. [Tex.], 180; *Smith v. Com*, 4 Id. [Ky.], 798; *Dacey v. People*, 116 Ill., 555.) The statute clothes only the court of the county where the crime was committed with the power to grant a continuance. (*State v. Anderson*, 9 S. W. Rep. [Mo.], 636; *State v. Greenwade*, 72 Mo., 298; Maxwell, Crim. Proc., 546; *State v. McGehan*, 27 O. St., 280.)

COBB, J.

The plaintiff in error has brought this case on error from the judgment of the district court of Pawnee county.

On April 10, 1888, a transcript and information, on change of venue from Richardson county, were filed in the district court of Pawnee county charging that James L. Gandy, the plaintiff in error, on April 8, 1887, in a certain action for the forcible entry and detention of certain real estate in Richardson county, pending before Garret Minor, Esq., a justice of the peace of Richardson county, wherein Daniel H. Maxson was plaintiff and Samuel Powell was defendant, appeared as a witness for the defendant, and, being duly sworn the truth to testify, did then and there in a matter material to said action willfully, falsely, corruptly, and feloniously depose under oath that one John M. Thayer on February 4, 1887, at Oberlin, Kansas, executed to him, James L. Gandy, a lease for the southeast quarter of the southeast quarter of section 5, and the southwest quarter of the southwest quarter of section 4, in township 2, range 13, in Richardson county; and that said lease was delivered to John H. Beery, on February 4, 1887, and by him retained until March 21, 1887, when it was delivered to the witness; that on April 2, 1887, the witness wrote a true copy of the lease and delivered the original to said Powell, who subsequently lost the same; that the copy then and there introduced by the witness in evidence, is the copy taken by him of said original lease, to-wit:

“HUMBOLDT, NEBRASKA, February 4, 1887.

“For and in consideration of the sum of two hundred and seventy-five dollars, I hereby release unto J. L. Gandy the farm I live on, southeast quarter of the southeast quarter of section 5, and southwest quarter of the southwest quarter of section 4, township 2, range 13, for the crop season ending December 1, 1887. J. M. THAYER.

“Witness: JOHN MARSHALL.”

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Whereas, in fact, said Thayer did not lease the land to said Gandy on the 4th of February, 1887, at Oberlin, Kansas, or at any other time or place execute a lease for said land to said Gandy, nor was the lease delivered to said Beery on said 4th day of February, or at any other time, and retained by him until March 21, or for any period of time; nor did said Beery deliver to said Gandy said lease on said 21st day of March, or at any time; nor did said Gandy on said 2d day of April, or at any other time, write a true copy of the same; nor did he on the 2d day of April, or at any other time, deliver the original to said Powell; nor did said Powell ever have possession of or lose the original lease; nor did John Marshall ever witness the same; nor is said pretended copy a true copy of any lease whatever; nor did the so called original lease ever have any existence; the said Gandy well knowing the testimony then and there by him deposed to be true, to be false, and thereby then and there committed willful and corrupt perjury. The second count of the information charged the plaintiff in error with the same offense in like manner and form with that stated. There was a trial to a jury, with a verdict of guilty against the defendant as charged in both counts of the information.

A motion for a new trial being overruled, the defendant was sentenced to be confined in the penitentiary of the state at hard labor for five years and pay the costs of prosecution.

The plaintiff in error by his petition and brief presents eighteen grounds of error, upon which is claimed a reversal of the judgment of the court below.

These points, or so many of them as may be found necessary to consider, will be reviewed in their order.

First—That there was an abuse of discretion in the trial court in overruling the motion of the plaintiff in error for a continuance. With this will be considered the second, or supplementary assignment to the first, that the court erred and abused its discretion in permitting the state to file writ-

ten objections and counter affidavits opposing the application for continuance.

It appears from the record, and is within the judicial knowledge of the court, that the plaintiff in error has been for the third time tried and convicted of the offense involved in this review. First, in the district court of Richardson county, where the judgment was brought up on error and reversed in an opinion of the supreme court published in 23 Nebraska Reports, 436. Upon the cause being remanded, the defendant, under the provisions of the statute, obtained a change of venue to the adjoining county of Pawnee, and was there again tried and convicted, and again the record was brought to this court, on error, and the judgment was reversed in an opinion delivered November 9, 1888, and published in 24 Nebraska Reports, 717. The mandate to the court below was filed in the district court of Pawnee county April 6, 1889. The term of that court at which the cause was again tried commenced April 15, 1889. On the third day of the term the defendant made his application for a continuance, supported by his own affidavit, and by that of E. W. Thomas, Esq., his attorney. These affidavits are voluminous and discursive, the latter containing allegations of fact scarcely permissible under the motion, but nevertheless intended as reasons and causes preventing the defendant from taking the depositions and testimony of certain witnesses, necessary to his defense, in the state of Kansas, and from procuring the attendance of witnesses at the trial in his defense. It is apparent that the affidavits contained the necessary allegations of due diligence, the inability of the defendant to procure certain depositions, or the attendance of certain witnesses at the trial, and showing the materiality of their testimony, setting forth what the defendant expected to prove and what he believed he could prove by the witnesses, and that he could not then safely go to trial without such testimony, and that he knew of no other witnesses by whom he could prove such facts. On

the same day the attorney for the state obtained leave to file counter affidavits in resistance of the application for continuance, and filed the affidavit of E. A. Tucker, Esq., county attorney of Richardson county, who appeared as the prosecuting attorney, and of F. Martin, Esq., assistant counsel, whose affidavits were in resistance of the motion for continuance. The defendant's motion, on the same day, that the counter affidavits filed by the state be stricken from the files, as appears from the record, was sustained. Subsequently, on the 28th day of May, at the same term, on the further hearing of the motion for a continuance the same was overruled, and on the same day the motion to file the second affidavit of E. A. Tucker, Esq., district attorney, was sustained. From this proceeding, forward, there appears an *ellipsis* in the record.

The affidavits of F. Martin and E. A. Tucker in resistance to a continuance are set out in the bill of exceptions and immediately thereafter the following: "A motion to file said affidavit was sustained by the court, to which the defendant duly excepted, and on the same day, May 29, 1889, the defendant being present in person and by counsel, and the state appearing by its attorney, the cause was further heard on the second motion and the affidavits of counsel for continuance." No motion follows this entry, but the affidavit of the defendant is set out, and states in substance: That on May 24, 1889, he went to Oberlin, Decatur county, Kansas, to procure the depositions of witnesses there, and to procure witnesses to return with him to Pawnee City, Nebraska, to give testimony for him there; that he did not succeed in getting the depositions he desired, but induced several witnesses to start with him on the train for Pawnee City; that John King, who is an important witness in his defense, and who lives near to Oberlin, was deterred from giving his testimony there on May 24, 1889, although subpoenaed for that purpose on that day, before the commissioner, being intimidated by

County Attorney Tucker, as he stated in his affidavit herewith.

That J. A. Ralston, H. H. Whitman, William Jones, and George Thomas, who reside near to Oberlin, agreed to accompany him to Pawnee City to testify in his defense, and took transportation on the railroad train with him on May 24, 1889, at Oberlin, and went so far as Norton, Kansas, about forty miles; that he was there arrested on a criminal charge against affiant, filed against him in Thomas county, Kansas, two years prior, by the sheriff of Norton county, Kansas, and was taken off the train, and into custody upon a telegram from J. M. Griffin, of Oberlin, one of the prosecuting witnesses, whose name is indorsed on the information against affiant on which he is to be tried; that Griffin was neither sheriff, deputy sheriff, nor constable; that when affiant was arrested the witnesses, Ralston and Whitman, became frightened and left the train and disappeared and have not been seen since; the other witnesses, Jones and Thomas, also disappeared and have not since been seen; that he had already paid the witnesses for attendance at the trial set for May 27 at Pawnee City, and was detained under arrest by the sheriff of Norton county from half past five P. M. May 24 till 8 A. M. of the 25th, when he was turned over to the sheriff of Thomas county, taken to Colby in that county, and held to bail in \$1,000 to appear there on June 17 following; by which the four mentioned witnesses were scattered and lost to him, and he could not get them together and procure their depositions in less time than two weeks; that he had talked with the witnesses, and knew that Ralston and Whitman would testify that on the night of February 4, 1887, at the Illinois hotel in Oberlin, they saw and read the lease made by J. M. Thayer on that day, being the same as to which he was then charged with perjury, and that there was nothing stated in that lease about one-third of the grass or hay, or one-third of the crop to be raised

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on the farm of J. M. Thayer near Humboldt, being the farm in question; and would testify that the paper offered at the trial before Justice Minor as a copy of the lease was substantially correct; that Jones and Thomas, if present in court, would testify that they were present when the lease of J. M. Thayer to J. L. Gandy was read to Thayer, on February 4; that they heard it read and knew its contents, and that nothing was stated as to one-third of the grass or of the crop to be raised on the farm in question; that the paper was a lease of the farm from Thayer to Gandy during the crop season of 1887, stating that fact distinctly.

That Charles P. Johnson, residing in Harlan county, Nebraska, is an important witness in his defense; that subpoena was served on him May 15, 1889, in Webster county, to appear and testify May 27; if present he would testify that he was in Oberlin February 4, 1887, when the lease was made and knows that it was a lease for the farm lying near Humboldt, for the crop season of 1887, and that he then heard J. M. Thayer agree to give possession of the land to J. L. Gandy on March 1, following; that Johnson was deterred from appearing as a witness, and was induced to leave the state by the threats and intimidation of J. M. Thayer, the principal witness for the prosecution against affiant.

That Jacob Gergens is an important witness; if present would testify that he was in affiant's house in Humboldt, January 15, 1888, in company with J. H. Beery, and heard Beery say that he had never read the lease or paper which he held; that shortly after affiant was arrested, in June or July in Humboldt, on the street not far from the postoffice, Beery said to Gergens that Gandy was not guilty of the charge of perjury, and that his (Beery's) evidence would clear him of the charge, and that on several occasions Beery repeated the same; that Gergens did not testify on previous trials, affiant not knowing the materiality

of his evidence; that he is now sick at home with congestion and inflammation of the brain, under affiant's care as his family physician, and not able to attend as a witness or to give testimony.

That the testimony of all of said witnesses is material and important for his defense, and he cannot safely go to trial without their testimony, but with a continuance he believes he can procure their attendance as witnesses at the trial. He knows of no other witnesses by whom he can so fully prove the facts stated.

The affidavit of J. M. Griffin, as deputy United States marshal at Oberlin, Kansas, corroborates the statement of the defendant as to his arrest and detention on May 24 and 25 by the sheriffs of Norton and Thomas counties, Kansas. That of James L. Loar, the county attorney of Thomas county, shows that the defendant was held to bail on the 25th of May in \$1,000, to appear at Colby on June 17, 1889.

C. P. Johnson's affidavit states that he has been acquainted with J. M. Thayer for more than ten years; that he was present at Oberlin, Kansas, February 4, 1887, and saw Thayer make a lease for the farm he lived on to J. L. Gandy for the crop season of 1887, and heard him contract with Gandy to give possession of the farm on the first day of March of that year; afterwards saw the paper delivered to another to hold until Thayer could get his relinquishment properly fixed up by the notary public; that he was subpoenaed as a witness for Gandy at Pawnee City, May 27, 1889, and failed to appear for the reason that he was informed by Thayer, at Inavale, Webster county, on May 15, that every one who had testified for Gandy, so far, had been indicted for perjury, and some had fled to Canada, which put him in fear, and he concluded to leave Nebraska rather than appear as a witness.

John King's affidavit states that he was notified and appeared to give testimony at Oberlin, Kansas, May 24, 1889;

that just before going on the stand to testify he understood, through different parties, that the sheriff had orders to arrest anyone who testified that he saw Thayer make a lease to Gandy on February 4, 1887, in Oberlin, Kansas; that he was present at Calvert & Wallace's office on that date and saw J. M. Thayer make a lease of his farm for the crop season, for a timber claim, to J. L. Gandy of Humboldt, Neb.; the lease was then turned over to another, whose name he does not remember. He did not give his testimony, but secreted himself from fear of getting into trouble; that he talked with a county attorney, Tucker, who said he had charge of the prosecution and that they had indicted, so far, all in the case, and would probably indict others, advising him to be careful, and that there was plenty of evidence to convict anyone who testified to a lease having been made between Thayer and Gandy. This conversation was on May 24, 1889, near the Commercial hotel in Oberlin, just after the witness was notified to appear before the officer and give his deposition.

John A. Chapin's affidavit states that he is pastor of the Methodist Episcopal church of Humboldt, Nebraska; that Jacob Gergens is a member of his church, and is now sick and unfit for any business whatever, being confined to his house and to his bed.

In resistance of the defendant's motion for continuance the counsel for the state filed a paper purporting to be objections to continuance of the cause which was asked to be considered by the court, together with leave to file the affidavits of E. A. Tucker and J. M. Thayer, not as counter affidavits to those set out, but as evidence that Tucker never knew, saw, or spoke to King who made the affidavit, and that Thayer never saw or spoke to Johnson, nor made the statements alleged in his affidavit, as a charge of intimidating witnesses.

The affidavits of E. A. Tucker and J. M. Thayer in rebuttal, traversing those in support of the defendant's appli-

cation for a continuance, were received and filed May 28, 1889, and upon the further hearing of said motion for continuance the same was overruled.

The law is sufficiently settled in this state that counter affidavits, in resistance of the motion for continuance, supported by affidavits, ought not to be received or considered. In the case of *Williams v. State*, 6 Neb., 334, on an indictment for murder, the defendant in the trial court in support of his application for a continuance alleged in his affidavit that one George Hicks, then absent in the state of Iowa, would testify to certain facts material to his defense; that on the night before the alleged homicide Hicks staid at the house of Vroman, the father of the deceased, and that both the deceased and his father threatened to kill the defendant, and were actually making arrangements to attack him that night; and that both of them stated on the morning of the day of the alleged homicide that if defendant attempted to get his horse they would certainly kill him and made unqualified threats to kill defendant. On motion of the district attorney the court permitted the counter affidavit of the mother of the deceased to be interposed, in which she swore that she was present at the time and place stated and that no such threats against the defendant were made. The motion for continuance was overruled. Upon this the court said: "As a matter of practice we see no propriety in permitting the use of counter affidavits on a motion for a continuance. We do not think a side issue of this sort should be raised, or the truthfulness of the affidavit in support of the motion be determined in this unsatisfactory manner. And if the affidavit in support of the motion in this case were such as to show that the ends of justice required a continuance of the case to enable the accused to obtain material testimony known to exist, we should feel bound to reverse the judgment on this ground alone, regardless of the affidavit of Mrs. Vroman, even if no other error were committed."

In the case of *Johnson v. Dinsmore*, 11 Neb., 391, the language quoted was cited and approved; and again in *Hair v. State*, 14 Neb., 504, in the opinion of the court Judge MAXWELL said: "Where a motion for a continuance is based upon the grounds stated in an affidavit which accompanies the motion, the facts stated in the affidavit for the purposes of the motion will be taken as true, and if sufficient grounds are shown and reasonable diligence has been used by the party filing the motion, a continuance should be granted. The court will not permit to be filed, nor considered, counter affidavits in such case, because it will not in that proceeding permit an issue to be raised as to the truthfulness of the affidavit." It is of equal importance that impartial justice should be done as that a speedy trial should be had.

Counsel for the state, in regard to the allowing of counter affidavits against the motion, say: "Where a motion for a continuance is supported by affidavits stating all that is necessary to state, to inform the court that it would be unsafe to proceed with the trial, the rule is correct and should be maintained; but where the affidavits go outside of the facts necessary, and state falsehoods that are apparent, and falsely charge violation of law upon the officers present in court, it would seem to allow such false statements to be taken as true, without an opportunity to correct them, constituting a premium on perjury, not within the rule laid down in *Hair v. State*." I cannot agree with the counsel in this position. While, as hereinbefore intimated, the affidavits in support of the motion for continuance, especially that of the defendant, contain matter irrelevant and improper to be stated in such a presentation, yet the trial court always has the power to apply the remedy and strike from the files papers containing irrelevant or scandalous matter, or to require the parties to withdraw improper papers and allow them to be refiled only after they are reformed and purged. And this remedy

is the proper practice, without allowing the breach of the rule, by one party to the suit, to provoke an equal, if no greater, violation of law by the other. The course followed in this case cannot be sanctioned.

Third—This assignment is that the court erred in overruling the application of defendant for change of venue. Section 455 of the Criminal Code provides that “all criminal cases shall be tried in the county where the offense was committed, unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein, in which case the court may direct the person accused to be tried in some adjoining county.” This section is identical with that of section 121 of the statute in force in Ohio, passed March 7, 1831, under which was tried and reported *McGehan's* case, 27 O. St., 280, cited by counsel for defendant in error.

In the opinion the court says, p. 283: “This section is appropriate legislation to enforce the bill of rights upon this question of venue, and confers jurisdiction upon the court in the county where the offense was committed to make an order that the accused may be tried in an adjoining county. When a statute directs the time when, the manner, and court that shall have jurisdiction over a subject-matter, and no provision is made for a rehearing in the same court, jurisdiction once exercised is exhausted, and a court of co-ordinate power could not, at another time and place, take jurisdiction of the same subject-matter.

“After an order for change of venue is made, the statute points out the manner and by whom it shall be executed. Section 122, Criminal Code, provides that the ‘clerk of the county where the indictment was found * * * shall make out a certified transcript of all the proceedings in the case, which, together with the original indictment, he shall transmit to the clerk of the court to which the venue is changed.’ This duty is required of the clerk of the county where the offense was committed, and permitted to no other.”

The construction placed upon this statute by the supreme court of Ohio meets with our entire approval, and is adopted as the proper construction of our own. It being remembered that the crime of which the plaintiff in error was on trial was alleged to have been committed in the county of Richardson, and that the accused, upon his application, had been directed to be tried in the adjoining county of Pawnee by a change of venue, he had exhausted his rights and privileges under the statute, and there was no provision by which he could be tried in another county and a strange place.

Fourth—This error consists in the court's permitting the attorneys, Martin and Falloon, to assist in prosecuting the accused.

It appears from the record that on the 28th of May, 1889, the cause being heard, the defendant by his attorney entered objections in writing to the appearance of E. A. Tucker as prosecuting attorney in the case, he not being the official prosecuting attorney of Pawnee county, and also objected to the appearance of F. Martin and Edwin Falloon for the reason that neither is county attorney of Pawnee county, which objections were overruled. Upon this part of the record the plaintiff in error presents the above point, number four and also number five. This objection was a general one to the appearance in the cause of the attorneys named and applies to each of them, whether in the capacity of official prosecutors, or as assistant counsel. The right of assistant counsel or counsel employed and paid by private parties to appear on the part of the state in a criminal prosecution and assist the prosecuting attorney has been considered and decided in this court in the cases cited by counsel for the plaintiff in error, that of *Polin*, 14 Neb., 540, and *Bradshaw*, 17 Id., 151; and the right of the state to the assistance of such counsel, in such cases, is fully established.

But it is contended that as these cases arose under the

statute existing prior to the passage of the act of March 10, 1885, providing for the election of county attorneys, they are not precedents in this case. The provision of statute at the time of the passage of the last mentioned act provides that "It shall be the duty of the district attorney of each judicial district to appear in the district court, at each term of the same, in each county in the judicial district for which he was elected, and prosecute and defend all actions, civil and criminal, and all matters whatsoever in which the state or county may be interested." (Comp. Stats., 1881, p. 66.) The corresponding provision now in force provides that "It shall be the duty of the county attorney to appear in the several courts of their respective counties, and prosecute and defend, on behalf of the state and county, all suits, applications or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested." (Sec. 16, chap. 7, Comp. Stats., 1889.) The following additional provision is relied upon by counsel as changing the rule and taking this case out of the effect of the decisions referred to (sec. 20, chap. 7): "The county attorney may appoint one or more deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties; *Provided*, That the county attorney of any county may, under the direction of the district court, procure such assistance in the trial of any person charged with the crime of felony as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such reasonable compensation as the county board shall determine for his services, to be paid by order on the county treasurer, upon presenting to said board the certificate of the district judge before whom said cause was tried certifying to the services rendered by such assistant or assistants." (Comp. Stats., 1889, 91.) Counsel in the brief say that "under the above section we think the assistants of the county attorney are to be regarded as his deputies, and that they must take the same oath as that of their

principal. In the case at bar, the record shows that in the trial of the case in Pawnee county, at the request of the county attorney of Richardson county, F. Martin and Edwin Falloon were appointed to assist in the prosecution. These attorneys were employed and paid by private parties and took no oath." But it by no means appears that Martin and Falloon were deputies of the district attorney appointed under the provisions of the 20th section, but were his assistants procured by him under the direction of the district court in accordance with the *proviso* of said section, and were not required to take an official oath other than that as attorneys of the court; and the only objection which, in my mind, could be urged to their appearing in the case, and even as to that I am not certain, is that they were not procured to assist the official attorney of the proper county.

The fifth point urged is to the fact that E. A. Tucker, county attorney of Richardson county, followed the case upon the venue being changed to Pawnee county, and there assumed, and was permitted by the court to assume and conduct the prosecution over the objections of the duly elected county attorney of Pawnee county. This objection was not very squarely made, as appears from the record. It was not made by the county attorney in his official capacity, but was made by him together with E. W. Thomas and Captain Humphrey as attorneys for the defendant. It does not appear with any clearness in the record at what time the firm of Humphrey and Lindsay [the county attorney] were employed or first appeared as counsel for the defendant. It is to be presumed, however, that it was before the election of Lindsay to the office of county attorney. If I am correct in this assumption, it then appears that upon taking charge of the office of county attorney Mr. Lindsay found himself under a disability to discharge the duties of his office in respect to the prosecution of the defendant. It does not appear that he availed himself of the

privilege of appointing one or more deputies. If he did, such deputies would probably rest under like disability, so that at the trial, so far as this case was concerned, the county of Pawnee was without a prosecuting attorney competent to prosecute the defendant. Here arises an important question as to the duty of the court in this exigency. Counsel for the state, in the brief, say: "It must be remembered that Richardson county pays the expenses of the trial, and the county attorney of that county was the proper one to try the case, when the county attorney of Pawnee could not defend the interest of the state by reason of having been employed as an attorney for the accused." I cannot agree to this proposition; certainly not in its general significance. If the fact that Richardson county "pays the expenses of the trial" is to be considered as entitled to weight, then it would follow that it was the duty of the county attorney of that county to control the prosecution of the case irrespective of the condition of the county attorney of Pawnee. There is certainly no express provision of statute making it the duty of a county attorney, upon the removal of a criminal cause from the county upon a change of venue, to follow the case to the adjoining county; nor any which relieves the county attorney, or any officer of the county to which such removal may be had, of his appropriate duty under the laws of the state in the prosecution of the cause to all intents and purposes as though the case had originated there.

The chapter of the statute of the state of Kansas entitled "County Attorney" is substantially the same as that of sections 15 to 27 inclusive of chapter 7 of our own laws; indeed, it is not improbable that those sections were adopted from the Kansas law. The case of *Huffman v. The Commissioners of Greenwood County*, 23 Kas., 281, cited by counsel for plaintiff in error, arose under the statute of that state, and was an action brought by the county attorney of Greenwood county against the commissioners

for services in the prosecution of one Nicholas, indicted for the crime of embezzlement as county treasurer, and who was granted a change of venue to the adjoining county of Lyon. The court in the opinion said, p. 282: "The county board seemed to labor under the impression that the services sued for were rendered as county attorney, and the trial court apparently held that, as the evidence of the defendants contradicted the testimony of the plaintiff concerning an express contract between plaintiff and the county board for the services, no contract was proved, and therefore the county was not liable. Here was error. As the services charged for were rendered in the prosecution of a case beyond the limits of Greenwood county, and as plaintiff attended personally the court outside of said county, the services for the county performed in Lyon county were beyond and outside of his duties as county attorney." From such consideration as I have been able to give the subject, I am unable to find anything in the general policy of the laws, and certainly nothing in their letter, imposing the duty or conferring the privilege upon the county attorney of Richardson county to follow this case into Pawnee, and in his official capacity take the management and control of its prosecution. It is true that the taxpayers of Richardson county had a remote pecuniary interest in the conviction of the accused; but they, in common with all the people of the state, had a higher interest in the due administration of the laws, and the meting out of impartial justice to all persons accused. This measure of justice, it had been made to appear by legal process, he would probably not obtain in Richardson county, therefore the duty, the power, and the privilege of his further prosecution of the crime charged was removed to the adjoining county of Pawnee. This removal was absolute and complete, as well from all the officers of that county, including the county attorney, as from the inhabitants as jurors and citizens. The removal imposed upon the adjoining county of Pawnee and its authorities, as well

as upon its inhabitants as jurors, the whole responsibility of prosecuting the accused; and although the people of Richardson county had still, as stated, a pecuniary interest as taxpayers in his conviction, neither the letter nor the spirit of the laws had left them any power to conserve that interest by the presence of an official prosecutor either to reinforce or to restrain the authorities of Pawnee county in the discharge of their juridical duties. But the question still remains, What was the duty of the court under these circumstances, the county attorney of Pawnee having to some extent been identified with the defense of the accused? This question I think is sufficiently answered by the language of the 21st sec., chap. 7, of the law referred to, that, "in the absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, in which there may be business for him, may appoint an attorney to act as county attorney, by an order to be entered upon the minutes of the court, but who shall receive no compensation from the county except as provided for in section six (6) of this act. [Sec. 20 of this chapter.]" Undoubtedly the word "disability" as used was intended to cover cases of this kind. It will not be contended that had the county attorney of Pawnee been absent or sick it would have been the plain duty of the court to have appointed an attorney to act as the county attorney in this case; equally so when his disability by reason of his prior employment as attorney for the defendant appeared upon the records of the court. It may be said that this was substantially done in the permission and acquiescence of the court of the appearance and action of the county attorney of Richardson county in that capacity. It is certainly the spirit of the statute that the attorney so appointed be a resident of the county, and while an occasion might arise when there was no competent resident attorney unemployed by the defense, such was not the case in this instance.

The sixth and seventh assignments of error arise upon the overruling by the court of the defendant's challenge for cause of certain jurors, and the refusal to allow the counsel for defendant to put certain questions to the jurors upon their *voir dire*. It appears from the cross-examination of W. G. Lyman, a jurymen, upon his *voir dire*, counsel for defendant put the

Q. Have you not within the past year made remarks about J. L. Gandy?

A. I think I have; yes, sir.

Q. Did they not indicate that your mind is biased against him?

The state's objection to the question was sustained by the court.

The cross-examination of the juror was continued at some length, and the counsel for defendant put the

Q. If I understand you correctly, you said you had not formed any opinion as to the merits of this case?

A. I have not, because I don't know anything about it.

Q. And outside of the facts and any circumstances coming within your knowledge, in regard to the case, is it not a fact that you have a bias against Mr. Gandy?

A. No, I cannot say that I have.

Q. Are you positively sure, and will you positively swear, that your mind is entirely free from any prejudice or bias against Mr. Gandy?

A. I will.

Taking these answers of the juror together, I do not think there was the error complained of in the overruling of the challenge for cause. The object of the question to the jurymen, which was overruled by the court, was to ascertain whether or not the juror was influenced by a bias or prejudice against the accused. Whatever his answer might have been to this question had he been required to answer, it would have been subject to explanation and qualification, and had it been strictly in the affirmative, his

subsequent answers to questions put by counsel would have explained it as not indicating a bias or prejudice against the accused, for, as to both of those disqualifications, he positively swore he had neither one.

In the case of *Davis v. Hunter*, 7 Ala., 135, cited in the text of Proffatt on Jury Trials, the court held that "after the juror had stated that he was sensible of no bias or prejudice in the cause it was not proper for the court to allow any further cross-examination of the juror on that subject." Without expressing an approval of this ruling to its full extent, I am of the opinion that when it appears from the entire examination of a juror that he disclaims all bias and prejudice against the challenging party in fact, and that he so declares himself on the cross-examination, it is not error in the court to overrule the challenge made upon that ground.

The juryman, Joseph Patterson, having stated on his examination in chief to the prosecuting attorney that he knew nothing of the facts in the case; that he had never heard anything of them except that there was such a case, and that he had no opinion in regard to the guilt or innocence of the accused; and was further examined by the counsel for the defendant, and having stated that he first heard of "this trial some time during the first two weeks of this court here;" that he was at home when the first trial took place, and heard nothing about it at that time, that he knows of; has had no conversation with any of his neighbors with regard to the case; nor had he talked the matter over with other jurymen; that he was perfectly clear that he had neither formed nor expressed any opinion in regard to the case; he was then asked, "If Mr. Gandy, sitting as defendant in the court here, is presumed by you to be an innocent man?" which was objected to by the state, and the objection sustained. The examination was continued to the

Q. Can you state whether or not you have the slightest bias in your mind against Mr. Gandy?

A. I have none.

Q. Have you none whatever?

A. No, sir.

The cross-examination continued at some length to the same effect. While I think it would have been entirely safe and proper for the court to have permitted the juror to answer the question, I am not prepared to say that it was its duty to allow, on the cross-examination, the question of presumption either in law or fact. The sole object of inquiry was the impartiality of the juror, to ascertain whether he had formed or expressed an opinion as to the guilt or innocence of the accused, and whether his mind was affected by any degree of bias or prejudice in favor of or against his prosecution. The course which the cross-examination was allowed to take fully answered these purposes.

Passing for the present the eighth objection, the ninth is based upon the overruling by the court of the challenge of the juror Ernest Lloyd. This juror on his examination by counsel for the state having replied that he was not acquainted with the defendant, but had met and knew him by sight; that he had talked with him, but not in regard to this case; that he had seen him in Birchard about three years ago, and was told that he was Mr. Gandy; that he knew nothing in regard to this case; that he had no opinion in regard to the guilt or innocence of the accused; that he had not talked with any of the attorneys about the case, nor heard them talk about it; he was cross-examined by counsel for defendant, in which he substantially reiterated his answers, and further answered in reply to the

Q. Can you state whether or not you have any bias in regard to this matter?

A. No, sir.

Q. Have you any prejudice?

A. No, sir; I have had no business to make me so.

Q. From what you have heard, hasn't it made a bias in your mind?

A. No, sir; because I don't know whether he is guilty or not.

Q. Did you ever hear any one say anything about his guilt or innocence.

A. No, sir.

Q. Do you think it would take less proof in his than in any other case?

A. No, sir; I would go according to evidence produced.

Q. You would decide on the evidence produced?

A. Yes, sir.

Q. And you would allow no other consideration but the evidence in making up your verdict?

A. Certainly not.

Q. You are positive of that?

A. I know it, but would not swear to it. * * *

Q. You are perfectly sure that you have not the slightest prejudice in this matter?

A. That is what I swore to.

Q. Either against Gandy or his attorneys?

A. No, sir. * * *

Q. You would give Gandy as good a show as any other person?

A. Yes, sir.

Q. You would let no outside matter influence your verdict?

A. No, sir.

Q. You may state whether you would give the same credit to what an infamous person would say on the stand as to a good reliable witness. (Objection of the state sustained by the court.)

Q. Do you look upon the testimony of all men, after being sworn, as of the same character?

A. Certainly, if a man goes upon the stand and swears to a thing. (Defendant challenges the juror for cause.)

By the court: You can explain yourself. If you would believe one man as quick as another, let it be known; but if you take other things into consideration, as bearing upon the probability of their story, or other opportunities of knowledge, and probabilities of truthful character, what would you mean by that?

A. I don't know any of the witnesses, and of course I would have to believe one as much as another. (The defendant again challenges the juror. The court makes no decision.)

Q. (supposed by the court): Do you mean till you know something about it?

A. Yes, sir.

Q. Do you mean that your mind is unbiased as to the evidence that may come before it?

A. Yes, sir.

Q. And in weighing the testimony of the several witnesses?

A. Of course it would be in the way the testimony comes.

Q. If the court would give you instructions on those questions, would you follow the instructions?

A. Certainly I would.

Q. Your mind is unbiased on those questions; you have no prejudice against one witness more than another?

A. I have no prejudice at all. (The defendant challenges the juror for cause, for the reason that he states "he would believe one witness as quick as another." Challenge overruled.)

As heretofore stated, the sole object of the examination of this juror was to ascertain whether he had formed or expressed an opinion as to the guilt or innocence of the accused, and whether his mind was affected by bias or prejudice for or against the accused, and not to ascertain his views in mental and moral philosophy, and the weight to be given to the testimony of witnesses by that criterion.

And, I think, there is no warrant in the law for holding him disqualified as a juror on account of the views expressed by him on any subject other than those indicated as the extent and limit of his examination.

Returning to the eighth point, the error is predicated upon the allowing by the court of the prosecuting attorney's indorsement upon the information of the names of ten additional witnesses, only one of whom was called at the trial, and not for the purpose falsely set out in the notice to the defendant. It appears that on May 21, 1889, the county attorney of Richardson county served on the defendant a notice that he would ask the court to allow him to indorse on the information against the defendant in the case to be tried May 27, 1889, at the opening of the court, the following witnesses, to be used for rebuttal or impeachment and for no other purpose whatever. The names of ten witnesses are enumerated, including that of George Marsh. No application was made to the court for that purpose until the 29th of May, after a portion of the jury-men had been selected, when the application was made and allowed against the objection of the defendant.

It appears from the record that on May 27, 1889, E. A. Tucker presented and filed a written notice directed to James L. Gandy, and which had been served on him by the sheriff, to the effect that he would ask the court to allow him to indorse upon the information the names of ten witnesses therein set out, which witnesses would only be used for the purpose of rebuttal, or impeachment, and for no other purpose whatever. It also appears that on May 29, following, the said Tucker asked and obtained leave of the court to indorse the names of said witnesses upon the information, which was done. There does not appear to have been any reason given, or showing made, why the names of the witnesses were not indorsed on the information at the time of its filing, nor does it appear that the names of the witnesses were not known to the county attorney

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at the time of filing the information. But one of these witnesses was sworn. Defendant complains that this witness was sworn and examined upon the presentation of the case in chief by the state, and not on rebuttal, or upon impeachment, according to the terms of the notice. But the statute does not provide for a classification of the witnesses. If this witness's name was properly indorsed upon the information for any purpose, he was a witness for any purpose of the trial for which the state might call him.

Section 579 of the Criminal Code provides that "All informations shall be filed during term, in the court having jurisdiction of the offense specified therein by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case, as the court may by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him." This section has been twice construed by this court, but not in either case upon facts precisely like those of the present case. In *Park v. State*, 20 Neb., 515, we had occasion to refer to the fact that our statute governing proceedings on information was borrowed substantially from that of Michigan, where they had been construed by the court of last resort before our adoption of them. We specially cited the case of the *People v. Hall*, 48 Mich., 482, where, in an opinion published prior to our adoption of the statute of that state, the supreme court laid down the law in its syllabus that "In a criminal prosecution the names of witnesses cannot, against objection, be added to the information without a showing that they were not known earlier and in time to give defendant notice in season to anticipate their presence before trial." We again signify our approval of the principle of that case. The notable departure from the law thus expressed in the present case is that the court allowed,

against objection, the names of witnesses to be added to the information without a showing that they were not known earlier.

The tenth assignment of error is that the verdict is not sustained by the evidence. It was formerly the law that two witnesses were necessary to convict of the crime of perjury ; as was said, otherwise there would be no more than the oath of one against another, upon which the jury could not safely convict. But this strictness has long since been relaxed ; the true principle of the rule being this, that the evidence must be something more than sufficient to counter-balance the oath of the prisoner, and the legal presumption of his innocence. The same effect being given to the oath of the prisoner as though it were that of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed by material and independent circumstances before the party can be convicted. (See 1 Greenl., sec. 257 ; 2 Roscoe, Crim. Evidence, * 858f.)

We have seen that the oath of the accused, which is assigned for perjury, must be contradicted by one witness, and that in addition thereto there must be at least strong corroborative evidence tending to show the falsity of the oath of the accused. It would seem upon principle that the oath affirmatively relied upon to contradict and disprove the oath of the accused must positively contradict. This would seem to be necessary in order to create that counterpoise and equilibrium between the oath of the accused and that of the prosecuting witness, which, as we have seen, must be overcome by additional or corroborating evidence before there can be a conviction. I have not been able to find any case of conviction upon oral testimony where the oath of the prosecuting witness has failed to absolutely and in positive terms contradict the statement of the accused assigned for perjury. Such being the case I have failed to find a discussion in any case of the point now under consideration.

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It appears from the bill of exceptions upon the oath of Garret Minor that upon the trial before said Minor, as a justice of the peace of Richardson county, in an action then pending and being tried before him, wherein D. H. Maxson was plaintiff and Samuel Powell was defendant, the accused, James L. Gandy, was a witness for the defendant; that upon being duly sworn by the said justice of the peace the accused testified and swore that J. M. Thayer had made him a written lease to the property in controversy in the suit then pending before the said justice of the peace; that he then and there offered what purported to be a copy of the lease, and said it was a copy of the paper given by Thayer to him; and said the lease was made at Oberlin, Kansas, and was put in the hands of Mr. Beery to be kept until called for; that Mr. Beery gave it up to him, and that he and Powell made a copy of it and that Powell took the original; he said that this (the paper which he presented) was a copy of the original lease given him by Thayer at Oberlin, Kansas, some time in the preceding February; that the Beery in whose hands the original was placed was the Rev. Mr. Beery, and the original was as follows:

"HUMBOLDT, NEBRASKA, February 4, 1887.

"For and in consideration of the sum of two hundred and seventy-five dollars, I hereby release unto J. L. Gandy the farm I live on, S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Sec. five & S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ Sec. four, town two, range 13, for the crop season ending December first, 1887.

J. M. THAYER.

"Witness: JOHN MARSHALL."

The foregoing is the oath of the accused which is assigned for perjury. Is it contradicted by the oath of J. M. Thayer, whom we will designate the prosecuting witness, in that positive manner necessary to create the equilibrium, spoken of, between his oath and that of the accused? I here give his examination in chief, and so much of his cross-examination as is directed to its elucidation.

Q. Do you know the defendant, J. L. Gandy?

A. Yes, sir.

Q. Do you remember of being with him at Oberlin about two years ago?

A. Yes, sir.

Q. Was there any paper executed there by you to him?

A. Yes, sir.

Q. What was the nature and contents of it? Describe it to the jury.

A. It was an order to Mr. Beery to give up a paper he held, a bill of sale against us; also a bill of sale or written contract for one-third of the crop raised on the farm.

Q. (Handing witness Exhibit G.) I will ask you to examine that paper?

A. I don't think that is the paper.

Q. Do you say it is, or is not?

A. I think not.

Q. Did you at the time execute a paper of this kind; that is, with these words in it?

A. No, sir; I don't think I did.

Q. What was done with the paper you executed at Oberlin, Kansas?

A. It was given to Mr. Beery to hold.

Q. What Beery?

A. Elder Beery.

Q. Who was present at the time and place the paper was executed in Oberlin, Kansas?

A. My son, and William Reeves, Mr. Beery, Mr. Gandy, and one of the lawyers, either Calvert or Wallace, and myself, I think, about as near as I can tell, were the men.

Q. Do you know the description of this land, and where it is?

A. I suppose so; I lived on it.

Q. Whose land was it?

A. Mr. Hunzeker's.

Q. Was it known as the Hunzeker farm?

A. Yes, sir.

Q. How far is it from Humboldt?

A. About a mile and a half, in Richardson county, Nebraska.

Q. What claim did you have on that land, if any, at the time you were in Oberlin, Kansas?

A. I had it for a year; I had owned the land and sold it, and was to have the use of it for that season, and after March rented it to Elder Maxson.

Q. The same who testified here a while ago?

A. Yes, sir.

Q. How long was it after you gave the paper executed in Oberlin to Elder Beery until you saw it again, if you ever did see it?

A. I did not see the one I gave to Mr. Beery until about the time of the trial at Pawnee.

Q. The paper that was given to 'Squire Beery?

A. No, sir; the one given to Elder Beery was the one executed.

Q. Did you ever see that paper after you gave it to Elder Beery at Oberlin?

A. I don't think I did.

Q. Do you know what became of it?

A. No, sir; I do not.

Q. Can you tell what the contents were; what the statements of that paper were?

A. It was to deliver a bill of sale that Mr. Beery held; and he was to have one-third of the crop, including grass or hay.

Q. Was there anything else in that paper that you remember of?

A. I cannot tell you all that was in it exactly; it was—during the crop season on the place I now live on—I think are the words.

Q. State to the jury, if you can, how the land was described in the paper you executed at Oberlin.

A. It was described by the name of the farm I now live on.

Q. Was there any other description in it?

A. I don't think there was.

Q. To whom was that paper made?

A. To M. E. Gandy, I think.

Q. Before you went to Oberlin, state whether or not there had been any dealings between you and the defendant.

A. Yes, sir.

Q. Was there any papers drawn?

A. Yes, sir.

Q. To whom?

A. My theory is that I executed the paper to Mrs. Gandy before I went, and in Oberlin we executed another paper to her. I think they were drawn to M. E. Gandy, to the best of my recollection.

Q. Do you recollect of their having a trial before Justice Minor concerning the right of Mr. Maxson to that land in Humboldt?

A. I heard there was.

Q. Do you know of such a circumstance?

A. I heard of it.

Q. After that trial tell the jury whether or not you had any conversation with the defendant about this matter.

A. I don't think I did after the trial.

Q. After the suit was—do you remember of having a conversation with Dr. Gandy, the defendant at one time, about this case we are now trying? (Objected to and question withdrawn.)

Q. After you left the vicinity of Humboldt, Nebraska, where did you move to?

A. To Marshall county, Kansas.

Cross-examined:

Q. What is your name?

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A. Jeremiah; I think I told you J. was for Jere, and M. for miah.

Q. You sign your name J. M.?

A. Yes, sir; I take those letters for convenience.

Q. Where do you live now?

A. In Webster county, Nebraska, since March last; before that in Marshall county, Kansas, for about two years.

* * *

Q. When did you leave Nebraska to go to Kansas?

A. I think it was about the 22-3 of March, 1885.

Q. You say you had made a paper to Gandy or his wife in Humboldt and that paper gave them what?

A. Yes, sir; it was a bill of sale for the crop, that is, one-third of the crop, and some stock we were to give him for three timber claims.

Q. To be raised on that Hunzeker farm?

A. I was to farm it myself and live there.

Q. Did the paper say so?

A. No, I don't think it did.

Q. The paper simply said it was for one-third of the crop to be raised on that farm?

A. Yes, sir.

Q. What kind of a crop did you allude to?

A. It didn't say; only grass or hay.

Q. That crop was not in the ground at that time?

A. No, sir.

Q. You think it was about the 3d of February?

A. I think it was.

Q. And you went to Oberlin that night?

A. Yes, sir; I think it was the same evening.

Q. You and your son-in-law?

A. Yes, sir, and Mr. Beery.

Q. On the fourth day of February were all of you parties in the office of Calvert and Wallace in Oberlin, Kansas?

A. Yes, sir.

Q. Was Gandy there?

A. Yes, sir.

Q. Were you there?

A. Yes, sir.

Q. Did you know Calvert and Wallace?

A. No, sir, I did not know either one of them; I think I have seen Calvert since, here, probably.

Q. Was Calvert in the office at that time?

A. Yes, sir.

Q. They were doing a land office business there; people were taking timber claims and making other entries at that time?

A. Yes, sir.

Q. And you made a paper in the office of Calvert and Wallace on that 4th day of February?

A. Yes, sir.

Q. Who drew it up?

A. I think Mr. Gandy wrote it up.

Q. Did he write it on a blank of any kind, or just on a sheet of paper?

A. Just on a sheet of paper, I think.

Q. It wasn't a blank lease or anything of that kind with writing on it, was it?

A. I don't think it was.

Q. Do you know where he got it?

A. No, I suppose he got it there in the office; I don't know anything about it.

Q. State again what it was—was on that paper.

A. It was an order for a bill of sale that Mr. Beery held.

Q. That was directed to Mr. Beery?

A. No, sir, I don't think it was; I don't know whether it was directed to him or not; Mr. Beery took the paper and held it.

Q. I want to know what was on the paper; you say there was an order to B. F. Beery, please deliver, and so forth; was that the way it was written?

A. I think likely it was written that way.

Q. To deliver what?

A. That bill of sale that was made the day before.

Q. To whom?

A. Mr. Gandy.

Q. Which part of the paper was that on?

A. I think it was on the upper part.

Q. What else was on the paper?

A. It was to give him one-third of the crop raised on my farm, including grass and hay.

Q. Isn't it a fact that the order to B. F. Beery was on the lower part of the paper and the other you speak of on the upper part?

A. I think not; I would not be sure, but I think not.

Q. Who signed the paper about one-third of the crop, including grass and hay?

A. I did.

Q. How did you sign your name?

A. I think I signed it J. M. Thayer.

Q. Who signed the lower part?

A. I, and my son, and son-in-law.

Q. And that was given to whom?

A. Elder Beery.

Q. And you never saw it afterwards till when?

A. I don't think I ever saw it; I am not certain about it.

Upon examining this evidence of the prosecuting witness, it will be seen that upon being shown the paper which the accused had sworn was a copy of a lease executed by the witness to him, and his attention being called to the time and place at which the accused had testified that the original was executed and was asked the question, "Did you at the time execute a paper of this kind; that is, with these words in it?" He answered, "No, sir; I don't think I did." This answer of the witness constituted but one sentence, and all of its parts are to be taken together, and so taken together it falls far short of a positive assertion that at the time re-

ferred to he did not execute a paper like the one exhibited to him. In other words, that he did not execute the original of which that paper was a sworn copy. This witness had previously, upon plaintiff's Exhibit G being handed to him and asked to examine it, answered, "I don't think that is the paper;" and being asked the direct question, do you say it is, or is not, answered, "I think not." No further attempt was made to directly contradict the statement of the accused that the paper was a copy of an original lease executed to him by the witness there. But the attorney representing the state here directed the attention of the witness to a certain paper which the witness had already testified that he had executed at Oberlin, Kansas. He is asked what he did with that paper, who was present at the time and place of its execution, and also to describe and locate the land referred to in it? All these questions he answered, and by his answers probably laid the foundation for the introduction of other evidence tending to disprove the statement of the accused that the paper held by him was a copy of that executed by the witness Thayer, referred to, but did not tend to contradict the statement of the accused that said paper was a copy of a lease executed to him by the witness Thayer. To state it in other words: The substantive statement, made by the accused under oath, upon which perjury is assigned, was that J. M. Thayer, the prosecuting witness, had executed a lease to him of a certain farm. Thayer is produced as a witness to convict the accused of perjury in the making of that statement on oath. He is examined directly as to the truth of the statement, but does not absolutely contradict it. A paper is shown him which the accused had testified was a copy of the lease and he is asked to examine it. He seems to have anticipated the question whether it was a copy of a lease which he had executed to the accused and answered it, but, instead of answering in terms of negation, he replied, "I don't think that is the paper;" and again, upon being

asked do you say it is, or is not, instead of replying in terms positive, he answered, "I think not;" and again upon being asked, "Did you at the time execute a paper of this kind, that is, with these words in it?" he answered, "No, sir; I don't think I did." It may be observed that even a positive answer in the negative to this last question would have been that of a negative pregnant. He was not even asked in direct and positive terms, without limitation as to time, whether he had executed a paper of the character of that shown him, or that of the one with "these words in it." But even in the objectionable form of the question, as put, his answer was equivocal. It is worthy of observation that the witness is nowhere asked the direct question whether he had at all executed a lease to the accused, and that he nowhere in his testimony stated directly, and in positive terms, that he had not executed a lease, to the farm in question, to the accused.

The conclusion is manifest, then, without entering upon the consideration of the question of corroborative evidence that the positive evidence of the falsity of the oath of the accused which is assigned for perjury is not directly proven even by the oath of one witness; and that no amount of merely corroborative proof would be sufficient to sustain the verdict.

I will now call attention to the fifth instruction of the court to the jury, though the error complained of is made the substance of the eleventh assignment:

"5. The jury are instructed that the law presumes the testimony of the accused as the testimony of one credible witness in his own favor, and sufficient to counteract the testimony of one credible witness, swearing positively in contradiction of the accused's oath; so that the testimony of J. M. Thayer, on the part of the state, and the testimony of the accused as set forth in the information (if the jury regard said Thayer as a credible witness) leave the evidence as between the state and the accused equally bal-

anced ; and before the accused could be convicted the state must furnish evidence in corroboration of said Thayer to cause the scale of evidence to preponderate in favor of the state ; and such corroborative evidence must be equal in force and effect to the evidence of another credible witness ; and if in view of the above rule the state has failed to prove the truth of the material allegations of the information, beyond a reasonable doubt, the accused is entitled to an acquittal."

The court below erroneously assumed in this instruction that there was before the jury the testimony of one credible witness (if the jury regarded Thayer as such), swearing positively in contradiction of the accused's oath, so that, in that case, the testimony of J. M. Thayer, on the part of the state, and that of the accused, as set forth in the information, leave the testimony as between the state and the accused equally balanced and of equal weight.

This instruction was erroneous and misleading ; for we have seen that the evidence of Thayer left the important and essential facts contained in the testimony of the accused, given before Justice Minor, and set out in the information, not positively contradicted.

The eleventh assignment, as above stated, presents errors based principally on the 1st, 2d, 4th, 5th, 6th, and 9th instructions to the jury. It is not deemed important, after what has been said on other questions, to consider each of these points. But in the fourth instruction it was given substantially to the jury that if they found the true name of J. M. Thayer, from whom, it is charged in the information, that the accused falsely testified he obtained the lease, is not John M. Thayer, as alleged in the information, and should further find that his true name was Jeremiah Thayer, but is known as J. M. Thayer and so signs his name, and as a matter of fact is the J. M. Thayer named in the information as the identical man from whom it is charged the accused testified he obtained the lease, they

were instructed that the averment in the information was not a fatal variance.

To this instruction exception is taken that the misnomer of *Thayer*, as the party injured in the charge against the accused, is a fatal variance between the allegations of the information and the evidence of record. To support this point the testimony of the witness Thayer is cited in his examination in chief, that "his name is *Jeremiah* Thayer; that he does not think he is commonly known by any other name, and that he is not known nor called and does not respond to any other name." It is claimed upon this evidence that the variance, contrary to the charge of the court, is such as to interpose against a conviction. In support of this view the authority of *Bishop* is cited, *Crim. Proc.*, sec. 488, that "*descriptive matter* must always be proved as laid; the name of a person, corporation, or firm must be proved as laid; any material variation being fatal;" and in sec. 477: "a mistake in the name of a third person, in a material allegation, will be fatal at the trial; for it creates a variance between the allegations and proof." To this may be added the authority of *Maxwell* in *Crim. Proc.*, p. 66-7, that "the names of parties injured and third persons should be stated correctly when known;" and "where an indictment stated the firm name of partners owning a house burglarized, and the property therein, and identified the firm by naming the individual members, proof that the property belonged to the firm without proof of the Christian names of the members of the firm will not sustain the indictment." Both authors agree, and set forth distinctly, that the variance under the analogies of this prosecution is fatal to conviction. This rule has not been recently discovered, nor since the times of *Archibald*, *Chitty*, and *East*, but before their day. Other authorities are cited by counsel of reversals after conviction on the same grounds, but are not deemed essential to encumber a lengthy opinion with.

There are other important errors assigned not treated here, and as there must be further proceedings, and as this opinion has reached its full length, they will not be reported.

The judgment of the district court is reversed and the cause remanded to that court in accordance with law.

REVERSED AND REMANDED.

MAXWELL, J., concurs.

REESE, CH. J., dissenting.

I cannot agree to all the conclusions of my associates, expressed in the opinion in this case, and will briefly state my reasons therefor.

1. While the statute is silent as to the duties of county attorneys in criminal cases, where the venue is changed, yet I do not think it was the purpose of the legislature to *deprive* the county attorney of the county from which the change is taken, of the right or authority to appear in the district court of the county to which the cause is removed, and of which court he is an officer, and prosecute persons accused of crimes alleged to have been committed in the county of which he is the attorney. While it is true that this is not shown to be a case in which there was no competent attorney of Pawnee county who might have been appointed as county attorney for *that* county for the purpose of prosecuting the case, yet just such a case might arise and the due administration of the law would be effectually prevented; for, if the theory of the majority is correct, no other could be appointed and the state would be without a prosecutor, as, if the attorney in charge of the prosecution *must* be the county attorney, either elected or appointed, of the county where the trial is had, no other one could act. A distinction between the county attorney and other county officers exists in this: the county attorney is as much an officer of the district court of one county as another, while other county officers are limited in all things

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to the territorial boundaries of their own county and therefore have no authority to act outside of that particular jurisdiction. While it may not be a duty specially enjoined by law upon a county attorney to follow civil and criminal prosecutions into counties to which causes are set for trial, yet I am far from believing that such action on his part could vitiate a verdict and require a new trial where the state or county had been successful. Having had charge of the case from the beginning, and having become familiar with the questions of law and fact involved, which are in many cases quite complicated, it would in many instances be a virtual surrender of the case to change attorneys and place the prosecution or defense into the hands of an attorney who knew nothing of the facts and was not specially prepared in the law of the case. It must be remembered that if it is error to allow him to follow a criminal case, it would be equally erroneous to allow him to follow a civil cause. It is held in this case as in the cases cited that the county attorney "may have the assistance of counsel employed on private account." The attorneys employed in this case were of the Richardson county bar, none of them, I think, being residents of Pawnee county. The mere fact that they were *not* the attorneys for the county, duly elected and qualified, is their only passport to the court of Pawnee county and their admission to the control and management of the prosecution of plaintiff in error. This I do not think is the rule. If the law is as claimed, it should be amended at the earliest practicable date.

In *State v. Carothers*, 1 G. Greene [Ia.], 464, it was held, under a statute somewhat similar to our own, that it was not only the right of the county attorney to follow a cause into county to which the venue was changed, but that it was his duty to do so.

2. Section 579 of the Criminal Code requires the prosecuting attorney to subscribe his name to the information and "indorse thereon the names of the witnesses known to him

at the time of filing the same; and at such time *before the trial* of any case, as the court may by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him."

By this provision it seems to me the matter of the indorsement of the names of additional witnesses is left to the sound discretion of the trial court, subject only to the requirement that such indorsement shall be made before the trial. I find no provision requiring it to be "in time to give the accused notice in season to anticipate their presence before trial," and I know of no authority to inject these words into the statute.

3. Section 413 of the Criminal Code provides that "Whenever on trial of any indictment for any offense there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof in the Christian name or surname, or both Christian and surname, or other description whatever of *any person whomsoever therein named or described*, or in the name or description of any matter or thing whatsoever therein named or described, such variance shall not be deemed ground for an acquittal of the defendant unless the court before which the trial shall be had shall find that such variance is material to the merits of the case, or may be prejudicial to the defendant."

There never has been any question as to the identity of J. M. Thayer, neither has there been nor could there be any question as to his being the person referred to in the indictment as John M. Thayer. He testified in substance that he signs his name and is known as J. M. Thayer. The whole case shows that the variance in the name of the witness by using the word "John" instead of "Jerry" could not have been in any degree prejudicial to plaintiff in error, and if the section which we have quoted means anything, it is that the administration of the criminal laws of this state shall not be prevented when no actual prejudice results to the accused.

FABIEN S. POTVIN v. EPHRAIM E. MEYERS.

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[FILED OCTOBER 30, 1889.]

Judgment: SATISFACTION: RIGHTS OF INDORSER. In an action against the makers and indorser of a promissory note judgment was rendered against all of the defendants jointly, no defense of suretyship having been made by the indorser. An execution was issued on the judgment and placed in the hands of the sheriff for collection and which was paid by the defendant, who was the indorser of the note upon which the judgment was founded, the money being returned by the sheriff with the execution to the clerk of the district court, who paid it to the judgment plaintiff. After the receipt of the money the plaintiff in the action assigned the judgment to the defendant, by whom it was paid, and who in the name of the plaintiff caused an execution to issue which was levied upon the land of his co-defendant, and under which the sheriff sold the said land. On a motion to confirm the sale the owner of the real estate appeared and moved the court to set aside the sale and vacate the execution, upon the ground that the payment of the judgment satisfied and cancelled it, and that the relation of principal and surety did not exist as between the judgment defendants. Upon a hearing before the district court the latter motion was sustained, the sale set aside, and the execution vacated. *Held*, No error.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Pound & Burr, for plaintiff in error:

The relation of principal and surety continues after judgment. The surety is entitled to the same rights as before; when he has paid a joint judgment against himself and principal, and taken an assignment of the same, he may be subrogated to the rights of the original judgment creditor. Such surety is entitled to subrogation without a formal assignment, but may insist upon such assignment and enforce it by execution. Evidence *aliunde* is admis-

sible to show the relation of judgment debtors. (*Day v. Ramey*, 40 O. S., 450; *Bangs v. Strong*, 4 N. Y., 315; *Carpenter v. King*, 9 Metc. [Mass.], 511; *Duffield v. Cooper*, 87 Pa. St., 443.)

W. Henry Smith, for defendant in error:

The record discloses nothing to show that Potvin was a surety for the other defendants. A payment by one of several joint judgment debtors, of the entire sum, extinguishes the judgment. (*Harbeck v. Vanderbilt*, 20 N. Y., 395; *Hammatt v. Wyman*, 9 Mass., 141; *Preslar v. Stallworth*, 37 Ala., 405; *Stevens v. Moree*, 7 Greenl. [Me.], 36.) In such case, the paying parties' remedy is contribution. (*Booth v. Bank*, 74 N. Y., 228.) In Missouri, under a statute giving greater facilities for obtaining judgment against co-sureties than existed at common law, it is held that a simple payment of the debt after judgment does not entitle a security to the rights of a plaintiff in the judgment and to an execution. (*McDaniel v. Lee*, 37 Mo., 204; *Hull v. Sherwood*, 59 Mo., 172; *Ferguson v. Carson*, 86 Mo., 673; see also *Montgomery v. Vickery*, 110 Ind., 211.) Subrogation is not a self-acting equity, and the mere fact of payment by an indorser is not a sufficient basis for it. Where, as in this case, it would work a positive wrong by being granted without hearing to one who merely alleges his surety-ship, and the fact is denied, it will not be allowed. (*Eaton v. Hasty*, 6 Neb., 425.) The very reason why chancery allows subrogation to a surety who has paid is that the debt is extinguished, and a court of law cannot aid him. (*Ontario Bank v. Walker*, 1 Hill [N. Y.], 652; *Russell v. Faylor*, 1 O. S., 327.)

REESE, CH. J.

On the 22d day of August, 1888, the Quincy National bank, as plaintiff, filed its petition in the district court of

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Lancaster county, against John K. Barr, Ephraim E. Meyers, and F. S. Potvin; as defendants, by which said bank sought to recover of the defendants named the amount of principal and interest due from them to it upon a promissory note for \$2,500, dated April 29, 1887, due fifteen months after date, payable to the order of F. S. Potvin, and by him indorsed and guaranteed to said bank. No defense was made to that action, the defendants all making default. On the 30th day of November of that year a judgment was rendered against all the defendants for the sum of \$2,827.80, together with the costs of the action. An execution was subsequently issued, upon which the sheriff made the following return: "This writ came into my hands December 29, 1888, and after diligent search I was unable to find any goods or chattels, lands or tenements, of the within named John K. Barr and Ephraim E. Meyers in my bailiwick, but did find property both real and personal, of the within named F. S. Potvin, and then notified said F. S. Potvin that unless he paid or caused to be paid said judgment and costs that I would levy on and proceed to sell his said estate. Whereupon, on the 9th day of February, 1889, said F. S. Potvin paid to me the full amount of said judgment and costs and interest in the sum of \$2,933.60, etc." The remainder of the returns consisted of an itemized statement of the principal, interest, costs and increased costs collected by the sheriff.

Presumably on the same day an instrument in writing was executed, which we here copy:

"In the district court of Lancaster county, Nebraska.

"QUINCY NATIONAL BANK,	}
Plaintiff,	
v.	}
EPHRAIM E. MEYERS, JOHN	
K. BARR, and F. S. POT-	
VIN,	
Defendants.	

"This indenture, made this 7th day of February, 1889,

between the above named plaintiff as party of the first part and F. S. Potvin, as party of the second part, witnesseth:

"That whereas said first party, on the 30th day of November, 1888, recovered a judgment against the above named defendants in the district court of Lancaster county, Nebraska, for the sum of twenty-eight hundred and twenty-seven dollars and eighty cents, bearing eight per cent interest from the date of such judgment:

"Now this indenture witnesseth, that the said first party, on consideration of the sum of twenty-eight hundred and seventy dollars and five cents (\$2,870.05), to it duly paid by E. R. Sizer, clerk district court, have sold, and by these presents do sell, assign, transfer, and set over unto the said party of the second part and his assigns the said judgment and all sums of money that may be had or obtained by means thereof, or any proceedings to be had thereon, and the said first party does hereby constitute and appoint the second party and his assigns its true and lawful attorney, irrevocable, with power of substitution and revocation, for the use and at the proper cost and charges of the second party, to ask, demand, and receive and to sue out executions and take all lawful ways for the recovery of the money due or to become due on the said judgment, and on payment to acknowledge satisfaction or discharge the same and attorneys one or more under him for the purpose aforesaid to make and substitute and at pleasure to revoke, hereby satisfying and confirming all that our said attorney shall lawfully do in the premises; and the said first party hereby covenants that there is now due on said judgment the sum of \$2,870.05, outside and above all costs in court, and costs of collecting said money on execution or otherwise, and that I will not collect or receive the same or any part thereof, nor release or discharge the said judgment, but will allow all proceedings therein, the said second party to save and keep the said first party harmless of and from any costs in the premises.

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"In witness whereof first party has hereto affixed its signature by its attorney of record, the day and year afore-said.

QUINCY NATIONAL BANK,

"By Frank A. Boehmer,

"Its Attorney."

There is some dispute as to the real date of this assignment. There are two copies in the record before us, one of which is dated the 7th, and the other the 9th day of February. But this discrepancy is not deemed material.

On the 16th day of February, 1889, a *præcipe* for execution was filed in the office of the clerk of the district court as follows: "Quincy National Bank v. John K. Barr et al. To the clerk of said court: please issue execution in the above entitled cause and deliver same to the sheriff of said county. Make returnable according to law and oblige, L. C. Burr, attorney for Potvin."

Soon thereafter a motion or application was filed in the district court for an order requiring Frank Barr, Abraham Barr, Annie Barr, F. S. Potvin, and Mrs. Mattie Musser to appear and answer concerning the property of said John K. Barr. In support of this application an affidavit of F. S. Potvin was filed in which he averred that he was the owner of the judgment by reason of the payment of the amount due thereon to the sheriff, he having been an endorser upon the promissory note upon which the judgment was rendered; that the judgment was unpaid, and that the said Barr had property which he refused to apply to its payment. An order was made by the district court requiring the said John K. Barr to appear before a referee appointed to take his evidence, and to answer under oath such questions as should be propounded to him concerning his property. Certain proceedings were had by the referee under this order which it is not deemed necessary to notice here, except to say that the witnesses called before the referee refused to answer certain questions propounded to them, which fact was reported to the court

that they might be punished for contempt. Whereupon John K. Barr filed a petition to vacate the order of February 9th, requiring him to submit to the examination, and alleging, among other things, that the full amount of the judgment, interest, and cost was paid on the 7th day of February, 1889, upon the execution, and that the judgment was thereby satisfied and cancelled. It was also alleged that Barr was not indebted to Potvin in any amount upon said judgment. The facts constituting the reasons for the allegations were set out in detail, but need not be here stated.

Again, on the 24th day of February Barr moved the court for an order setting aside the *alias* execution, in which he again alleged the payment and satisfaction of the judgment. Under this *alias* execution the sheriff had levied upon, advertised, and sold certain real estate as the property of Ephraim E. Meyers, and had made his return to court and which awaited the action of the court in confirming or refusing to confirm the sale. Objections to the confirmation of the sale were also filed, and the case was heard by the district court upon the whole record thus presented. The trial of the issues thus formed resulted in a finding and order, which we here copy in full:

"QUINCY NATIONAL BANK,	}	5657—S 27.
v.		
JOHN K. BARR, EPHRAIM E.		
MEYERS, AND F. S. POTVIN,		
FIRST NAME UNKNOWN.		

"This cause now comes on to be heard upon the motion of defendant Potvin to confirm the sale made in this action and the objections to the confirmation filed herein, and on due consideration thereof the court sustains said objections, and overrules the motion to confirm said sale; to all of which defendant Potvin duly excepts.

"This cause having been heretofore argued and submitted to the court upon the motion and petition filed herein to

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set aside execution and to vacate the order for examination of defendant John K. Barr, made in this cause, the court now on due consideration finds that the judgment upon which said execution was issued was taken against the defendants upon a note executed by defendant John K. Barr and Ephraim Meyers to the defendant F. S. Potvin; that Potvin indorsed said note and transferred same to this plaintiff; that this plaintiff sued all the defendants upon said note and obtained upon default of the defendants a joint judgment against all the defendants upon said note; that execution was issued upon said judgment and the defendant Potvin paid said judgment in full to the sheriff who paid same into court, and the clerk of the court paid said money to the plaintiff; that plaintiff assigned said judgment to said defendant F. S. Potvin by their attorney, F. A. Boehmer.

"The court finds that such payment by defendant Potvin was a satisfaction of said judgment, and that it should be satisfied of record, and that the said Potvin was not entitled to the issuance of the execution in this case; and the court further finds that the judgment herein being satisfied as aforesaid prior to the issuance of the execution and making the order for the examination of John K. Barr, defendant, in aid of execution, that the defendant Potvin was not entitled to have the said execution issue upon said judgment or for said order in aid of execution.

"It is therefore considered and adjudged by the court that the said motion and petition of the defendant John K. Barr be sustained, and that said executions be and the same hereby are vacated and set aside, and that the order made herein on the 19th day of February, A. D. 1889, for the oral examination of the defendant John K. Barr in aid of execution, be and the same hereby is vacated and set aside, and all proceedings under said judgment and executions and under and in pursuance of said order in aid of execution are hereby vacated and set aside and held for

naught, and the judgment in this case is hereby satisfied and discharged of record.

"And it is further ordered by the court that the costs accrued in this action since the satisfaction of the same, taxed at \$....., be paid by the defendant F. S. Potvin, for which execution is hereby awarded.

"To all of which findings, orders, and decree the defendant Potvin duly excepts and forty days from the rising of court is hereby given to reduce exceptions to writing."

It will thus be seen that the payment of the judgment by Potvin was held to be a satisfaction and cancellation thereof, and that plaintiff in error could take no further proceeding thereon in his behalf, thus relegating him to his action against his co-defendants for the money paid by him in satisfaction of the judgment, if any indebtedness existed.

A number of questions of secondary importance are presented, but we think the one question decided by the district court as to the satisfaction of the judgment by reason of the payments made by Potvin must be decisive of the case. The return of the sheriff showed that the amount due on the judgment was paid to him in satisfaction thereof by plaintiff in error, and by the so-called assignment it is shown that at the time of its execution the money had been paid by the sheriff to the clerk of the district court, and by him paid over to the judgment plaintiff. This being true, there was nothing which was the subject of an assignment or which the bank could convey. Had the fact existed, plaintiff in error might have appeared in the district court and filed his answer in the principal action, showing that he was surety only for the principal defendant, his liability having been created by the indorsement of the note, and thus procured a finding and judgment fixing his status, yet nothing of the kind was done, and so far as appears upon the face of the judgment, he was one of the principal defendants and the relation of

principal and surety did not exist. Therefore he must be treated as a joint judgment defendant, and the payment of the amount due upon the judgment by him to the sheriff must be held to be a complete satisfaction and cancellation thereof, and any subsequent arrangement entered into between the plaintiff in the action and plaintiff in error here would be unavailing, the judgment having been extinguished. (*Harbeck v. Vanderbilt*, 20 N. Y., 395; *Booth v. Bank*, 74 Id., 228; *Preslar v. Stallworth*, 37 Ala., 405.)

But it is contended by plaintiff in error that he was a surety for defendants upon the note upon which the judgment was founded, and that relation as between them continued after judgment, and in support of this a large number of cases are cited. It may be conceded that when a judgment is obtained against principal and sureties that that relation will continue after judgment, and yet the decision of the district court be upheld. The issue presented to that court by defendant was that, as between the defendants in the principal action, this relation did not exist; and this question was passed upon by the district court to the extent of holding that the proof did not show the suretyship of plaintiff. The judgment failing to show the existence of the relation of principal and surety as between the defendants in that action, and the fact of its existence having been denied by defendants in error, the court very properly refused to compel the payment of the judgment by them in the face of the issue thus presented. If plaintiff in error has a cause of action against defendants in error growing out of the payment of the judgment referred to, he can maintain it in a proper action instituted for that purpose, in which the issue can be fully tried upon pleadings filed in such case.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

ROBERT FENTON ET AL., APPELLANTS, V. THOMAS YULE
ET AL., APPELLEES.

[FILED OCTOBER 30, 1889.]

1. **Statutes: AMENDMENT: CONSTITUTIONAL LAW.** An act, approved February 26, 1889, to amend the second division of section 25 of chapter 18 of the Compiled Statutes of 1887, relating to county buildings and offices, as amended by act approved March 31, 1887, *held*, to be valid and in force from its passage, and not obnoxious to sections 11 and 15, art. III, of the constitution of this state. (*Burnham v. Auditor of State*, 23 Neb., 128.)
2. ———: ———: ———. Although there be apparent confusion in the application of an amendatory act of the legislature to provisions sought to be amended or repealed, *held*, that where the intention of the legislature, within constitutional limits, is not doubtful, and the amendatory act not incongruous with the title and purview of the amended statute, the amendment is valid. (*Comstock v. Judge*, 39 Mich., 195.)
3. ———: **FAILURE TO COMPILE.** An act passed, enrolled, approved, and deposited with the secretary of state is an act in force, competent of amendment, though by error, inadvertency, or misconception it may not have been compiled and published in the same manner with all other laws of the state. The work, alone, of the editor and compiler of general statutes will not invalidate an act of the legislature.

APPEAL from the district court for Gage county.
Heard below before BROADY, J.

A. D. McCandless (O. P. Mason with him), for appellants:

The act of 1887 could not be amended by designating its title or chapter in a foot note to the Comp. Stats. Sec. 30, ch. 18, might have been *repealed*, but hardly *changed and amended* by implication. If repealed, the board had no power to levy the special tax, particularly as the taxing power must be expressly granted and strictly construed

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(*State, ex rel. Grady, v. Lincoln Co.*, 18 Neb., 283; *Wheeler v. Plattsmouth*, 7 Id., 276; *Morrill v. Taylor*, 6 Id., 241; *B. & M. R. Co. v. York Co.*, 7 Id., 491; *State v. Gosper Co.*, 14 Id., 23); if not repealed, such tax could have been levied only after two-thirds majority in favor of the proposition. The act of 1889, if amendatory of both sections 25 and 30, is void under sec. 11, art. 3, Const. (*White v. Lincoln*, 5 Neb., 515; *People v. Mahaney*, 13 Mich., 495; *Ives v. Norris*, 13 Neb., 254; *Holmberg v. Hauck*, 16 Id., 334; *State v. Lancaster Co.*, 17 Id., 87; *Miller v. Hurford*, 11 Id., 381; *State v. Wish*, 15 Id., 450.) Neither the title nor the subject-matter of an amendatory act can be broader than the original. (*B. & M. R. Co. v. Saunders Co.*, 9 Neb., 511; *Hamlin v. Meadville*, 6 Id., 234.) The subject-matter of each part must be germane to the primary objects of the bill. (*State, ex rel. Jones, v. Lancaster Co.*, 6 Neb., 485; *Ives v. Norris*, 13 Id., 254.) As to whether or not such matter is germane, see cases last cited, and *B. & M. R. Co. v. Saunders Co.*, 9 Neb., 511; *Tecumseh v. Phillips*, 5 Id., 311; *Holmberg v. Hauck*, 16 Id., 340; *Miller v. Hurford*, 11 Id., 382; *State v. Pierce Co.*, 10 Id., 477. The act being incomplete and amendatory of the former statute is void. (*Smails v. White*, 4 Neb., 356; *Sovereign v. State*, 7 Id., 413; *Ryan v. State*, 5 Id., 280; *Lancaster Co. v. Hoagland*, 8 Id., 38; *State v. Corner*, 22 Id., 272.) The provision of the act lessening the vote required for bonds is against public policy.

Hugh J. Dobbs (*G. M. Lambertson* with him), for appellees:

It is sufficient if the title designate clearly the law to be amended and the subject-matter be germane to the original bill. (*People v. McCallum*, 1 Neb., 194; *Dogge v. State*, 17 Id., 143; *State, ex rel. Burnham, v. Babcock*, 23 Id., 133; *Gatling v. Lane*, 17 Id., 84; *Herdman v. Marshall*,

Id., 259.) In this case the subject-matter is clearly germane. (*Boggs v. Washington County*, 10 Neb., 300; *Perry v. Gross*, 25 Id., 830.) The act providing for compilation is silent as to the form, and there is nothing to forbid the insertion of an act in the form of a foot note. The amendment is not in the nature of class legislation. (*State v. Berka*, 20 Neb., 379.) Sec. 30, ch. 18, is not mandatory but directory. So much of sec. 30 as conflicts with the act of 1889 was repealed by implication. The legislative intent to change the old law is apparent from the act of 1889.

COBB, J.

On July 8, 1889, Robert Fenton, A. Perkins, John Mordhorst, Michael Keckley, Patrick Murphy, and J. W. Bridenthal, plaintiffs, filed their petition for an injunction in the district court of said county against Thomas Yule, as chairman of the county board of supervisors, and Geo. E. Emery, county clerk, alleging that the plaintiffs are citizens and taxpayers and duly qualified electors of said county, which is duly organized under the laws for the government and administration of counties; that the defendants are duly elected and qualified officers of the county as designated, and that on May 7, 1889, said chairman and the board of county supervisors called a special election to be held in said county on June 18 following, to submit to the legal voters for their acceptance or rejection the proposition to issue bonds of the county, to the amount of \$100,000, of the denomination of \$1,000 each, for the purposes of building and completing a court house on block twenty-four of Cropsey's addition to the city of Beatrice, at the county seat of said county; the entire proceeds, or so much as required, to be devoted to that purpose; said bonds to be payable to the bearer at the state's fiscal agency in New York city, at the expiration of twenty

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years from date, with interest at five per cent per annum, to be redeemable at the option of the county after ten years from date, with interest to be paid annually, on interest coupons attached, at said fiscal agency, the bonds to bear date August 1, 1889, and the coupons to be payable August 1 of each year thereafter; with the proposition to levy according to law, in addition to the usual taxes, annually a sufficient tax to pay said interest, and after the expiration of nine years from the date of the bonds, a sufficient tax to pay ten per cent of the principal annually thereafter; and for the year preceding the maturity of the bonds, a tax sufficient to discharge the residue of principal and interest.

That notice of the election was duly given, and it was held, returned, and canvassed in the same time and manner, and by the same officers, as required by law, at a general election in this state, by which it appears there were cast 5,059 votes, of which 2,589 were in favor of the proposition and 2,470 against it.

This election was called under an act entitled "An act to amend the second sub-division of section 25, article 1, chapter 18, of Comp. Stat., approved February 26, 1889," the defendants claiming authority under said law to issue said bonds.

The plaintiffs aver that the proposition was not carried, and that the statute under which the same is claimed to be authorized is unconstitutional and invalid for the reasons:

1. That the statute does not set out the entire section amended.
2. The substance amended, so far as it attempts to grant a power to borrow money and issue bonds, is not germane to the subject-matter of the second subdivision of the section amended.
3. The subject of the amendment, the power to borrow money and issue bonds, is not within the title of the amendatory act.

4. The amendatory act could not be valid unless it be held by implication to amend and repeal sections 27, 28, 29, and 30 of article 1, chapter 18, Compiled Statutes, which require that two-thirds of the votes cast shall be given for the adoption of the proposition, no reference or amendment to said sections being made in said amendatory act.

That the defendants, in violation of law, claim that inasmuch as the proposition received a majority of the votes it is carried, and they have the power to levy and collect the special tax provided for in the call for said election, and by law to issue, dispose of, and redeem said bonds and the interest thereon, notwithstanding such power is derived solely from the provisions of section 30, article 1, chapter 18, of Comp. Stat., which requires that said proposition must have received two-thirds of all the votes cast.

Wherefore the plaintiffs pray for an injunction against the defendants, restraining and enjoining them from proceeding in any respect to carry out the proposition submitted at said special election, etc.

Whereupon, on July 8, 1889, the following order was made:

"The petition having been presented to the district judge of the first judicial district of Nebraska, and deeming it proper that the defendants should be heard before granting the temporary injunction within prayed, in the presence of attorneys for both parties, the 13th of July, 1889, at 2 P. M., at the court house in Beatrice, is appointed as the time and place for the hearing of the application therefor.

"In the meantime defendants are restrained as prayed within and until such hearing and ruling thereon, on giving bonds according to law in the sum of \$1,000.

"J. H. BROADY, *Judge*."

On July 15 following the defendants demurred to the petition, that it does not state facts sufficient to constitute a cause of action. On July 17 following it was ordered by

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the court that the demurrer be sustained, the injunction be dissolved, and the bill dismissed at cost of plaintiffs, and the cause is brought to this court by appeal.

The first point presented by appellants in the brief of counsel is, that the act of the legislature approved February 26, 1889, entitled "An act to amend the second division of section 25 of chapter 18 of the Compiled Statutes of Nebraska of 1887," in relation to county buildings and offices, and to repeal said second division, is invalid and without the force of law; and in support of this proposition attention is called to the fact that that part of chapter 18 of the Compiled Statutes of 1887 embracing section 25 was passed by the legislature and approved on the 30th day of March, 1887, and that on the day following, to-wit, March 31, 1887, an act was passed and approved amending said act, which act of March 31 was not carried into the the compilation of 1887 other than as a foot-note to the page containing said section 25, with a query, whether it was in force; and the conclusion is drawn that the act of 1889 was directed to, as well in the title as the purview, and sought to amend, a repealed and superseded section.

This question was before the court, substantially, if not precisely, in the case of the *State, ex rel. Burnham, v. Babcock*, 23 Neb., 128. That case was submitted upon a stipulation, from which I extract the following:

"It is hereby stipulated and agreed by and between the parties that the annexed transcript, which is incorporated in and made a part of this stipulation, is a true and accurate history and transcript of all things connected with and pertaining to the voting of \$5,000 of bonds of the county of Logan, state of Nebraska, on the first day of October, 1887, said bonds having been presented to the auditor of state for registration, and he having refused to register said bonds solely on the ground that the law of 1887, being chapter 28, entitled 'An act to amend the second division of sections 25 and 26, chapter 18, of the Compiled Statutes

of 1885, so that the county boards shall have power to borrow money and issue bonds for the payment thereof, to erect or otherwise provide the necessary county buildings,' is unconstitutional and void," etc.

In passing upon the question thus submitted the court, in the syllabus, says: "An act to amend section 25 of chapter 18 of the Compiled Statutes of 1885 was passed and approved March 30, 1887, to take effect from date, and on the succeeding day an act was passed to amend the second division of section 25 of chapter 18 of the Compiled Statutes of 1885. *Held*, That the amendment related to the section 25 as amended on March 30, 1887."

Now if it was competent for the legislature on the 31st day of March, 1887, to amend the section in question by referring to it in the title and in the purview of the act as "section 25 of chapter 18 of the Compiled Statutes of 1885," notwithstanding the act of March 30, then it was equally competent for the legislature of 1889 to amend the act of March 31, 1887, by referring to it both in the title and the purview as "section 25 of chapter 18 of the Compiled Statutes of 1887," although the act of March 30 had been given the place in that compilation formerly occupied by the corresponding section of chapter 18 of the compilation of 1885.

It cannot be denied that there is some confusion in the application of the amendatory acts to provisions sought to be amended, but as said in the opinion above referred to, in citing the case of *Comstock v. Judge*, 39 Mich., 195, "Where the amendment is plain and can be carried out, it may be held valid, even though the section numbers of the original act and of the amendment are in confusion." The act to be amended, after all, is the act enrolled by the secretary of state, and on file in his office, and all references to compilations, or biennial publications, as session laws, are matters merely of convenience, and it often happens that that which is used for convenience fails of its purpose

in a greater or lesser degree. In the matter now under consideration, the object of the reference to the provision of law to be amended is sufficiently attained if the amendatory statute furnishes the means for its identification, and we are all of the opinion that it does.

The second point presented and urged by the appellants is, that the act of 1889 does not seek to change or amend section 30 of said chapter, which is the section which gives the board of supervisors the only authority they have to levy and collect the special tax to pay the interest on the bonds, and that section requires, as a condition to their having that power, that the proposition must have had two-thirds of all the votes cast at that election.

Section 30 in its present form constituted a part of chapter 18 of the Compiled Statutes as long ago as 1881, and its provisions were a matter of detail, directory in their character, and as such applicable to section 25 as it then stood, which limited the power of the county board to the expenditure of fifteen hundred dollars for the purpose of erecting or otherwise providing a court house, jail, and other county buildings, without first submitting the proposition to a vote of the people of the county at a general election, and the same is ordered by a two-thirds vote of the legal voters thereon. Section 26 required the county board, in all cases where they should deem it necessary to levy a tax in excess of one dollar and fifty cents per one hundred dollars valuation, except in certain cases, to submit a proposition therefor to a vote of the people of the county. Section 27 prescribed the mode of submitting questions to the people for any purpose authorized by law, and sections 28 and 29 also contained matters of detail applicable to the foregoing sections. Section 25 is first in the order of sequence in the chapter which prescribes by what majority a proposition may be adopted, and is the only one which has been amended or sought to be amended. That section was first amended by the act

approved March 1, 1883, but not in respect to the matters involved in the case now being considered. The act of March 30, 1887, is entitled "An act to amend section 1 of chapter 26 of the Laws of Nebraska, 1883, entitled 'An act to amend section 25 of chapter 18 of the Compiled Statutes of 1881, defining the duties of the board of county commissioners, and to repeal all acts not consistent therewith.'" This is the amendatory act of 1883, above referred to. This last act changed the former act only in one particular, not necessary to be further noticed, and retained the words, "two-thirds of the legal voters voting thereon," in the second clause of section 25. The act of March 31, 1887, entitled "An act to amend the second division of sections 25 and 26, chapter 18, of the Compiled Statutes of 1885, so that the county boards shall have power to borrow money and issue bonds for the payment thereof, to erect or otherwise provide the necessary county buildings," is, notwithstanding its title, confined in its operation to the twenty-fifth section, and to those words of it requiring a *two-thirds* vote of the people of the county to whom the same should be submitted at a *general election*, to order an expenditure of money exceeding fifteen hundred dollars for the erection of county buildings; and the changes made by said act were that the proposition might be submitted to a vote of the people of the county at a *general or special election*, and the same might be carried by a vote of *three fifths* of the legal voters voting thereon.

The act of February 26, 1889, is directed to the words *three-fifths*, as originally contained in the amendatory act above referred to, and amends and changes them to read *a majority*. The act had no other purpose, and has no other effect whatever.

Construing all these acts together, there can be no doubt that it was the intention of the legislature to clothe the county boards of the several counties with the power, and to impose upon them the duty in the class of cases therein

enumerated, to submit to a vote of the people of such county, either at a general or special election, as might seem to such board most convenient, a proposition to borrow money, and issue bonds for the payment thereof, for the purpose of erecting or otherwise providing the public buildings in said acts specified, and to borrow such money, and issue the bonds of the county for the payment thereof, upon such proposition being carried at such election by a *majority* of the legal voters voting thereon. Nor can it be doubted that such intention of the legislature is expressed, as well in the title as in the purview of said several acts, with sufficient clearness to answer the requirements of the constitution. The provisions of section 30 remain in the chapter, but its words have scope and meaning without applying the words *two-thirds* as therein contained to the provisions of section 25, as amended by the several amendatory acts above considered. And it was doubtless the intention of the legislature in passing said acts, and is no less clearly the effect of said acts, to take said section as amended out of the effect and qualification of the words requiring a two-thirds vote upon any proposition submitted to a vote of the people of a county as a condition precedent to the levy and collection of a special tax for the payment of the interest upon the indebtedness therein referred to. This follows as a corollary to the proposition, decided under the first head of this opinion. Section 25, as amended, being placed in the statute as law, we must apply to it the well known rule of construction which accords to every section and word of a statute some meaning and effect, and no meaning or effect can be given to the words of the said section unless they are accorded such meaning and effect as will supersede the inconsistent meaning of the words of the 30th section, so far as it may be sought to apply the same to section 25. I do not think it necessary to discuss the question of state policy, presented and argued at the bar, further than to remark that cases may arise, in the absence of legislation,

in which a court would consider an acknowledged and settled policy on the part of the state, or nation, with great deference. But it is with the acts of the legislature that courts have mostly to do; and the intention and will of the legislature, constitutionally expressed in the last enactment in relation to any subject within their constitutional powers, will be taken as the expression of the policy as well as the law of the state.

The point referred to in oral argument upon the amended petition of the relators, to the effect that the proposition submitted provided for the erection of a court-house upon a certain block of ground which, in fact, is not within the original plat of Beatrice, not having been discussed or referred to in the brief of counsel, I only notice here to say that a designation of a block or lot of ground upon which a public building may be erected under the provisions of the statutes now considered has no place in a proposition under said act, and would be held as merely surplusage, unless it be plainly shown that voters were misled thereby.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

SALLIE A. WARD, APPELLEE, v. MICHAEL WATSON ET AL., APPELLANT.

[FILED OCTOBER 30, 1889.]

1. **Attorney: LIEN: SET-OFF: PLEADING.** A & B, practicing attorneys, recovered a judgment for C against D, under an agreement with their client that they were to have one-half the amount of recovery, and they filed an attorney's lien for that

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amount. D recovered a judgment against the client of A & B, and brought an action to set off one judgment against the other; and without making an issue in the pleadings upon the amount claimed to be due A & B sought to reduce it. *Held*, That in the absence of an issue in the pleadings upon that point, the attorneys had a lien for the amount agreed upon.

APPEAL from the district court for Lancaster county.
Tried below before BROADY, J.

Houston & Baird, for appellants:

In the pleadings but one question could be raised as to attorney fees, viz.: in regard to the existence of a contract for the same. Such contract being alleged, it was error to allow evidence as to *quantum meruit*. The Code requires new matter constituting a defense to be set up so that the opposing party may meet it. (*A. & N. R. Co. v. Washburn*, 5 Neb., 117; *Jones v. Seward Co.*, 10 Id., 154; *McKyring v. Bull*, 16 N. Y., 297; *Clark v. Spencer*, 14 Kas., 398.)

Harwood, Ames & Kelly, and *Edson Rich*, for appellee:

The question as to the reasonableness of an attorney fee is not such new matter as must be pleaded in order to be raised. (*Sayre v. Thompson*, 18 Neb., 43.) An attorney is not to be allowed a lien in any amount he may allege a contract for, and thus supersede equities which an unsuccessful litigant might have as against the successful party. While an attorney's lien is paramount, its reasonableness may be questioned.

MAXWELL, J.

This case seems to be an offshoot of *Ward v. Watson*, 24 Neb., 592. Watson recovered judgment against Ward for the sum of \$749.60. Upon the recovery of this judgment Houston & Baird filed an attorney's lien thereon for \$374.89, that being the amount agreed upon between Wat-

son and his attorneys. In June, 1888, Ward recovered a judgment against Watson for the sum of \$693 and costs, and this action was brought to set off one judgment against the other. On the trial of the cause the court allowed the attorneys in question \$150 and no more, and set off the balance of the judgment against that of Ward. The only question presented is, Did the court err in thus reducing the amount of the plaintiff's claim? No issue was made in the pleadings as to the amount to which the attorneys were rightfully entitled, and in the absence of an issue upon that matter it will be presumed that the amount agreed upon was correct. In any event, that was the contract of the parties, and a lien was obtained for that amount. The question of the reasonableness of the fee is not before the court; but even if it was, we are not prepared to say that under the circumstances of the case the fee charged was unreasonable. The judgment of the district court will be modified so as to allow the appellants the amount of their fees as agreed upon, and for which they have a lien, and, as thus modified, the judgment will be affirmed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

CITY OF WAHOO V. ANGELINE G. REEDER.

[FILED OCTOBER 30, 1889.]

1. **Villages: DEFECTIVE SIDEWALKS: LIABILITY.** A person passing over a public sidewalk, in a village, which sidewalk was elevated from one to three feet above the ground, stepped into a hole in such walk and was permanently injured. *Held*, That a village was liable for such injury in the same manner as a city. (*Village of Ponca v. Crawford*, 23 Neb., 662.)

2. ———: ———: CONTRIBUTORY NEGLIGENCE. *Held*, That there was no proof of contributory negligence on the part of the plaintiff to submit to the jury.

ERROR to the district court for Saunders county. Tried below before MARSHALL, J.

S. H. Sornborger, and *E. E. Good*, for plaintiff in error:

Villages should not be held liable the same as opulent municipalities endowed with extraordinary powers. Defendant in error failed to use ordinary diligence to prevent the enhancement of the injury, and is guilty of contributory negligence. (*Potter v. Warner*, 91 Pa. St., 362; *Hibbard v. Thompson*, 109 Mass., 288; *Lyons v. R. Co.*, 57 N. Y., 489; *Hunt v. Gaslight Co.*, 1 Allen [Mass.], 349; 4 Am. and Eng. Enc. of Law, art. "Contributory Negligence," par. 39, N. 2.)

G. W. Simpson, for defendant in error:

Villages are, by our statute, given control of streets, alleys, and sidewalks, with power to collect taxes to maintain the same. (Comp. Stats., 1887, secs. 67b, 69, 77.) The execution of the power follows as a duty. (*Omaha v. Olmstead*, 5 Neb., 446.) A general grant of such power in a charter prevents its exercise by an individual. (*Noble v. Richmond*, 31 Gratt. [Va.], 271; *Barnes v. District*, 91 U. S., 540.) A village exercising such authority is liable without an express statute (*Kittridge v. Milwaukee*, 26 Wis., 46; *Prideaux v. Mineral Point*, 43 Id., 513; *Phelps v. Mankato*, 23 Minn., 277); and under such a statute is liable for failure to properly exercise the power. (*Dillon, Mun. Corp.*, secs. 1012, 1017; *Studley v. Oshkosh*, 45 Wis., 380; *Furnell v. St. Paul*, 20 Minn., 117; *Rockford v. Hildebrand*, 61 Ill., 155.) The defense of contributory negligence, like any other, must be proved. (*Lincoln v. Walker*, 18 Neb., 244.) The carelessness of plaintiff

must operate *directly* to produce the injury complained of. (*Omaha Horse Ry. Co. v. Doolittle*, 7 Neb., 481, and cases cited in plaintiff in error's brief.)

MAXWELL, J.

This action was brought in the district court of Saunders county to recover damages for personal injuries alleged to have been received by the plaintiff in consequence of stepping into a hole in a defective sidewalk on Fifth street, in the village (now the city) of Wahoo.

The defendant answered, admitting its corporate existence, and that Fifth street was one of its principal streets, and denied any negligence on the part of the defendant, and alleged "that said alleged injuries, if any were sustained by the plaintiff, were caused by the carelessness and negligence of the plaintiff."

The reply of plaintiff denied negligence on her part.

The facts, as shown by the testimony, are substantially as follows:

Fifth street, in the city of Wahoo, is one of its principal streets, extending from and through its principal business street to the court house. A broad walk had been constructed on the south side of this street, and at about opposite block 152 the walk was elevated from the ground from one to three feet. The walk was old, full of holes, and had been in bad condition for some time. About the 9th day of January, 1886, the plaintiff, in going over the walk, which was at this time partly covered with snow, stepped into one of the numerous holes therein and received the injury to her knee complained of.

Plaintiff returned to her home, made an examination of the injured knee, which was then paining her, and applied some liniment or other external remedy. There was no abrasion of the skin nor swelling to indicate the serious character of the injury. Soon afterwards a physician was

called, and from that time on such treatment of the injury was had as the various physicians who were called in the case prescribed. The plaintiff believed the injury an ordinary strain or bruise, and that it would soon get well. Nor did her medical attendants disabuse her mind of this belief until some time after the accident.

The plaintiff was not in the habit of traveling on the walk on Fifth street, and had no knowledge of its bad condition. The jury returned a verdict in favor of the plaintiff below for the sum of \$950, and a motion for a new trial having been overruled, judgment was entered on the verdict. On the trial the plaintiff in error objected to the introduction of any testimony on the grounds that the petition did not state facts sufficient to constitute a cause of action, "For the reason that the defendant was, at the time of the wrongs complained of, only a *quasi*-corporation, created under the general laws of the state of Nebraska, without the consent, express or implied, of its citizens or any of them, and was and is but a political division of the state, and has no special powers, privileges, immunities, or rights not enjoyed by other citizens of the state, and has voluntarily undertaken no liabilities or obligations to the public or persons not enjoined by the laws of the state."

The objection was properly overruled.

A village is a municipal corporation, although of the lowest grade; but the duties imposed upon it of keeping its streets and sidewalks in a safe condition are the same as those of a city. Judge Dillon defines municipal corporations as follows: "Municipal corporations are bodies politic and corporate of the general character above described, established by law, to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated." He also includes "within the term" villages, towns, and cities. (Id., sec. 10.)

At common law a municipal corporation is "an invest-

ing the people of a place with the local self-government thereof." (*Cuddon v. Eastwick*, 1 Salk. [Eng. K. B.], 192; *People v. Morris*, 13 Wend., 325-334; *People v. Hurlbut*, 24 Mich., 44-88; *Brinckerhoff v. Board of Education*, 37 How. Pr., 499; 4 Wait's Acts & Def., 595.) In *People v. Morris*, *supra*, 330, Nelson, J., in discussing the powers of municipal corporations, says: "What was the power thus conferred by the village charter? We answer that it was wholly political. Instead of prescribing at their discretion every duty to be performed, and forbidding every act to be avoided—in a word, directing the whole system of government to be observed and executed—the legislature have merely defined the outlines and leading principles, and conferred upon the inhabitants, within the bounds of the corporation, the power at discretion to fill up and carry them into operation."

The question here presented was before this court in *Village of Ponca v. Crawford*, 18 Neb., 551, and the village was held liable, although the case was reversed for error in the proceedings. That case was again before the court in 23 Neb., 662, and a verdict for \$950 sustained. In the latter case the first point in the syllabus is as follows: "A stranger in an incorporated village, after night-fall, passing along a public street between the postoffice and one of the principal hotels, came to a break in the sidewalk. Instead of turning back, he endeavored to descend to the ground (a distance of about three feet) at the end of the sidewalk. In doing so, in a careful manner, he fell upon a saw-bench, which had been left on the ground at the end of said side walk, whereby he was injured. *Held*, Not guilty of contributory negligence." We adhere to that decision. The first objection is overruled.

Second—It is contended by the attorneys for the plaintiff in error that the defendant in error was guilty of contributory negligence, and that an instruction to that effect set out in the record should have been given.

Morrill v. Davis.

The testimony tends to show that the serious nature of the injury was not known at the time the accident occurred, nor for some time afterwards. It was supposed at first to be a mere sprain which would cause no permanent lameness. So far as we can judge there seemed to be no cause for alarm as to the result of the injury until some considerable time after the accident, when it became apparent that there was danger of ankylosis of the knee joint. This result followed, notwithstanding the efforts of skillful physicians to avert it; there is absolutely no proof of negligence on the part of the defendant in error and no question to submit to the jury on that point.

The instructions given by the court cover the whole case, and it is apparent that substantial justice has been done. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

The other Judges concur.

G. M. MORRILL ET AL. V. E. VIOLA DAVIS ET AL.

[FILED OCTOBER 30, 1889.]

Real Estate: CONTRACT: UNACCEPTED OFFER: AGENTS: COMMISSIONS. In an action by certain real estate agents to recover commissions on a sale of real estate alleged to have been made by them, the testimony failed to establish a contract of sale, and it was held that they could not recover therefor.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Harwood, Ames & Kelly, for plaintiffs in error.

Marquett, Dewees & Hall, for defendants in error.

MAXWELL, J.

This action was brought in the district court of Lancaster county upon a petition, the first cause of action in which is stated as follows :

"Now come the above named plaintiffs, and for a cause of action against the defendants say, that on March the 30th, 1887, Annie Morrill was the owner of the southwest quarter of section 11, township 10 north, range 6 east of the 6th P. M., Lancaster county, Nebraska. That on said date, and long prior thereto, G. M. Morrill was the agent for said Annie Morrill, acting for her with her knowledge and consent, looking after, managing, and controlling said land, the same as though it were his own, and that on the 25th day of March, 1887, the said Annie Morrill employed the said plaintiffs to sell and dispose of the southwest quarter of section 11, township 10, range 6, at \$150 per acre. That in pursuance of the instructions received from the said Annie Morrill they sold the said land on the 30th day of March, 1887, to Mrs. Carrie R. Johnson for the sum of \$150 per acre, the purchase price to be paid on any terms that might be satisfactory to the defendants; and the plaintiffs had made the said sale.

"That the commission on said sale amounted to the sum of \$625, and the same has not been paid to the plaintiff by the said defendants. That E. Viola Davis was formerly E. Viola Dowden; that Annie Morrill is the wife of G. M. Morrill."

The second cause of action is for the money paid for the use of the defendant below.

The answer denies the sale by the plaintiffs as agent for the defendants, or either of them, of the land in question, and denies that there was any employment of the plaintiffs as such agents except as follows : "Unless the terms of sale to be submitted to said defendants were by them ap-

proved as satisfactory, and no sale was to be consummated or binding on them (said defendants) unless the terms of payment were first given and approved. And defendants further aver that an offer to purchase made by said Carrie R. Johnson through the said plaintiffs was rejected and never consummated, because the terms of sale were not satisfactory to said defendants, as the plaintiffs were informed upon the reception of the offer."

The second cause of action, although put in issue by the answer, was admitted on the trial, and no error is assigned with reference to it.

A verdict was returned in favor of the plaintiffs upon both causes of action for the amount claimed.

The proof introduced to show a contract is as follows: First, a letter from G. M. Morrill to Miss E. Viola Dowden, dated March 25th, 1887, as follows:

"Miss E. Viola Dowden: DEAR MADAM—I received a letter from Mr. Dowden a short time since and he desired me to write you if I would sell my farm. I have never intended to sell it, but always expected to occupy it myself; but lately I have been thronged with letters, and several parties have been to see me asking if I would sell, and I have invariably said *no*. Yesterday I had another party who offered me a big figure for it, but as your father desired will give you the first chance to sell it. Will say that if you can sell it for \$150 per acre will take it, or if you have a proposition, you submit it and I will consider it. Will delay writing other parties till I hear from you. Please let me know if the trees are all living that were to be set out around the place, and if the grove has been set out according to terms of lease; have thought almost every month for the past year that I would be out there. * *

"Respectfully yours, G. M. MORRILL.

"110 East 82d street, N. Y. City."

On the 29th day of March, 1887, the following dispatch

was sent direct to G. M. Morrill, then in the city of New York :

"Think can sell at your price if can make terms, one thousand dollars in hand, five thousand in sixty days, balance in three equal annual payments at eight per cent. Shall I try? Wire at my expense.

"JOSIE L. DOWDEN."

On the same day defendant sent the following telegram:

"To E. VIOLA DOWDEN, corner O and Twelfth, Lincoln.—Will reply by letter. G. M. MORRILL."

This dispatch was received in Lincoln on the following day.

On the 31st day of March, 1887, defendants wrote :

"*Miss Dowden*: DEAR MADAM—Your telegram received, but have delayed reply by letter to see what terms I could make with parties for property which I was contemplating buying; but find terms you proposed would not answer their purpose. Hence have come to the conclusion not to buy for the present, nor to sell my property in Lincoln till I can invest it to better advantage here. Please write me what you think the prospect of my property advancing. Are the salt works being developed, etc.? If you think property *will not advance* and you can get better terms I will consider it, but of course want to get all I can. Respectfully yours,

"G. M. MORRILL.

"110 E. 82d st., N. Y."

On the 30th of March plaintiff writes:

"LINCOLN, NEB., March 30, 1887.

"*Mr. G. M. Morrill*: DEAR SIR—Your dispatch received this A. M., and in reply will say we have sold the farm at \$150 per acre as per your letter, and if you do not agree to the telegraphed terms the parties can make some better, and when we receive your answer we will

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know your terms and act accordingly. Property is at a good price now, but the most sanguine are thinking it only a boom of a few months.

* * * * *

"The trees are doing nicely and they are preparing to crop the cultivated land.

"The trees were hoed last year and father has made special arrangements for their care.

"Is there some indebtedness against the farm?

"The buyer is Mrs. Carrie R. Johnson—her husband has considerable property, but is an engineer and puts all his property in his wife's name because of dangerous work.

"I will enclose draft on N. Y. for \$500, and you may receipt, and when I get your letter will know the terms of sale. * * * * *

"We are, respectfully,

"JOSIE L. DOWDEN & SISTER."

The telegram mentioned in the foregoing letter as being received "this A. M.," was testified by the witness, Josie L. Dowden, to have been received at about eleven o'clock A. M. on the 30th day of March. This telegram, it will be remembered, says, "will reply by letter;" and this sale, the same witness also testifies, was made on the 30th day of March, 1887, between two and three o'clock in the afternoon, and of course after the receipt of the telegram.

On the 1st day of April Morrill telegraphs:

"Will return check and answer. Have made other arrangements."

On April 2d Morrill writes:

"Miss Josie Dowden: DEAR MADAM—Your letter with check for \$500 received, which I herewith return to you unclaimed. In your telegram of the 29th ult. you said you thought you could sell, and mentioned probable terms and asked if you should try. I wired you that I would

reply by letter, which I did, saying that offer was unsatisfactory and I had made other arrangements, as I have.

“Respectfully yours,

“G. M. MORRILL.”

And on the 4th day of April the following letter was sent:

“LINCOLN, NEB., April 4, 1887.

“*Mr. Morrill:* DEAR SIR—Yours in answer to telegram received to-day, and in reply to that have this to say: Lincoln has had a boom far exceeding any before, and the wisest are shaking their heads and saying ‘this can’t last much longer!’

“Now is surely the time to sell, and it must be done quickly I think. There are several parties here who would like it, and I have tried to-day to get a definite price, but failed, but think I can get \$200 an acre, and perhaps a little over. The usual terms are one-fourth cash, balance in one, two, three years at eight per cent. I really feel, Mr. Morrill, that now is the time. If you were here and would plat your land and advertise and make a big sale of it you could get more, but there is so much expense connected with such work that if it were me I would sell it as a whole and let others in that business do it.

“The salt works are inactive. The special boom is over; R. R. coming in; the establishment of a Methodist university; a talked-of belt line, and an electric car line. The R. R. will come in the S. E. part of city and the Methodist college is three miles directly east of your farm. The belt line is in the imagination of some real estate firms and can hardly be built for the reason there can be no travel, or not enough to pay, and the pres. of the road told me in confidence it would never be built, at least he had no money to put into it. The electric line will doubtless go out 14th street to fair ground, thence west to West Lincoln, a little town starting one mile west of your place

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and at about a mile south. They have boomed and boomed, so I think the extreme outside property can't keep up.

"My advice is to sell. Mr. McMurtry has had a man to see you to try to buy it. I hope you won't let him have it, for I can get more for it than any other one, I am sure, so if you have a good offer from him or any one else there, telegraph me and I will find better.

"We can't delay this much longer, or it will be too far past. We have had three applicants and to-day one drew off.

"If I telegraph you an offer and you can or cannot accept it telegraph me at once at my expense. I must know soon as I have bought the renter off and can't afford to do it unless you sell—now is just the time for them to plant.

"The farm looks nice.

* * * * *

"I have tried to tell you honestly the state of affairs and hope you understand me. I hope to hear your answer as to other arrangements, and if favorable I will telegraph you another offer, after you get this letter, so you will decide what is best to do. I am doing quite a large business for a new one—sold four lots to-day. Give my whole time to it, and keep posted as to the true state of affairs, and know now is the time, or, at furthest, this month. Outside property now is a little slow, but can make a good sale.

* * * * *

"Hoping to hear from you soon,

"I am, yours respectfully,

"JOSIE L. DOWDEN and SISTER E. VIOLA.

"Have sold over one hundred lots in last two months and this is a fair average work with any firm of the size.

"JOSIE L. DOWDEN."

It will be observed that there is a failure on the part of the plaintiffs below to prove a contract. The letter of the

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plaintiff in error, dated March 25th, 1887, if construed as favorably as possible in favor of defendants in error, could only be accepted by an offer to pay cash. This they did not offer to do, but sought to impose other terms and conditions. The minds of the parties never met, and there is a failure of proof to sustain the verdict. The judgment and verdict as to the first cause of action is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

CYRUS N. BAIRD ET AL. V. AMI B. TODD ET AL.,
AND
WILLIAM JAMESON V. A. B. DICKSON ET AL.

[FILED NOVEMBER 6, 1889.]

1. **Statutes: CONSTITUTIONALITY.** The act approved February 26, 1889, to amend the second division of section 25 of chapter 18 of Compiled Statutes of 1887, relating to county buildings and offices, as amended by act of March 31, 1887, *held*, to be constitutional and valid from the date of passage. (*State, ex rel. Burnham, v. Babcock*, 23 Neb., 128; *Fenton v. Yule*, at the present term, cited and affirmed.)
2. **County Bonds** for internal improvements, creating a public debt prior to November 1, 1875, to be satisfied by levy on the total valuation of the county, are not an assessment of taxes within the limitation of section 5 of article 9 of the constitution, but are an "indebtedness existing at the adoption of the constitution," not subject to the restriction "of one and a half dollars per one hundred dollars valuation" of the total levy of the board of county commissioners.

APPEALS from the district court for Cass county. Heard below before FIELD, J.

Webster & Holmes, and *E. H. Wooley*, for appellants.

Mathew Gering (*A. N. Sullivan* and *B. Clark* with him), for appellees.

For contentions of counsel, see *Fenton v. Yule*, *ante*, 758, where the points raised in the briefs are in the main similar.

COBB, J.

The appellants in this case appeal from two different actions rendered against them separately in the court below.

First—Cyrus N. Baird and Lewis C. Todd, suing as taxpayers of said county, represent that Ami B. Todd, A. B. Dickson, and Lewis Foltz, the board of county commissioners of said county, under an act of the legislature entitled “An act to amend the second subdivision of section 25, article 1, of chapter 18 of the Compiled Statutes of this state,” approved February 26, 1889, appointed a special election to be held in said county on June 8, 1889, for the purpose of submitting to a vote of the electors the proposition to issue \$80,000 of county bonds, of the denomination of \$1,000 each, to be dated January 1, 1890, bearing an annual interest of five per cent, payable in twenty years from date and redeemable in ten years at the option of said board of county commissioners, or their successors in office, for the purpose of building a court house at the county seat of said county, with power and authority to levy a tax to pay the principal and annual interest of said bonds at the state’s fiscal agency in the city of New York, and to create an annual sinking fund of \$4,000 for the payment of the principal; that there were cast at said election in favor of said proposition 3,078 votes, and against it 2,875 votes, leaving a majority of 203 votes in favor of the proposition, which the said board of county commissioners is about to carry out under said act of

February 26, 1889, and which act, not being in accord with, but in violation of, sections 27 and 30 of article 1 of chapter 18 of the Compiled Statutes of this state, requiring two-thirds of the votes cast at said election in order to authorize the proposition, and against which an injunction is now prayed.

Second—The plaintiff, William Jameson, sets up against the same board of county commissioners that said county, prior to November 1, 1874, contracted a bonded indebtedness in the aid of internal improvements, of which there was then outstanding \$82,000, for the payment of which there had been collected and was in the county treasury the sum of \$32,000, and there was still outstanding, in excess of any moneys for the payment, \$50,000 of such indebtedness; that the assessed valuation of the county was but \$4,761,884, and that the county revenue requires a tax of twelve mills, which has been levied, and for sinking fund for the outstanding bonds, four mills on the dollar, making for all purposes of county revenue sixteen mills; that if said proposition to issue \$80,000 additional court house bonds is permitted to be carried out, there must be imposed a further tax of one and three-fourths mills on the dollar of valuation of the property in said county for the interest and sinking fund for the payment of the bonds under the defendants' proposition, which will necessitate a tax of seventeen and three-fourths mills on the dollar, and in excess of the limit permitted by the constitution of this state.

The defendants demurred generally in each case, which demurrers were sustained by the court below and the plaintiffs appealed both causes to this court.

The questions presented in the petition of Cyrus N. Baird and Lewis C. Todd are substantially the same as those considered at the present term and decided in the case of *Fenton v. Yule*, appealed from the district court of Gage county; and nothing need be added here to the views

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expressed in that case. The judgment of the district court is therefore affirmed.

In Jameson's petition another and different question is sought to be raised. The petitioner starts out with the allegation that long prior to November 1, 1875, the county of Cass issued its bonds to the Burlington & Missouri River Railroad Company in Nebraska, bearing interest at the rate of ten per cent per annum; that there is outstanding of that indebtedness \$82,000, and for the payment thereof there has been raised and collected about \$32,000, and that there is still outstanding against the county of Cass, in excess of said sinking fund, the sum of \$50,000 of indebtedness accruing prior to the adoption of the present constitution; that the board of county commissioners of Cass county has levied for various purposes for the year 1889 the sum of twelve mills for general revenue purposes, and four mills for sinking fund, of said county indebtedness, being a total levy of sixteen mills for all purposes of county revenue. The petitioner then sets up the submission, by the county commissioners, to a vote of the legal electors the proposition to issue and put upon the market eighty bonds of said county of the denomination of \$1,000 each, bearing interest at five per cent per annum, payable annually as stated; also, further providing for a sinking fund of five per cent per annum for the payment of the principal; that such election was duly held and the proposition carried by a majority vote only of the legal electors; that the county board claim that such majority vote is sufficient to authorize and empower them to issue the bonds and make them binding upon the county; and that the board is about to proceed to issue and sell the same; and that if the bonds are issued, for the purpose of paying the interest and providing the sinking fund it will be necessary to make an annual levy of taxes upon the total property of the county, in addition to the taxes above specified, of one and three-fourths mills on the dollar of

total valuation, thereby swelling the taxes to an amount exceeding the constitutional limit of fifteen mills.

Section 5 of article IX of the constitution provides that "County authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county."

From the language of this provision it is readily seen that the bonded indebtedness of the county of Cass set out in the plaintiff's petition, having been contracted before the adoption of the state constitution, is excepted from its provisions, and hence the taxes and assessment required to pay the same are not to be considered as any part of the taxes limited therein. Leaving such taxes out, as we must, it does not appear that the taxes necessary to pay the annual interest and provide a sinking fund for the payment of the principal of the bonds contemplated by the submission and vote referred to in the plaintiff's petition, and the issuing of which is sought to be enjoined, added to the other taxes for the year 1889 levied upon the property of said county will increase the taxes thus to be levied to an amount or rate exceeding one and one-half dollars per one hundred dollars of valuation thereof; that is to say, as shown by the exhibit attached to the petition, the levies for the year 1889 are:

General fund.....	7 mills.
Bridge "	2 "
Road "	3 "
Insane "	$\frac{1}{2}$ "

Making.....	12 $\frac{1}{2}$ "
Add to this the levy for the bonds to be issued...	1 $\frac{3}{4}$ "

Making an aggregate for all county purposes of 14 $\frac{1}{2}$ "
—a levy quite within the constitutional limitation.

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I acknowledge my entire inability to comprehend any legal force within the proposition and argument of counsel in the brief, that the indebtedness and the tax to pay the same incurred prior to the adoption of the constitution does not fall within the exception contained in sec. 5 of article 9 above quoted. For unless it is the meaning of said section to take the taxes necessary to be levied to liquidate all indebtedness incurred prior to the adoption of the constitution, and existing at the time of its adoption whether as principal sum or interest thereon, out of the limitation there established for general taxation, I am unable to attach any meaning to that part of the language of the section.

Holding as I do that all the taxes enumerated, other than that necessary to pay said prior indebtedness, and including the taxes necessary to pay the interest and raise the sinking fund contemplated upon the bonds, the issue of which is sought to be enjoined, come within the limitation established by the first clause of said section, I do not deem it necessary to discuss the proposition whether the issue of the bonds sought to be enjoined falls within the exception of the last clause, "unless authorized by vote of the people of the county." Otherwise it might be seriously doubted whether any act of the legislature could with binding force add to the language of said clause and require a vote greater than a majority of the people of the county to authorize an indebtedness, and take it out of the limitation established by said section.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

GEORGE POFFENBARGER ET AL. V. LYDIA E. SMITH.
ET AL.

[FILED NOVEMBER 6, 1889.]

1. **Liquors: STATUTES: CONSTITUTIONALITY.** The title of the act to regulate the license and sale of malt, spirituous, and vinous liquors, etc., approved February 28, 1881, is broad enough to cover a provision therein requiring the licensee and his bondsmen to pay all damages which individuals may sustain in consequence of intoxicating liquors furnished by him to another.
2. —: **CIVIL DAMAGES: EXPERT TESTIMONY.** In an action by a widow and her minor children to recover from certain saloon keepers and their bondsmen for loss of means of support caused by the death of the husband and father of the plaintiffs by suicide, which, it was alleged, was caused by continued intoxication from liquor furnished by the defendants for several days before his death, there was proof tending to show that for several days before his death the deceased had been sober and that the act was deliberately done. There was also proof tending to show that for a considerable period prior to his death he had been constantly under the influence of intoxicating drinks furnished by the defendants. Physicians were thereupon called who testified as experts to hypothetical questions as to the probable effect of the continued use of intoxicating drinks in causing suicide. *Held*, That such testimony under the facts proved was admissible.
3. **Objections to testimony, held**, properly sustained.
4. **Instructions.** Modification of instructions asked, *held*, correct.

ERROR to the district court for Gage county. Tried below before CHAPMAN, J.

Burke & Prout, for plaintiffs in error:

Secs. 15, 16, and 18 of the act of 1881, commonly known as the "Slocumb Law," conflict with sec. 11, art. 3, Const. (*Tecumseh v. Phillips*, 5 Neb., 305; *White v. Lincoln*, Id., 505; *Ex parte Thomason*, 16 Id., 238; *Ives*

v. Norris, 13 Neb., 252.) The question of the constitutionality of the act was not before the court in *Pleuler v. State*, 11 Neb., 547, hence any statement therein relative to such question is an *obiter dictum*. (Wells, Res. Adj., sec. 581, and cases cited; *Carrol v. Carrol*, 16 How., 287.) The title of an act is the index to legislative intent and the courts cannot enlarge its scope. (*Ives v. Norris*, *supra*; *Cooley*, Const. Lim., p. 149.) The title to the act in question assumes simply "to regulate the license and sale," etc.; while the sections above mentioned relate to actions, civil and criminal, damages, maintenance of paupers, widows and orphans, jurisdiction, parties, evidence, and other matters outside the scope of its title. By force of these sections the well established rule that "damage * * * must be the natural and proximate consequence of the act complained of" (2 Greenl., Ev., sec. 256), is abrogated. (*McClay v. Worral*, 18 Neb., 52; *Sellars v. Foster*, *ante*, 118.) The fact that the law has been treated as valid for nine years has no bearing on its constitutionality. (*Cooley*, Const. Lim., 188.) There was nothing in the case calling for the opinion of the physicians upon any point presented to them, and even if their testimony were admissible they were not shown to be competent to give such opinion. (*Soquet v. State*, 40 N. W. Rep. [Wis.], 391.)

A. Hardy, and J. N. Rickards, for defendants in error:

The title of the act of 1881 is broad enough to allow a provision that a liquor dealer shall pay for loss of means of support, this being simply a regulation of the sale. *Ives v. Norris* would have been in point had the repudiated section there merely provided that the owner of animals running at large should pay all damages caused by them; but the section in fact was entirely outside the scope of the title. The witnesses objected to were duly qualified, and hypothetical questions were properly asked them based on testimony of others. (*O'Hara v. Wells*, 14 Neb., 403;

Williams v. Brown, 28 O., 547; *People v. Luke*, 2 Kern. [N. Y.], 358.)

MAXWELL, J.

This action was brought in the district court of Gage county by the defendants in error against the plaintiffs in error to recover damages for loss of means of support caused by the death, from the use of intoxicating liquors, of John E. Smith, the husband of Lydia E. Smith, and the father of Leroy Smith and Nellie Smith, minor children of said Smith and wife. On the trial of the cause a verdict for the sum of \$2,000 was rendered, and a motion for a new trial having been overruled, judgment was entered on the verdict.

There are fourteen assignments of error, but four of which are referred to in the brief of the plaintiffs in error, and these will be considered in their order.

1. It is claimed that the court erred in receiving any evidence in support of the petition because the object of the bill or act is not clearly expressed in the title and that the subject-matter of sections 15, 16, and 18 are not contained or referred to in the title of the bill. In *Pleuler v. State*, 11 Neb., 547, the question of the authority to license was considered by this court and the act sustained, and that decision has been adhered to ever since. The title of the act approved February 28, 1881, is as follows: "An act to regulate the license and sale of malt, spirituous, and vinous liquors, and to repeal chapter 53 of the code of criminal procedure of the General Statutes of 1873 entitled 'License and sale of liquors,' and to repeal an act entitled 'An act to amend section 575 of chapter 58 of the criminal code,' approved February 9, 1875, and to repeal an act entitled 'An act to regulate the issuance of licenses for the sale of malt, vinous, and spirituous liquors in the state of Nebraska,' approved February 25, 1875."

The title of the act in question is "An act to regulate the license and sale of malt, spirituous, and vinous liquors," etc. A provision in the body of the act declaring the liability for damages sustained by any person from the use of intoxicating liquors furnished to another by the licensee is clearly within the title of the act. The law regards the traffic as an evil and it attempts to regulate it and reduce the evils to the minimum: First, by requiring the petitioners to state that the "applicant for license is a man of respectable character and standing;" second, that he must pay for each license the amount required by the licensing board, which shall not be less than \$500; third, public notice must be given of the application for license at least two weeks before the granting of the same and a time set for the hearing, and if there be "any objection, protest, or remonstrance filed in the office where the application is made, against the issuance of the license," a day shall be set for the hearing of the case, and if it shall be made to appear that any former license has been revoked for any misdemeanor against the laws of the state, or that the applicant has been guilty of the violation of any of the provisions of the act for one year preceding, then the license shall be refused. Either party may appeal. To enforce compliance with the law the applicant is required to give bond in the sum of \$5,000, "conditioned that he will not violate any of the provisions of this act, and that he will pay all damages, fines, and penalties and forfeitures which may be adjudged against him under the provisions of this act." The licensee is absolutely prohibited from selling to an Indian, insane person, idiot, or habitual drunkard, and also to "any minor, apprentice, or servant under twenty-one years of age." He is required to "pay all damages that the community or individuals may sustain in consequence of such traffic," etc. There are other provisions, binding upon the licensee, which need not be noticed. The provision for damages is notice to every licensee and his

bondsmen to beware; and an assumption upon their part of the obligation imposed by statute. The sections referred to, therefore, are in harmony with the object of the act, not in conflict with the constitution, and are valid.

The second objection is that the court erred in receiving the testimony of certain physicians, as experts, to testify as to the cause of death. There is testimony in the record tending to show that John E. Smith had been sober for several days before his death, and there is also testimony tending to show that for several days prior to that time he had been under the influence of intoxicating liquors furnished by the defendants below. The immediate cause of his death appears to have been morphine administered by himself in two glasses of beer, in the saloons of the plaintiffs in error. The question arose, therefore, whether the case was one of deliberate suicide, or was caused by the use of intoxicating liquors. One of the experts, Dr. D. A. Waldon, after stating that he had been a practicing physician and surgeon for twenty-six years, was asked the following question:

Q. Supposing a man, thirty years of age, had been drinking hard for two weeks' time, and had been irregular about his meals and his going to bed during that time, what would be his natural mental and physical condition?

A. I should think a man's mental condition would be very much impaired by a debauch of that character.

Q. Doctor, would a man in that condition be more liable to commit suicide than a man who had for the past two weeks been regular in his habits, and had not been drinking to excess?

A. He most surely would.

Q. Why, doctor?

A. From the fact of the weakened and debilitated state of his mind. It is usually the case that men when they commit suicide do it after a debauch of that kind and character.

Cross-examination :

Q. Did you ever know, in your experience, or do you know, of any person committing suicide when not intoxicated or under the influence of liquor?

A. I don't believe I ever knew a person to commit suicide unless they were drinking persons; not to come under my observation.

Q. Do you pretend to say, as a physician, that such a case has never been?

A. No, sir; I would not say that.

Q. And that a person would not commit suicide at any time, except they were under the influence of liquor?

A. Well, sir; it is a question whether they would or not; I don't believe they would.

Q. Do you say to the jury they would not?

A. I don't believe they would.

The testimony of the other experts is substantially to the same effect. This testimony, in our view, was properly received for the purpose of showing the probable effect of the long continued intoxication of Smith—if the jury should believe the testimony tending to show such continued intoxication—in causing a loathing of life and hence suicide. If the suicide was deliberately committed by Smith while not under the influence of intoxicating drinks, the defendants below would not be liable; while if such suicide was caused by the use of intoxicating liquors furnished by the defendants below, they would be. There was no error, therefore, in admitting the testimony.

Objection is made to the refusal of the court to permit certain witnesses to testify that on the afternoon and in the evening of the day on which Smith took poison and killed himself each separately charged him with having embezzled large sums of money due to Fillmore and Poffenbarger, in whose employment Smith had been for a year prior thereto. It is claimed that such testimony would have shown a cause for the suicide and hence was

admissible. So far as we can see, the only effect of the testimony, if admitted, would have been to divert the attention of the jury from the main question at issue, and the evidence was properly rejected.

The fourth assignment is as to the modification by the court of instructions Nos. 2 and 3, asked on behalf of the defendants below. It is impossible in this connection to review the instructions at length, but they seem to be adapted to the evidence, and the modification of the instructions complained of appears to have been made to make them conform to the proof. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

H. D. ESTABROOK V. MRS. E. W. HATEROTH.

[FILED NOVEMBER 6, 1889.]

Forcible Entry and Detainer: EVIDENCE: PRACTICE. In an action of forcible entry and detainer there was testimony tending to show that one Mrs. M. was possessed of a half interest in certain premises; that to secure her rights she entered into a contract with one E., an attorney, to prosecute an action in her behalf, if necessary, and enforce her claim; that the attorney, without suit, obtained a recognition of her claim by the adverse party, and Mrs. M. thereupon took possession of the premises jointly with E. and the owner of the adverse interest, and that E. collected rents from certain tenants with the consent of Mrs. M. E. also obtained judgment of ouster against a tenant, who thereupon took a lease from him. Mrs. M. made a deed to the holder of the adverse interest, which was not introduced in evidence. *Held*, That the testimony failed to show that E. was a trespasser and not entitled to the possession of the premises and rents, and that the questions of fact should have been submitted to the jury.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Estabrook, Irvine & Clapp, for plaintiff in error:

The object of forcible entry and detainer is to protect actual possession, whether rightful or not, against unlawful invasion (*Myers v. Koenig*, 5 Neb., 422; *People v. Leonard*, 11 Johns., 504; *St. L., etc., Ass'n v. Reinecke*, 21 Mo. App., 478; *Lorimer v. Lewis*, Morris (Ia.), 253*); hence the fact alone of Estabrook's possession needs to be established. The judgment of eviction against Davis ended his former lease and left him free to accept one from plaintiff (*Burr v. Stenton*, 52 Barb., 377; *Morae v. Goddard*, 13 Metc. [Mass.], 177); and Davis's possession under such lease was that of plaintiff. (*Langworthy v. Myers*, 4 Cole [Ia.], 18.) Where one, for any time, exercises the usual acts of ownership, he may maintain this action against all save one whom he has forcibly dispossessed, and even against latter if he has not continuously resisted such acts. (*Bowers v. Cherokee Bob*, 45 Cal., 503; *St. L., etc., Ass'n v. Reinecke*, and *Langworthy v. Myers*, *supra*; *Bradley v. West*, 60 Mo., 59.) The acts of Davis were insufficient to deprive plaintiff of his possession. (*Gallagher v. Connell*, 23 Neb., 391.) One of two co-tenants may maintain this action against a stranger. (*Crook v. Vandervoort*, 13 Neb., 507; *Turner v. Limbrick*, 1 Meigs [Tenn.], 7.)

John L. Webster, for defendant in error:

Estabrook cannot maintain this action against defendant, who is tenant of real owner. (*Haller v. Blaco*, 14 Neb., 195.) Vorce had a right to place a tenant in possession. (Taylor, Land. & Ten., secs. 531, 532, and cases cited in N. 1, 788; *Wood v. King*, 43 N. Y., 152.) Right of possession may be examined in this form of action, and, incidentally, title of one in possession. (*Smith v. Kaiser*,

17 Neb., 187; *Leach v. Sutphen*, 11 Id., 528.) Vorce as owner could have dispossessed either Estabrook or his tenant, Davis. (*Cox v. Cunningham*, 77 Ill., 445.) A mere scrambling possession, such as Estabrook's, was not sufficient to maintain this action. (*Hayes v. Porter*, 27 Tex., 92; *House v. Keiser*, 8 Cal., 500; *Conroy v. Duane*, 45 Id., 601; *Com. v. Keeper*, 1 Ashmead [Pa.], 147; *Mann v. Bradley*, 67 Ill., 95.)

MAXWELL, J.

This case was before this court in 1887, and the opinion reported in 22 Neb., 282. The facts in that case are briefly stated on pages 282-3 of that report. On the second trial the court, on the conclusion of the plaintiff's evidence, directed a verdict for the defendant and dismissed the action. It is claimed on behalf of the defendant in error that the proof fails to show any right of Estabrook to the possession of the premises. The only witness called on the trial was the plaintiff himself, and he testified on his direct examination as follows:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. You may state what time you entered into possession of the property in dispute here, and under what circumstances.

By the court: Ask him if he was in possession and what the nature of his possession was.

Q. Do you know Margaret A. McCoy?

A. Yes, sir.

Q. State whether or not at any time you entered into a contract with her in regard to this property; and if so, what it was.

A. Here is a copy of it. I don't know where the original is.

[The copy was introduced as evidence and is set out in the record.]

Q. Were you at that time a practicing attorney at law here?

A. Yes, sir.

Q. Who was in possession of this property at the time this contract was entered into?

A. They were the tenants of William Vorce, of New York, and Mr. Vorce at the time generally supposed himself the owner.

Q. Who were the owners?

A. As a matter of fact?

Q. Yes, sir. State what was done under that contract.

A. I first wrote to Mr. Vorce, of New York, inviting him—I entered into negotiations with Mr. Vorce for the premises, if possible. There was a dispute as to the ownership of the property, Mr. Vorce claiming an undivided half of the property and Mrs. McCoy a dower interest in the other undivided half. Mr. Vorce, through my suggestion, called upon his New York attorney—He conceded—I went into possession of this property. Mrs. McCoy went into possession of the double house, receiving the rentals and so on—herself and daughter lived in one side of this little frame cottage; I as owner of half of that—as the claiming owner—I took possession of the other side.

Q. Mrs. McCoy went into possession of the property in pursuance of the agreement with Vorce?

A. I have testified to that.

Q. When was that?

A. That was in '83; early in '83, or the latter part of '82, when we first went into possession.

Q. Now you may state whether or not you went into possession of any part of the property.

By the court: You had better ask him just what he did.

Q. After Mrs. McCoy took possession of that property, what, if any, arrangement was made between you and her in regard to it?

A. Mrs. McCoy told me to take the west side of the house, and we would simply keep possession till such time as Mr. Vorce and ourselves should partition or agree upon a partition, or have it done by the court.

Q. Then what was done in pursuance of that?

A. I took possession of the west side by renting it, by giving notice to the tenants and turning them out, by making arrangements, or at least discussing with architects in regard to fixing it up, and various other things.

Q. What time was it you took possession?

A. It was either in the latter part of '82 or the first part of '83.

Q. Soon after Mrs. McCoy took possession?

A. Immediately after.

Q. You took possession of the west half?

A. Yes, sir; the west half. I rented that and got the rent for it for several months, six months perhaps; four or five months anyhow.

Q. You may state what transaction, if any, passed between you and Mrs. McCoy in regard to changing possession of the west half for the east half?

A. A few days, I will say a week or two at the furthest before the deed made by Mrs. McCoy to Vorce, she came to my office and said the west side was a little better papered and fixed up and her daughter, who was living in the east side, would like to occupy that. They were identical, I think, with the exception, perhaps, the other was a little cleaner. It would be a great accommodation if I would give notice to my tenants and let her daughter have the other side. Accordingly I did that. I told my tenants to get out, gave them notice, and he vacated the premises, either the evening before or the very day that this deed of Mrs. McCoy's was made; there was not twenty-four hours elapsed between his getting out of there and this deed to Vorce.

Q. Then what became of the property?

A. Her daughter did take possession of that and Davis moved immediately into the east side as a tenant under Webster.

Q. The side you were to take?

A. Yes, sir.

Q. What did you do next?

A. Well, I brought a forcible detaining suit against Mr. Davis.

Q. Then what followed in regard to the possession of the property?

A. Why, Mr. Davis was turned out, and rented on the 20th day of July from me and took possession of that east side as my tenant.

Q. Was the lease to Davis in your handwriting?

A. Yes, sir.

Q. Have you it there?

A. Yes, sir.

Q. He entered under that lease?

A. Yes, sir.

Q. And how long did he remain?

A. Why, I think he remained there about two months; he remained there until the second month's rent became due.

Q. Did he pay you rent?

A. Yes, sir.

Q. How many months?

A. One.

Q. When the second month's rent became due what occurred?

A. He stood me off and the next time I went there I found Mrs. Hateroth in it.

Q. Did you know anything about Davis moving out before he did it?

A. No, sir.

Q. Did you know anything in regard to the manner in which Mrs. Hateroth obtained possession?

A. Only from what Mrs. Hateroth tells me; I know it from that.

Q. What did you do upon finding Mrs. Hateroth in possession?

A. I had a talk there at the door one day with some lady, I don't know whether it was Mrs. Hateroth or her daughter, or who it was, in regard to how they came into possession and so on.

Q. I will ask you now what was said in regard to their getting into possession there at that time?

A. I can state what Mrs. Hateroth has said since then. I wouldn't say that it was Mrs. Hateroth I talked with at the door; I really had no recollection of this lady until I met her in the court house.

Q. State what, if anything, you have heard Mrs. Hateroth say since in regard to her taking possession.

A. I have heard Mrs. Hateroth say since that she was out looking for a house along about the 1st or 2d of September, '83, and that she went by this house and saw that it was vacant or pretty much so and that she looked in; that the curtains were down, and the house was locked. She looked in at the window and saw some furniture there and inquired next door of Mrs. Shipley and learned that the parties had moved out or were moving out; that she would find the key at Mr. Webster's office; that she went to Mr. Webster's office and made the bargain for renting it and he referred her to Davis for the key; that she went to Mr. or Mrs. Davis and got the key and took possession.

This testimony tends to show that at the time the contract with Mrs. McCoy was entered into she was the owner of at least one-half interest of the lot in question; that she took possession of the lot jointly with Mr. Vorce and gave the plaintiff possession; also that he was lawfully in possession when the deed from Mrs. McCoy to Vorce was executed. What that deed contained we have no means of

knowing, as it was not introduced as evidence in the case. It may have conveyed the title of Mrs. McCoy subject to the rights of the plaintiff. The plaintiff was permitted by Vorce and Mrs. McCoy to collect rent on the premises for some months before the defendant took possession of the premises, and so far as appears the rent thus collected was considered to be his. He also obtained judgment of ouster against Davis, who thereupon took a lease from him. Mrs. McCoy had agreed with the plaintiff to give him one-half of the net results if he succeeded in the case. That he did succeed is clear, although without suit. She thereupon, apparently in pursuance of the contract as she understood it, entered jointly into the possession of the premises with him. His possession thus became rightful and could not be divested by force. Whether or not the right of possession had lawfully terminated at the date in question is to be determined from the evidence in the case.

It is evident that the questions of fact should have been submitted to the jury, and the court erred in directing a verdict. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
V. MARY HOGAN.

[FILED NOVEMBER 6, 1889.]

1. **Railroads: FENCING: LIABILITY.** Where, from the agreed statement of facts in a case, it is made to appear that the corporate limits of a city, with buildings thereon, extend along one side of the various side tracks of a railway, the land on the other

side not being platted; that the side tracks thus established were necessary and proper for the transaction of the business of the railway, and that it would be inconvenient and unsafe to the employes of the company if a cattle guard, and fence were erected, the railway company is not required to fence its tracks at that point, and will not be liable for stock killed by its engines and cars at that place unless guilty of negligence.

2. ———: ———: STOCK KILLED WITHOUT NEGLIGENCE. Where the attorneys for the plaintiff and defendant agree in writing that certain stock killed by the engines of a railway company escaped without the fault of the owner, and was killed at a place where the court finds the company was not required to fence its track, and without the negligence of the railway company, there can be no recovery for such stock.

ERROR to the district court for Lancaster county.
Tried below before FIELD, J.

Marquett & Deweese, for plaintiff in error:

The decisions cited in defendant in error's brief were under statutes which make no exception in regard to railroad fencing, the courts so construing the statute that a fence was often required within the town limits. Our statutes have made the town limits also those of fencing, hence those decisions do not apply here. Even where there was no limitation in the law requiring tracks to be fenced the company would not be bound to fence its tracks where this horse was killed or where it entered. (*Cole v. R. Co.*, 38 Ia., 314; *Wood, Railway Law*, p. 1555; *I., etc., R. Co. v. Quick*, 109 Ind., 295; *McGrath v. R. Co.*, 57 Mich., 555; *O., etc., R. Co. v. Rowland*, 50 Ind., 349; *C., etc., R. Co. v. Wood*, 82 Id., 598; *Lloyd v. R. Co.*, 49 Mo., 199.)

Sawyer & Snell, for defendant in error:

Only when a place is a public one, or used by the public, is the company relieved from its obligation to fence it. (*Bean v. R. Co.*, 3 West. Rep., 192; *Flint, etc., R. Co. v. Lull*, 28 Mich., 510; *Greeley v. R. Co.*, 33 Minn., 137; *I.*,

etc., *R. Co. v. Parker*, 29 Ind., 471; *J., etc.*, *R. Co. v. Parkhurst*, 34 Id., 501; *A., etc.*, *R. Co. v. Shaft*, 33 Kas., 521; *Prickett v. R. Co.*, Id., 748.) As to what is a depot, see 1 Rorer on Railroads, sec. 7, p. 486. The place where the horse was killed was not, under the most liberal construction, a public one, and should have been fenced. Under the statutes of other states railroads have been held liable for not fencing within corporate limits. (*Coyle v. R. Co.*, 62 Ia., 518; *U. P. R. Co. v. Dyche*, 28 Kas., 200; *Wymore v. R. Co.*, 79 Mo., 247; *Lane v. R. Co.*, 18 Mo. App., 555; *Cleveland, etc., R. Co. v. McConnell*, 26 O. S., 57; *Brace v. R. Co.*, 34 N. Y., 427; *Corwin v. R. Co.*, 13 Id., 42.)

MAXWELL, J.

This cause was submitted to the court below on a stipulation of facts, which is substantially as follows: "That on the 10th day of November, 1887, the said horse of the plaintiff accidentally got loose, without fault or negligence on the part of the plaintiff, from the stable where he was confined on plaintiff's land, which stable is marked 'A' on the map hereafter mentioned, and was discovered on the east side of defendant's main track, and between that and the switch tracks of the defendant, also shown on said map at a place on said map marked 'B;' that an out-going passenger engine and cars of the defendant, coming along at this time (12:10 P. M.) scared the horse, which ran along the side of the main track to a place at or near to the switch marked 'C,' when, attempting to cross over the main track, he was struck by the said engine of the defendant and killed; that the place where said accident occurred was not at the crossing of any public road or highway, but was in Lancaster county; that said accident occurred without any negligence or fault on the part of defendant, unless it may be on account of the want of fencing the railroad

track at the place where the horse entered upon the defendant's right of way and where he was struck and killed as aforesaid; that said horse entered upon defendant's right of way and tracks at some point north of the bridge on Salt creek, as shown on the map, and either within the corporate limits of Lincoln or west of First street; that defendant's road, where said horse entered upon the defendant's right of way, and where he was killed, has been in operation since the year 1870, and is not now nor never has been fenced on either side.

"That the corporate limits of the city of Lincoln at the time of the accident extended as far west as First street, as shown on the map, and also included Mechanics' addition as far west as the center of Salt creek, which Mechanics' addition was included in the corporate limits of the city of Lincoln at the time of the accident, and had been within such corporate limits of the city of Lincoln at the time of the accident, and had been within such corporate limits since March 18, 1887; that the West Side addition, lying immediately east of the defendant's right of way and abutting thereon, as shown on the map, was not included within the corporate limits of the city of Lincoln at the time of the accident, but was incorporated with the city of Lincoln on the 13th day of February, 1888, and that on February 13, 1888, Highland Park and Elmwood additions, as shown on the map, on the west side of the defendant's railroad and right of way, and west of a line projecting to the south from the west side of Sherwin's addition, as shown on the map, through the land of M. A. Hogan, and extending as far south as the south side of Thayer street, as shown in Elmwood addition, and including that portion of M. A. Hogan's land west of said line, were duly and legally incorporated with the city of Lincoln; that at the time of the accident and at the immediate place where the accident occurred the defendant's right of way and M. A. Hogan's land lying on the west side of the right of way were not

incorporated within the city limits of Lincoln; that at the date of said accident none of the additions herein named were incorporated into or included within the corporate limits of any town, city, or village, excepting the said Mechanics' addition; that the ground immediately east of the defendant's right of way and the place of the accident and abutting upon said right of way is, and was at the time of the accident, laid out and platted into an addition to Lincoln known as 'West Side addition' and had several houses thereon, which were occupied by tenants or the owners; the same was also true of Mechanics' addition and Field and Holmes' subdivision; that the land on the opposite side of the track from 'West Side addition,' being fifteen (15) acres, and where plaintiff lives, is now, and was at the date of the killing of said horse, owned by plaintiff and has never been platted and remains in one body, and was at the date of the killing of said horse outside of the corporate limits of any town, city, or village, and there were no roads or streets running through the same, and no one living thereon except this plaintiff and her family; said tract of land is marked on said map M. A. Hogan, 9; but a portion of said land was used as a brick yard, and for the manufacture and sale of brick.

"That the freight and passenger depots of the defendant are northeast of the place where said horse was killed and are within the original corporate limits of the town of Lincoln, the passenger depot being about 5,200 feet and the new freight depot 6,000 feet from the place of said accident; that although the map shows various streets leading up to — and E street crossing the defendant's tracks, there is no means of getting over the same from Salt creek to F street with wagons and horses except at said F street, and there is no traveled road of any kind leading up to or over said tracks between said points, except at said F street; that the defendant had established and for many years used the various tracks through defendant's

grounds and yard limits, a portion of which are shown on the plat hereto attached, said railroad yards being used for depot and station purposes and for side tracks and switching cars thereon; that this yard limit extended as far south as the bridge across Salt creek, as shown on the map.

"That the railroad track of defendant immediately southwest and up to Salt creek to the bridge was properly fenced, the bridge serving as a cattle guard, to which the fence on either side of the defendant's railroad was properly connected; that the right of way at the point where the accident happened, belonging to the railroad company, is 200 feet wide; that it would be inconvenient and unsafe to the employees of the road if a cattle guard and fence were nearer to the switch north of Salt creek than where the bridge itself is located, and that the yard limits thus established and used by defendant were necessary and proper in the transaction of the business of the company as a common carrier."

The court found the issues in favor of the defendant in error and rendered judgment for the value of the horse. Sec. 1, art. 1, chap. 72, Comp. Stats., provides "That every railroad corporation, whose lines of road or any part thereof is open for use, shall within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages," etc.

It will be observed that a railroad company is required to fence its track at all points except "within the limits of towns, cities, and villages," and at the crossings of public roads. With the exceptions named, it is "to erect and maintain fences on the sides of their said railroads," etc.

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Construing these provisions together, it is apparent that in a case like that under consideration, where "the ground immediately east of the defendant's right of way and the place of the accident and abutting upon said right of way is and was at the time of the accident laid out and platted into an addition to Lincoln, known as "West Side addition," and had several houses thereon which were occupied by tenants or the owners," etc., is within the exceptions of the statute. In such case the limits of the city extend to the track on the east, and therefore the track on that side is not required to be fenced, and a fence upon the west side would not have the effect to keep stock off the track. In fact, such fence might become an obstruction that would result in injury to stock, as in *B. & M. R. R. v. Franzen*, 15 Neb., 365. To be effective the road must be fenced on both sides with suitable cattle guards at the crossings of public roads to prevent stock from going upon those parts of the track which are fenced. A railway company therefore is required to fence its track in such cases only where it is necessary to fence on both sides thereof. The company was not liable therefor upon the ground of a failure to fence its track. This decision is to be confined to the facts of this case as agreed upon by the parties, and the question as to the limits of the municipal corporation, where land is merely platted but no buildings erected thereon, is not before the court. From the stipulation of facts it appears that neither party was to blame; that the horse escaped without negligence on the part of its owner, and was killed without negligence on the part of the railroad company. This being so, no fault can be imputed to either party and there can be no recovery.

The judgment of the district court is reversed and the action dismissed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

HORACE A. GREENWOOD V. GEORGE H. BURTON.

[FILED NOVEMBER 6, 1889.]

Real Estate Agents: COMMISSION. A real estate agent was employed by one B to effect an exchange of certain real estate with one C. He succeeded in making a contract between the parties for the exchange of said parcels of land, and C complied with the contract on his part, but B, apparently without just cause, refused to comply. *Held*, That the agent was entitled to his commission.

ERROR to the district court for Gage county. Tried below before BROADY, J.

A. D. McCandless, and *E. N. Kauffman*, for plaintiff in error:

There is a failure to prove title in Gray. The record shows that he lived some miles from the land; but does not show whether or not the same was improved. If it was not Gray did not even have possession unless he had the legal title. (*Yorgensen v. Yorgensen*, 6 Neb., 385.) His possession must have been actual, adverse, and continuous. (*Baldwin v. Merriam*, 16 Neb., 201; *Hull v. R. Co.*, 21 Id., 386; *Gatling v. Lane*, 17 Id., 79; *Haywood v. Thomas*, Id., 237.) As a sale was not effected, Burton can recover, if at all, only on a *quantum meruit*. (*McMurtry v. Madison*, 18 Neb., 294; *Gregg v. Loomis*, 22 Id., 182.)

Geo. B. Everitt, for defendant in error:

The evidence establishes Gray's title and the instructions on that question are approved by this court in *Horbach v. Miller*, 4 Neb., 31, and *Gatling v. Lane*, 17 Id., 79. A real estate agent is entitled to commission if he provide one who is willing to buy or exchange on terms agreed to by seller even if the sale is finally abandoned. (*Potvin v. Cur-*

ran, 13 Neb., 302; *Fisk v. Henarie*, 9 Pac. Rep., 322; *Lockwood v. Halsey*, 21 Id., 98; *Love v. Miller*, 53 Ind., 294; *Sayre v. Wilson*, 5 So. Rep., 157.)

MAXWELL, J.

This action was brought to recover commissions claimed to be due the defendant in error, a real estate agent, upon an exchange of real estate. The cause of action is stated in the petition as follows:

"That on or about the first day of September, 1888, he (Burton) entered into the services of the defendant Greenwood at his request, as agent to trade, exchange, and dispose of certain land described as follows: The northeast quarter of section six, township two, in range eight, in Gage county, Nebraska, for certain other land in said county, for which the defendant Greenwood, agreed to pay plaintiff the sum of fifty dollars.

"The plaintiff negotiated the sale of said land belonging to the defendant Greenwood, upon the terms and conditions and at the time agreed upon and suggested by defendant; that the purchaser procured by the plaintiff for the defendant's aforesaid land, was then and there willing, ready and able to complete the purchase of the defendant's real estate upon the terms and conditions fixed and agreed upon by the defendant Greenwood, with the plaintiff.

"The plaintiff has duly performed all the conditions of said contract on his part to be performed.

"The defendant has not paid the plaintiff the said sum, or any part thereof, for his aforesaid services, and there is now due the plaintiff from the defendant therefor the sum of fifty dollars, with interest on the same from September 1, 1888."

The answer is a general denial. On the trial of the cause there was a verdict and judgment for the plaintiff below. The only error assigned in this court is that the

verdict and judgment are not sustained by the weight of evidence. Burton was called as a witness in his own behalf and testified as follows:

Q. Give the different conversations.

A. Greenwood put this land in my hands, for trade or exchange, some time in August, 1888, and very soon after he put the land into my hands I undertook to get an offer to trade it for a stock of hardware. The trade finally fell through on that, and then I proposed to trade for this Gray land—land belonging to L. D. Gray, sixty acres lying west of Blue Springs—and he and his wife went and looked at it, I think, during the last of August, and he told me how he would trade. I think he told me he would trade with Gray if Gray would give him three hundred dollars and assume the incumbrances on his land. I think there was \$1,050 against the Greenwood land unpaid, of back payments—he would trade with Gray if Gray would give him three hundred dollars, and assume the back payments on the land. I went to Gray and Gray made me an offer. I think he offered to give Greenwood one hundred dollars, so they were two hundred dollars apart. I went back to Greenwood, I think on Friday of the last week of August; if I remember right, and told him the result of my conversation with Gray, and he took it under advisement, and the next morning,—Saturday morning, September 1,—I was in Wymore, and met Greenwood on the street. He said: "Come over to the office, I want to talk to you awhile." I went over and into his private room, and he said: "Burton, if we make that trade with Gray we have got to get it before night." "Well," I says, "I will go immediately to Holmesville, if you won't accept his proposition." He said he would not. I said I would go and try to work Gray for another hundred dollars or so. I went to Holmesville, and Gray did come up another hundred dollars to boot, and made his offer two hundred dollars. I telegraphed Greenwood to meet me at Blue Springs

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at two o'clock. The telegram was sent from Holmesville over the U. P. wire and telephoned to Wymore. Mr. Gray was going to Blue Springs and I got into my buggy and followed him down. He either followed me or I him, I forget which, and I met Greenwood at Blue Springs at 5 o'clock or thereabouts. He wanted to know what I had done and I told him. He said if Gray would pay the commission on that deal I could close it up on those figures, and I went to Gray.

Q. Whereabouts in Blue Springs were you when this was going on?

A. It was on the street, I think in front of Armstrong's grocery.

Q. Was Greenwood there too?

A. Yes.

Q. Where was Gray?

A. Across the street in the furniture store.

Q. Go ahead.

A. I went to the furniture store and told Gray if he would pay the commission I would close the deal. He said he would not do it. I says: "That is the best you can do?" He says: "That is the best I will do." I then got Gray and Greenwood together, and had them talking quite awhile; and I got Greenwood out on one side and he said: "Burton, you can close the deal on that if you will accept fifty dollars commission." I turned to Gray and told him the trade was made.

He also testifies to the making of a deed by Gray and a check for \$200, which is shown to have been drawn on funds of his in a bank of Gage county, and that such deed and check were left with Mr. Burke, an attorney of Blue Springs for delivery to Greenwood upon his delivering a deed for the land he had agreed to give in exchange for that of Gray.

The testimony of Burton is corroborated by that of Gray and Greenwood himself. It is true that Greenwood

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claims that there is a failure to prove that Gray had title to the land conveyed by him. But his title to such land is not put in issue either by the pleadings or proof, and so far as appears it was good. No objection is made to payment of the \$200 due from Gray by his check and no doubt it was regarded as sufficient.

It is evident from the testimony that Burton has performed all the labor required of him in securing an exchange of the land in question and that Greenwood, after having entered into the contract, refused, without sufficient cause, to perform the same. The verdict and judgment therefore are right and are affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JAMES D. RUSSELL V. WILLIAM GRIMES, SHERIFF.

[FILED NOVEMBER 8, 1889.]

Sheriff: AMERCEMENT. Upon the case and evidence as set out at length in the opinion, *held*, that no ground of amercement is shown against the sheriff.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

S. P. Davidson, for plaintiff in error:

The motion for amercement should have been sustained upon the pleadings alone, as the answer contains no sufficient defense. (Code, 513, 891.) Plaintiff in error was induced to purchase Spicknall & Hassett's interest by the assurances and return of the sheriff; the latter is therefore liable to the amount thereof with interest. (Code, secs. 513, 515; *Crooker v. Melick*, 18 Neb., 229.)

A. M. Appelget, for defendant in error:

The sheriff's sale was not made subject to the prior foreclosed liens of Buffam and Harman (*Hapgood v. Ellis*, 11 Neb., 131); hence these should be paid first out of the proceeds, and plaintiff is entitled only to the remainder (*Tootle v. White*, 4 Neb., 403; *Buel v. Farwell*, 8 Id., 224); and after they were paid there would be nothing left to apply on the Spicknall & Hassett claim. The low price paid for the claim shows that all parties knew the state of affairs. Plaintiff in error has no standing in court save as the holder of the Buffam lien.

COBB, J.

This was a proceeding in the district court of Johnson county, brought by James D. Russell against William Grimes, sheriff of said county, for the purpose of amercing said sheriff for failing to bring into court or pay over to the said Russell the proceeds of a sale of real property made by said sheriff upon an order of sale issued in a certain action lately pending in the said court. Upon the trial of said proceeding and application for amercement the court rendered a judgment denying the same and for the costs of said proceeding against the said James D. Russell, who brought the said matter to this court upon error.

The error assigned, although stated in several somewhat different ways, only presents the question of the decision of the district court upon the evidence presented for and against the application and motion for amercement. It appears from the bill of exceptions that some time in the year 1887, or previous thereto, William R. Spicknall and William H. Hassett commenced an action in the district court of Johnson county against Sarah E. Ingraham, Austin W. Buffam, John S. Harman, James D. Russell, James D. Russell, trustee, Jacob Garria, and C. T. Bradley, the purpose and object of which action was to foreclose a cer-

tain mortgage executed by the said Sarah E. Ingraham to the said William R. Spicknall and William H. Hassett, upon lot 5 in block 40, in the city of Tecumseh, to secure the payment of one promissory note for the sum of \$600, with interest, executed to the said William R. Spicknall, and one promissory note for the sum of \$400, with interest, executed to the said William H. Hassett, and upon which notes it was claimed there was due—on the note executed to W. R. Spicknall the sum of \$600, together with interest thereon at the rate of ten per cent per annum from July 1, 1886, and upon the note executed to W. H. Hassett the sum of \$400, with interest at ten per cent per annum from the 1st day of January, 1887. The other defendants were made such for the purpose of foreclosing certain liens which they had or claimed to have upon said lot, but all of which, with the exception of one of the liens of James D. Russell, were claimed to be junior and subsequent to the lien of the said mortgage sought to be foreclosed.

An answer and cross-bill was filed in said action by the defendant, A. W. Buffam, setting up a mortgage executed by the said Sarah E. Ingraham to him for the payment of the sum of \$800, with interest at ten per cent per annum, dated March 28, 1883, upon which there was claimed to be due the sum of \$800, with interest thereon at the above rate from the 28th day of March, 1887, and which was claimed to be a prior lien upon a part of said lot to the lien of the plaintiffs in said action.

An answer in said action was also filed by the defendant, J. S. Harman, setting up a mortgage executed to him by the said Sarah E. Ingraham, upon a part of said lot and upon which there was then claimed to be due the sum of \$384.45 and interest thereon from January 1, 1887, and although the claim does not appear to have been made, the date of recording shows the lien of said mortgage to have been prior and senior to the mortgage lien of the said plaintiffs.

Russell v. Grimes.

Upon the above answers the parties probably went to trial, and a judgment of foreclosure and sale was rendered in favor of the plaintiffs in the said action, but the record does not show it. The next paper that appears in the bill of exceptions is a copy of a requisition upon the clerk of the district court of Johnson county, by the sheriff of said county, requiring him to certify under his hand and official seal the amount and character of all existing liens against the following described land and tenements, to-wit: Beginning at the west (?) corner of lot 5, in block 40, in the city of Tecumseh, Johnson county, Nebraska, running thence south 125 feet, thence east 66 feet, thence north 125 feet, thence west 66 feet to the place of beginning; together with the answer of said clerk to the said requisition, setting forth as the first lien upon the said lot the decree in favor of A. W. Buffam, for \$860 $\frac{1}{100}$, and interest at ten per cent from December 24, 1887; the second lien, the decree in favor of J. S. Harman for \$419 $\frac{2}{100}$, with interest at 10 per cent from December 24, 1887; the third lien, the decree in favor of W. R. Spicknall for \$750 $\frac{4}{100}$, and W. H. Hassett for \$440 $\frac{4}{100}$, both drawing interest at 10 per cent; fourth, judgment in favor of Jacob Garriss for \$500.58, with interest from December 24, 1887, at 10 per cent.

J. D. Russell testified that he purchased the decree in favor of W. R. Spicknall and W. H. Hassett, in the case of Spicknall and others against Sarah E. Ingraham and others; that he obtained assignments in writing for said decree, both from Spicknall and Hassett, both of which assignments were exhibited. He also testified that the proceeds of the sale in said case of Spicknall and Hassett against Ingraham had never been paid to him, and that he had applied to the sheriff, William Grimes, for such proceeds.

It appears from the bill of exceptions that J. S. Harman bid off the lot at sheriff's sale at the price or bid of \$1,100. It does not appear whether the purchase money

was ever paid or whether the sheriff ever executed a deed to Harman. It is supposed that he did, as Harman appears to have conveyed the lot, or that part of it which he purchased, to James D. Russell.

Now from the meager and unsatisfactory evidence furnished by the bill of exceptions the defendant in the foreclosure suit, J. S. Harman, whose claim amounting to \$419.20 and interest, swelling it to \$460, or thereabouts, was found to be the second lien on the property, bid it off at the sale. The sheriff, upon conveying the property to Harman, would, after satisfying his decree in full and paying the costs of suit and sale, hold the balance for A. W. Buffam, the holder of the first lien upon said lot involved in said foreclosure suit; and indeed by allowing the said Harman to retain the full amount of his lien out of his said bid, if he did, the sheriff laid himself liable to make a portion of it up to Mr. Buffam. If Mr. Russell did not buy out the interest of Mr. Buffam in the decree, which does not appear that he did, he has no claim on the sheriff for the said purchase money.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM S. AMOS v. JAMES F. TOWNSEND.

[FILED NOVEMBER 12, 1889.]

1. **Assumpsit: PAYMENT: PLEADING: EVIDENCE.** A. being the owner of a certificate of deposit for \$1,000, a check for \$900, and another check for \$81.78, placed the same in the hands of T. for presentation and collection, and, as a method of keeping an account thereof and of the money to be received thereon, took a promissory note from T. at thirty days for \$1,981.78. T. pre-

Amos v. Townsend.

sented the small check, which, after protest, was paid. Afterwards, and before the maturity of the note, T. returned the certificate of deposit and large check and paid the net proceeds of the small check to A., who received the same and delivered up the note to T. In an action by A. against T. for money had and received, *held*, that a plea of payment was unnecessary to let in proof of the above transaction as a defense.

2. **Evidence: REVIEW.** Upon the facts stated at length in the opinion, as to the second cause of action, *held*, that the record furnishes no ground for the reversal of the judgment.

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

J. Hall Hitchcock, for plaintiff in error :

Payment must be pleaded and is not otherwise admissible in evidence. (Bliss, Code Pleading, sec. 358; *Baker v. Kistler*, 13 Ind., 63; *Clark v. Mullen*, 16 Neb., 481; *Savage v. Aiken*, 21 Id., 605; *McKyring v. Bull*, 16 N. Y., 297.) In an action for money had and received and for services rendered, a general denial is inconsistent with evidence of payment. (*School District v. Holmes*, 16 Neb., 486; *Savage v. Aiken*, *supra*.) A cause should be submitted upon the issues raised by the pleadings, not upon incidental questions which may arise from the testimony. (*Tootle v. Maben*, 21 Neb., 617.) The position of the parties is an aid in construing a contract. (*Tootle v. Elgutter*, 14 Neb., 159; *Singer Mfg. Co. v. Doggett*, 16 Id., 609.)

Daniel F. Osgood, for defendant in error :

Plaintiff could not recover in this action unless the money had been converted; hence, under a general denial, evidence of payment was admissible without the latter being specially pleaded. (*Smith v. Jernigan*, 3 South. Rep. [Ala.], 515; *Phoenix, etc., Ins. Co. v. Walrath*, 10 N. W. Rep., 151; *Robinson v. Frost*, 14 Barb. [N. Y.], 536; *Edgerly v. Bush*, 16 Hun [N. Y.], 80; *Rost v. Harris*, 12 Abb.

Pr. [N. Y.], 446 ; *Stoddard v. Onondaga Conference*, 12 Barb. [N. Y.], 573 ; *Timp v. Dockham*, 32 Wis., 146.) The indebtedness here was not such as is referred to in cases cited by opposing counsel, and as there could have been no indebtedness without conversion, to require the plaintiff to plead payment would be requiring him to admit the conversion. The other questions in the case were for the jury and there was evidence to support their verdict.

COBB, J.

This is a proceeding in error from the county of Johnson.

The plaintiff in error complained of the defendant, in the court below, that he is indebted to him in the sum of \$81.73 for money had and received August 20, 1885, and then due and payable, with interest from February 20, 1886 ; and also the further sum of \$10, which the defendant agreed to pay him on July 20, 1888, as compensation for assistance in collecting an indebtedness due defendant from J. M. Rice, of \$50, rendered at his instance and request ; no part of said sums due plaintiff has been paid ; he prays judgment for the amounts, with interest on the first sum from February 20, 1886, as stated, and costs of suit.

The defendant answered : (1) denying each and every allegation set up ; (2) alleging that prior to the commencement of this suit he had paid the plaintiff in full of all claims which the plaintiff had ever held against him, and prays judgment for costs.

The plaintiff moved to strike from the defendant's answer the second cause of defense, for the reason that it presented a new and entirely different defense from that made in the county court below, where this action was instituted, which motion was sustained by the court and was excepted to by the defendant on the record.

There was a trial to a jury with verdict for the defendant, to which the plaintiff excepted, and moved the court

to enter judgment for the full amount of his claim, notwithstanding the verdict, for the reason that there is no evidence to sustain the verdict, and all the competent evidence was in favor of the plaintiff, which motion was overruled and the plaintiff excepted. Whereupon the plaintiff moved for a new trial upon errors assigned in his motion, which having been duly argued and considered, the motion was overruled and judgment was entered upon the verdict, to which the plaintiff duly excepted and brought the case to this court on the following errors :

1. The court erred in refusing to give the first paragraph of instructions requested by plaintiff and in giving the same as charged by the court.

2. In giving the second instruction requested by defendant.

3. In giving the second instruction by the court.

4. In overruling plaintiff's objection to any evidence by defendant touching payment under the pleadings.

5. In not rendering judgment for plaintiff, notwithstanding the verdict.

6. For errors of law excepted to on the trial.

7. The verdict is contrary to law.

8. The evidence is not sufficient to sustain the verdict.

9. In overruling the motion for a new trial.

Upon the first cause of action stated the plaintiff testified, as a witness, that about August 20, 1885, there was a check of \$81.78 which defendant had from him to collect; that he did collect that amount, and is still owing him the money; that he made demand of defendant for the money, and he said that he thought he had paid that money, but admitted he had received it. In answer to question put by his counsel, the plaintiff stated that there was due about the sum of \$81.78, and interest thereon.

A. B. Sanford, a witness for the plaintiff, testified that on August 20, 1885, he was employed as bookkeeper in the Bank of Sterling; that some time in August, 1885, the de-

fendant brought to the bank a check for an amount, something over eighty dollars; that witness took it to the Johnson County Bank, and demanded payment, which was refused, and witness caused the check to be protested; that on the following day the check was paid by the Johnson County Bank, and witness opened up a new bank account with defendant, giving him credit for the balance of the check, less the fees of protest, leaving something like \$79 to defendant's credit, which he subsequently checked out. On cross-examination the witness stated that there was another check, or certificate of deposit, presented and protested.

The defendant testified, as a witness in his own behalf, that the only money transaction he had ever had with the plaintiff was some checks and certificate of deposit, which he had received for collection, on the Johnson County Bank; that these consisted of a certificate of deposit of \$1,000, one check of \$900, and one of \$81.78 received in the month of August, 1885, all at the same time; that he placed them in the bank of Sterling for collection, and that bank presented them, and they were protested, the witness thought, all on the same day. In answer to the question, "Were they all in one transaction?" the witness answered, "In one transaction; yes." I further quote his testimony from the bill of exceptions:

Q. What paper, if any, did you give on receiving the checks and certificate?

Over the objection of the plaintiff he answered: I gave him my note for the amount of the paper received.

Q. [Handing the witness defendant's Exhibit A.] Is that the note?

A. Yes.

Q. By the court: Is that note you have there and are now offering in evidence the note you say you gave the plaintiff in payment for these checks?

A. I gave him this note as a sort of receipt, or as some-

thing to show that I was indebted to him for these papers received.

Q. By Osgood: You may state why it was made in the shape of a note instead of a receipt, if any reason was given you at the time.

Over the objection of the plaintiff he answered: Mr. Amos demanded a note.

Q. For what reason did he demand it, if for any?

A. He wanted me to be the owner of these papers, if any of his creditors garnisheed them.

Q. That was the object of giving a note instead of a receipt?

A. Yes.

Q. What did you do with these checks after you had them protested, if anything?

A. After they were protested, there was one of them, the smallest one, paid; but the bank still refused to pay the other larger one, and after a few days the plaintiff thought he might as well take them up as to have any litigation, and he took the certificate and check back and the money, less the protest fees, some \$6 and some cents. * * *

The witness having produced a memorandum book containing minutes, entered by him at the time of the transaction, and being directed to refresh his memory and state to the jury when and what was done, stated: August 15, 1885, received of Wm. S. Amos & Co. check and certificate amounting to \$1,981.78 and gave my note for them.

Q. Did that include the \$81.78 check?

A. Yes. * * *

Q. What is the next transaction in regard to this?

A. August 24, turned back to Amos the certificate and check amounting to \$1,900, and the money proceeds of the check for \$81.78 less the protest fees.

Q. Give the amount of the protest fee.

A. Six dollars and eighty-five cents.

Q. State whether there was anything done with the note you had given Amos at that time.

A. He gave me back my note.

Q. He gave you back this note? (Defendant's Exhibit A.)

A. Yes.

Q. Was that memorandum made on the face of the note at the time you took it up?

A. Yes.

Q. By you?

A. Yes.

Q. And you turned back to him what money you collected less the protest fees?

Over the plaintiff's objection he answered: Yes, I paid him all the money received by me, less the protest fees.

Q. Did you ever have any other money from him?

A. No.

The defendant's Exhibit A referred to, attached to the bill of exceptions, appears in the words and figures as follows:

"\$1,981.78. STERLING, NEB., August 15, 1885.

"Thirty days after date I promise to pay to the order of W. S. Amos & Co. nineteen hundred and eighty-one and $\frac{7}{100}$ dollars, at ———, value received.

"J. F. TOWNSEND."

[Signature erased.]

Indorsed across the face: "Canceled August 25, 1885. Chks. & cerf. returned, \$1950; cash, \$74.93; protest fees, \$6.80."

This cause of action is set out in the petition in the old form of a common count in assumpsit for money had and received, to which the defendant answered by a general denial.

Upon the trial the plaintiff among other instructions presented that of the first paragraph given by the court to the jury, "That if from the evidence you find the defend-

ant received the money complained of by the plaintiff in his first cause of action, you will find for the plaintiff, as to this cause of action, allowing interest thereon from the 20th day of February, 1886, at 7 per cent;” to which the court added: “unless you further find from the evidence that defendant has repaid the same to the plaintiff;” to the giving of which, as charged by the court, the plaintiff excepted, and now assigns this action of the court as error for review. As a matter of strict law, the instruction presented by the plaintiff was erroneous and was inapplicable to the evidence adduced to the court and jury; for while from the evidence it did appear that the defendant at one time received the amount of money stated in the petition, for which he was abstractly accountable to the plaintiff, yet he was not accountable to him in law for money had and received, if his testimony was to be taken as true. The jury should have been instructed that if they believed the evidence of the plaintiff, and disbelieved that of the defendant, then they should find for the plaintiff; but if, on the contrary, they believed that of the defendant and disbelieved that of the plaintiff, they should find for the defendant. It was obvious that the testimony of both could not be true; and it was the duty of the jury to accept that only which was in their opinion the most worthy of belief, and of which they were the sole judges. The instruction as modified by the court was but little less objectionable, as it was predicated upon the assumption that there had been at one time an admitted cause of action, and it was only to be left to the jury to say whether it had been paid, or was then unsatisfied; while, upon the theory of the defendant’s evidence, there never had been a cause of action, as it appears that the note had been given up to the defendant and canceled before it matured, and that the claim for \$81.78, declared on by plaintiff, was included in the note.

But the plaintiff having presented this instruction, as he could not have assigned for error the refusal to give it had

it been refused, cannot assign as error the giving of it as changed, by the court. This disposes of the first cause of action.

Upon the second cause the plaintiff further testified that the defendant came to him, on the street, July 20, 1888, and said that Rice had stated to him that he (the plaintiff) owed him (Rice) about \$50, or more than that, and that Rice owed defendant \$50 and if plaintiff would pay that amount to him (Rice) and help him to collect that, that he would give plaintiff a bonus of \$10 for doing so; that he could not get the money from Rice until Rice should get it from plaintiff, and would rather give ten dollars than to have it lie; that plaintiff immediately went to Rice to get the amount between them adjusted, and had to give several dollars to get a settlement, more than he really owed him, thinking that the ten he was to get through the defendant would compensate him, and he would not be a loser, and he did not care for the ten, so long as he was kept whole. The plaintiff informed Rice of the conversation with the defendant, in pursuance of which Rice gave an order to Hitchcock to collect that money from plaintiff and pay it over to defendant, and plaintiff paid it to Hitchcock for Rice upon the order, and Hitchcock paid it to defendant, whereupon plaintiff demanded his bonus of \$10, and the defendant refused to pay it.

J. M. Rice was sworn and examined as a witness for the defendant, and stated that he was acquainted with the parties to this suit; that he had had an account against the plaintiff which was collected for him by Hitchcock, amounting to \$50, and witness thought \$14 additional, amounting in all to \$64. Being asked how much was his account against the plaintiff, he answered: "When we first went to settle it was \$90, but he had paid me \$40 and afterwards paid to Hitchcock \$50." I further quote from his testimony:

Q. Did you have to pay Hitchcock for this collection?

A. I did.

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Q. Were you owing defendant at that time?

A. Yes.

Q. Did plaintiff collect or assist in collecting any money from you for defendant?

A. Not that I know of.

Q. Did he say anything about collecting it for defendant?

A. No, he said he would pay me then.

Q. So you received it in the attorney's hands?

A. Yes.

Q. And it was paid after you left it in the attorney's hands?

A. Yes.

Q. State whether or not you had the plaintiff's horse in your possession and refused to give it up until the account was settled with you.

A. I did.

There thus appears to have occurred a conflict of the testimony involving the entire transaction of the second cause of action. Without expressing an opinion as to which party has the preponderance and weight of evidence, it is deemed sufficient to say that there was such evidence before the jury as to warrant them in returning their verdict against the plaintiff in respect to the second as well as the first cause of action alleged.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

ELIZA K. TARKINGTON V. HARVEY LINK.

[FILED NOVEMBER 12, 1889.]

1. **Ejectment: PARTIES.** In an action of ejectment to recover the possession of real estate all occupants of the premises must be made defendants, to be concluded by the judgment unless some of such occupants are so in privity with one or more co-defendants that a judgment against such co-defendant will be conclusive upon them.
2. ———: **EVIDENCE: INJUNCTION.** A recovered judgment in ejectment against B for the possession of certain real estate and thereupon caused a writ of restitution to be issued against B & C; C thereupon filed a petition in the case, in which he alleged in substance that he was in possession of the premises adversely to the plaintiff when the action was brought but was not made a party defendant, and that he was still in possession, and asking the court to restrain the plaintiff from ousting him from the estate. *Held*, That the proof sustained the finding of the court below in favor of the injunction, and that C could not be divested of his possession without a trial, and judgment to that effect.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

W. J. Connell, for plaintiff in error.

James W. Savage, for defendant in error.

MAXWELL, J.

Prior to the year 1883 the plaintiff recovered a judgment in ejectment for the possession of certain real estate in Douglas county. The case was brought on error into this court, where on motion the proceedings in error were dismissed. (*Hollenbeck v. Tarkington*, 14 Neb., 430.) Upon the issuing of a mandate to the district court a writ of restitution was duly issued by that court against Hollenbeck and one Link, who was not made a defendant, and

placed in the hands of the sheriff of that county. Thereupon Link filed a petition to intervene in the case, as follows:

"Harvey Link, being duly sworn, says that the decree heretofore made in this case was affirmed by the supreme court, and upon the filing of the mandate in this court a writ of restitution has been directed to the sheriff of this county; that under said writ the said sheriff now proposes and threatens to evict this deponent from the premises in the petition in this cause described.

"And deponent further says that he is the owner and entitled to the possession of the said premises; that he was not a party to the above suit and his title was not adjudicated therein; that he has had possession of said premises ever since the 13th day of June, 1870; that his title is in no way derived from the said Hollenbeck, and his possession of the said premises has been alike adverse to the plaintiff and the said defendant; that his possession has been absolutely without collusion with said Hollenbeck, or with any of his attorneys in any way, directly or indirectly; that in case the sheriff shall evict him from said premises, he will be deprived of his day in court and have no opportunity to maintain his title.

"And deponent, in support of his allegations above made, refers to the various deeds on record in this county and the proceedings of this court."

This was supported by a large number of affidavits in favor of and against said application, and on the hearing on the 20th day of August, 1887, the court made an order denying the petition of said Link. Afterwards a motion to reopen, vacate, and set aside the order was sustained, and on the 21st day of April, 1888, the court entered an order as follows:

"On this day came on to be heard the motion of Harvey Link, that the order in the above entitled cause, made on the 20th day of August, 1887, be set aside, the same having been heretofore argued and taken under advisement.

"Whereupon it is now ordered that said motion be sustained and that the said order be and hereby is set aside and vacated, to which the plaintiff excepts.

"And it is further ordered that the said plaintiff have until Saturday morning next to file affidavits in reply to those filed by said Link herein; and that the motion of the plaintiff filed June 16, 1887, to vacate the restraining order made by Judge Neville, may be heard during this term of court by consent, or upon twenty-four hours' actual notice by either party, to which orders, and each thereof, the said plaintiff excepts.

"It is further ordered that said plaintiff have forty days from the final adjournment of the present term of this court, within which to prepare a bill of exceptions."

There is a sharp conflict in the affidavits in the case upon the question of the date of possession of Harvey Link. The affidavits filed on his behalf show that he was in possession of the premises before and at the time the action was brought, while those filed on behalf of the plaintiff in error assert that such possession was taken while the action was pending. This being the state of the proof, it is impossible for this court to say that the court below erred in sustaining the injunction. In our view, however, the holding of the court is in accord with the weight of the evidence.

The question is one proper to submit to a jury to determine all the facts of the case under instructions of the court.

In ejectment, the general rule is that all parties in possession of the land must be joined as defendants, in order that the judgment may be conclusive upon all. If this were not so, a party claiming the title to land might join as defendant one who as against him possessed no right whatever, and upon recovering judgment against such person proceed to oust others whose title was superior to his. This the law will not permit. Every person, before he can be divested of a right, must have his day in court.

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No person can be condemned unheard, or his property taken from him without making him a party to the action. Therefore, in an action of ejectment, when a party is in possession of the premises when the action is brought, he must be made a party or he will not be bound by the judgment unless he is so in privity with a co-defendant that a judgment against his co-defendant will be conclusive on him. This does not appear to be the case here. The plaintiff was not entitled to a writ of restitution against Link, but should restrict the same to the defendant in the ejectment proceedings. The injunction in the case, however, will not prevent the plaintiff herein from bringing an action of ejectment against Link and submitting all the facts as to the possession of the parties to a jury and procuring, if he can, a judgment for the possession of the premises. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

LAFAYETTE D' GETTE V. AMSDELL SHELDON.

[FILED NOVEMBER 12, 1889.]

1. **Taxes: LIENS: LIMITATION.** Under the revenue law of 1879, an action to foreclose tax liens must be brought within five years after the expiration of the time to redeem. (*Helphrey v. Redick*, 21 Neb., 80; *Parker v. Matheson*, Id., 546.)
2. ———: ———: **TITLE BY ADVERSE POSSESSION.** Under the aforesaid law a person who has been in the open, exclusive, notorious, adverse possession of real estate for ten years, thereby acquires an absolute title free from the liens of any taxes which existed on said property prior to the commencement of said period of ten years.

27	829
30	736
27	839
33	291
33	339
33	747
27	829
36	302
27	829
38	814
27	829
41	276
27	829
43	497
27	829
54	16

3. ———: ———: STATUTE CONSTRUED. The provision of the statute declaring taxes to be a "perpetual lien" upon real estate must be construed with reference to those provisions providing for redemption of the land sold, within two years from the date of sale, and for a tax deed if desired, and the time in which an action to foreclose the lien may be brought. It was not intended to continue a tax lien in force after the remedies to enforce it had ceased.

APPEAL from the district court for Otoe county. Heard below before CHAPMAN, J.

C. W. Seymour, for appellant:

The acts of 1875 and 1879, providing for the foreclosure of tax certificates, cannot apply here, as they would cut off a claim existing at the time of their passage without allowing a reasonable time to bring an action. (Wood, Limitations, sec. 11; *Horbach v. Miller*, 4 Neb., 31; *Morford v. State*, 24 Pa. St., 92; Boone, Code Pleading, sec. 69.) The five-year limitation is not available in this case, as it was not pleaded. (*Bowman v. Mallory*, 14 Ind., 424; *Tootle v. Clifton*, 22 O. St., 249; *Taylor v. Courtnay*, 15 Neb., 196; *A. & N. R. Co. v. Miller*, 16 Id., 661.) The statute does not begin to run until the title acquired by the tax deed fails. (*McClure v. Warner*, 16 Neb., 446; *Bryant v. Estabrook*, Id., 217; *Baldwin v. Merriam*, Id., 199; *Schoenheit v. Nelson*, Id., 235; *Merriam v. Hemple*, 17 Id., 345; *Otoe County v. Mathews*, 18 Id., 466; *Lammers v. Comstock*, 20 Id., 341.) Taxes are a perpetual lien (*Holmes v. Andrews*, 16 Neb., 298); and mere technical irregularities should not be allowed to defeat the latter. (*Stockle v. Silsbee*, 41 Mich., 615; *Otoe County v. Brown*, 16 Neb., 399.) A tax purchaser at a void sale, who pays the taxes for subsequent years, will be, to that extent, subrogated to the rights of the county (*Merriam v. Hemple*, *supra*); may add all such payments to his purchase (*Schoenheit v. Nelson*, *supra*); is entitled to a judgment for the same, with an attorney's fee of ten per cent, (*Towle v. Shelley*, 19 Neb., 632); and to

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the highest rate of interest, if the proceedings are regular up to the issuance of the tax deed. (*Sullivan v. Merriam*, 16 Neb., 157; *Baldwin v. Merriam*, Id., 199.)

Frank T. Ransom, John C. Watson, and George D. Schofield, for appellee:

A tax deed, though void on its face, gives color of title sufficient so that under it adverse possession will operate as a bar. (Black, Tax Titles, 378; *Gatling v. Lane*, 17 Neb., 82; *Bartlett v. Kauder*, 11 S. W. Rep. [Mo.], 67; *Hacker v. Horlemus*, 41 N. W. Rep. [Wis.], 965.) There is a distinction between an action by a tax purchaser, as in this case, and one by a land owner to set aside an illegal tax sale, the latter being allowed greater privileges. (*McNish v. Perrine*, 14 Neb., 584, and cases cited.) *Wygant v. Dahl*, 26 Neb., 562, relied on by counsel for appellant, was an action by a land owner, and the court applied the maxim that "he who seeks equity must do equity." Here appellant, by allowing appellee to enter and make valuable improvements, and not seeking to enforce his claim, failed to do equity.

MAXWELL, J.

This is an action to foreclose a tax lien. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action. The plaintiff alleges in his petition that "the defendant, Amsdell Sheldon, is the owner of certain real estate described as follows: the north half of the northeast quarter of section 1, township 9, range 12, lying and being in Otoe county, state of Nebraska; that the said real estate was subject to taxation for the years 1861, 1862, 1863, 1864, 1865, 1866, 1867, and was duly and legally assessed and valued for taxation for the said years, and for each of said years; that the taxes for each of the said years were duly levied thereon; that

they were not paid for each or for any of the said years 1861, 1862, 1863, 1864, 1865, 1866, 1867, by the owner and occupant of the said real estate, to whom they were assessed and taxed, but became delinquent; that they were unpaid after delinquency until the date of the sale of the said real estate for the delinquent taxes for the said years and each of said years; that the said real estate was duly and legally advertised for sale for the non-payment of the delinquent taxes thereon for the said years at the time and in the manner required by law, and that the said real estate was duly offered for sale for the taxes for the said years and for each of the said years, and was unsold for the want of bidders at public sale; that due return was made to the office of the county clerk of Otoe county, state of Nebraska, by the said treasurer of the said county, of the lands and lots sold by him at public sale, within the time required by law; that the said real estate was sold at public sale at the county treasurer's office, in the said Otoe county, state of Nebraska, for the delinquent taxes thereon for the said years 1861, 1862, 1863, 1864, 1865, 1866, 1867, to Dwight J. McCann, on the 7th day of September, A. D. 1868, who received a certificate of tax sale therefor for each of the said years of the said date, and paid therefor for the year 1861, \$2.15; for the year 1862, \$5.80; for the year 1863, \$5.19; for the year 1864, \$5.68; for the year 1865, \$12.70; for the year 1866, \$7.71; for the year 1867, \$5.88; certificate, stamp, and com., \$2.85; total, \$47.91; said certificate of tax sale numbered —; that on the — day of —, A. D. 1874, the said Dwight J. McCann for a valuable consideration did sell and assign all his right, title, and interest in and to the said tax certificate to this plaintiff, who is now the legal owner and holder of the same. This plaintiff says that he has not produced the said certificate or surrendered the same to the said county treasurer of Otoe county, state of Nebraska, and demanded a tax deed for the said real estate for the said

delinquent taxes, for the reason that the said tax deed would be invalid and fail to convey to this plaintiff the legal title to the said premises to this plaintiff; that though he is not entitled to the legal title of the said premises, he is yet entitled to a perpetual lien upon the said premises for the taxes as aforesaid duly and legally assessed and levied on the said real estate for the said years 1861, 1862, 1863, 1864, 1865, 1866, 1867, and paid by him thereon for each of the said years, with interest on each of the said sums paid by him as and at the time hereinbefore set forth, at the rate of forty per cent per annum, for the period of two years from each of the said dates, at which the same were paid at the rate of twelve per cent per annum thereafter, and to the finding of this court of the amount due, and the allowance of this court of an attorney's fee of ten per cent of the amount found due, and to the decree of this court enforcing said lien for taxes, interest, attorney's fee, and the costs of this action upon and against the said real estate and foreclosing said perpetual lien therefor upon and against the said real estate in the manner of foreclosing mortgages and to an order of sale of the said real estate, to pay and satisfy the said perpetual lien for taxes, interest, attorney's fee, and the costs of this action," etc.

The defendant in his answer alleges that he purchased the land in question at tax sale, for the years 1870, 1871, 1872, and that on the 4th day of September, 1873, he obtained a tax deed from the treasurer of said county for said land, under the tax sale thereof, for the year 1870, which deed was duly recorded, and that the defendant entered into the possession of said land and has since paid all taxes thereon, and has been in the open, exclusive, notorious, adverse possession of said premises to the present time.

The facts stated in the answer are denied in the reply.

Section 180 of the revenue law of 1879 provides that "If the owner of any such certificate shall fail or neglect either to demand a deed thereon, or to commence an action

for the foreclosure of the same, as provided in the preceding sections, within five years from the date thereof, the same shall cease to be valid or of any force whatever, either as against the person holding or owning the title adverse thereto, and all other persons, and as against the state, county, and all other municipal subdivisions thereof."

The construction of the above section was before this court in *Helphrey v. Redick*, 21 Neb., 80, and it was held on the facts in that case that the action was not barred, as five years had not elapsed within which an action could be brought. In *Parker v. Matheson*, 21 Neb., 546, the question was again before the court, and it was held that the action was barred. In the latter case the sale took place on the 5th day of February, 1878, and the action to foreclose the lien was instituted February 21, 1885. It is said: "At the time of the sale the law of 1875 (Laws 1875, 107) was in force, but the act of 1879 must apply to the foreclosure wherein the former act has been changed or amended. It is urged that a material difference in the two acts is that, by the act of 1875, the foreclosure might be had notwithstanding the tax deed, and by the act of 1879 he is entitled to foreclose instead of demanding a tax deed. This is true, but he could not demand a tax deed until after the expiration of the two years; therefore the landowner had that time within which he could redeem, without consulting the purchaser, and the right to foreclose did not accrue until the right to redeem by the payment of the money to the treasurer ceased. Under the rule stated in *Helphrey v. Redick*, *supra*, the statute began to run February 6, 1880. Five years from that time the cause of action would be barred."

It was the evident intention of the legislature to limit the time in which to bring an action for the foreclosure of tax liens to five years from the time the cause of action accrued. This is in conformity to the general purpose of the statute of limitations—that stale claims shall be

barred. The whole tenor of the legislation of this state has been in favor of the repose of titles to real estate after a fair opportunity has been given any party claiming an adverse interest therein to assert his claim thereto. Hence an action for the possession of real estate must be brought in ten years, otherwise it is barred. This gives security to titles, and is designed to be and is a statute of quiet enjoyment. The statute in effect says to every one, here is a party in possession of real estate as owner. If you dispute his claim you must assert your rights in the courts within the period fixed by law or the doors of the courts will be closed against you. This applies to every one. The law does not distinguish between claims and claimants, but gives to the adverse occupant for ten years an absolute title in fee. In many cases no doubt taxes upon real estate are paid by the land owners and the tax receipts lost or mislaid, so that it would be impossible after the lapse of twelve years or more to prove the fact. A party knowing that he has paid his taxes, and relying upon the presumption that the treasurer would do his duty and enter the payment of the tax on his record, could not be expected to take the same care of his tax receipts that would be expected of papers that he might be required to produce at any time.

But it may be said that the statute declares taxes upon real estate to be a "perpetual lien" and therefore they can be enforced at any time. This provision of the statute, however, is to be construed in connection with that providing for a sale of the land at a specified time for the taxes due, and if not redeemed after notice to that effect within two years thereafter, then the tax purchaser may either take a tax deed or foreclose his tax lien. In either case, if he seeks the aid of a court of equity to enforce his lien, he must do so in five years. The word "perpetual," therefore, was not intended to continue the delinquent taxes in force against real estate after the statute has barred a

right of action thereon. The lien conferred by the statute is fixed upon the land itself and is primary, overriding all other liens, since a sale thereunder if duly made would extinguish all other claims, and the word "perpetual" seems to be used in that sense. Upon the whole case it is apparent that the action is barred and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JOHN B. KEEDLE V. SUSAN R. FLACK.

[FILED NOVEMBER 12, 1889.]

Real Estate Mortgage: ASSUMPTION BY VENDEE: ACTION BY MORTGAGEE. Where a land owner sells real estate upon which he has given a mortgage and the purchaser as part of the consideration assumes the mortgage debt and agrees to pay the same, the mortgagee, after the debt becomes due, may bring an action against the purchaser and recover the amount due thereon. (*Foss v. Cooper*, 15 Neb., 516; *Shamp v. Meyer*, 20 Id., 223.)

ERROR to the district court for Hamilton county. Tried below before NORVAL, J.

Bowen & Hoepfner, for plaintiff in error:

A mortgagee cannot, by an *action at law*, enforce the promise of a third party who assumes the mortgage debt; such promise is primarily for the benefit of the original debtor, and he alone has the right of action. (*National Bank v. Grand Lodge*, 98 U. S., 123; 1 Jones, Mortgages, sec. 761 (b); *Booth v. Ins. Co.*, 43 Mich., 299; *Hicks v. McGarry*, 38 Id., 667; *Higman v. Stewart*, Id., 513; *Unger v. Smith*, 44 Id., 22; *Stuart v. Worden*, 42 Id., 154; *Mellen v. Whipple*, 1 Gray [Mass.], 317; *Locke v. Homer*, 131

27 836
45 812
27 836
50 461
50 520
52 402
54 569
27 836
58 417

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Mass., 93; *Pettee v. Peppard*, 120 Id., 522; *Bank v. Rice*, 107 Id., 37; *Prentice v. Brimhall*, 123 Id., 291; *Crowell v. Hospital*, 27 N. J. Eq., 650; *Klapworth v. Dressler*, 13 Id., 62.) It cannot be urged that there was a novation, as the original promisors were joined in the action below. Defendant in error's recourse is to a foreclosure in equity, in which case plaintiff in error might be a *proper*, though he would not be a *necessary*, party.

Agee & Stevenson, for defendant in error :

A third party, for whose benefit a promise has been made, can maintain an action thereon, though the consideration does not move directly from him. (*Shamp v. Meyer*, 20 Neb., 223; *Bond v. Dolby*, 17 Id., 491; *Morgan v. Mining Co.*, 37 Cal., 534; *Helmes v. Kearns*, 40 Ind., 124; *Johnson v. Knapp*, 36 Ia., 616; *Anthony v. Herman*, 14 Kas., 494; *McDowell v. Laer*, 35 Wis., 171; *Saunders v. Classen*, 13 Minn., 379; *Bay v. Williams*, 1 N. E. Rep., 340.) In *Follansbe v. Menage*, 9 N. W. Rep., 882, and *Thompson v. Thompson*, 4 O. St., 333, it is expressly held that the mortgagee may maintain an action *at law*.

MAXWELL, J.

This action was brought by defendant in error against James M. Miller, Emma Miller, John B. Keedle, John W. Harris, A. R. Hoagland, and A. Veith, upon a promissory note executed and delivered on the 12th day of March, 1888, by James M. Miller and Emma Miller, to A. W. Agee and Wm. J. Stevenson, for the sum of \$648, due eight months after date, with interest at the rate of ten per cent per annum from date until paid.

At the time of the execution and delivery of said note, defendants Miller and Miller, to secure the payment of said note, executed and delivered to Agee & Stevenson a mortgage upon certain real estate in the city of Brownville, Ne-

maha county, Nebraska. The petition alleges that the note was subsequently assigned for value to the plaintiff. The petition, after setting out the note, states that a mortgage was given to secure the payment of the same, and the conditions of the mortgage, etc. It is alleged that "on the 25th day of September, 1888, the said James M. Miller and Emma Miller, his wife, sold and conveyed the premises above described to the defendant, John B. Keedle, for the sum of \$4,000, and that as part payment of said consideration the said John B. Keedle assumed and agreed to pay the note and mortgage hereinbefore described, said agreement being written in the deed of conveyance of said premises, and is as follows, to-wit: 'And we do hereby covenant with the said John B. Keedle, and his heirs and assigns, that we are lawfully seized of said premises except a mortgage of \$648, and interest thereon from March 12, 1888, and the grantee assumes and agrees to pay said mortgage and interest as a part of the consideration.' Said deed, containing said agreement on the part of the said John B. Keedle, was duly executed, witnessed, and acknowledged, and delivered to him and he caused the same to be filed and recorded in said county of Nemaha.

"Afterwards the said John B. Keedle and his wife, Mary R. Keedle, sold said premises to the defendant, John W. Harris, and the said John W. Harris, as a part of the consideration for said premises, assumed and agreed to pay the note and mortgage hereinbefore described, with interest thereon, and by direction of the said John W. Harris the said John B. Keedle, and his wife, Mary R. Keedle, made, executed, and delivered to the said A. R. Hoagland a deed of conveyance, which contained the following provision, to-wit: 'And we do hereby covenant with the said A. R. Hoagland, and his heirs and assigns, that we are lawfully seized of said premises; that they are free from incumbrance except a mortgage of \$648 and interest thereon from March 12, 1888, and the grantee assumes and agrees to pay said

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mortgage and interest as a part of the consideration herein, which said deed was duly witnessed and acknowledged, and recorded in the deed records of said county of Nemaha; and the plaintiff alleges that said conveyance from said John B. Keedle and Mary R. Keedle to said A. R. Hoagland was made for the use and benefit and in trust for the defendant, John W. Harris, who was, after the making of said conveyance, the real owner of said premises, and who, in fact, assumed and agreed to pay said mortgage and note as a part of the consideration for said deed of conveyance and for the property therein described.

"Plaintiff further alleges that afterward the said John W. Harris sold said premises to the defendant A. Veith, and caused a deed of conveyance of the same to be duly executed and delivered to said A. Veith by the said A. R. Hoagland, which said deed of conveyance was duly witnessed and acknowledged, and in consideration of such deed of conveyance, and as part of the consideration for said premises, the said A. Veith expressly assumed and agreed to pay the note and mortgage hereinbefore described.

"The plaintiff says that said A. Veith has retained said deed of conveyance and claims to be the owner in fee simple of said property, but has never caused his deed of conveyance to be recorded in said Nemaha county."

In *Cooper v. Foss*, 15 Neb., 515, it was held that the purchaser of mortgaged property, who, as a whole or part consideration for such purchase, agrees to pay off the mortgage, may be sued upon default of such payment by a holder of the mortgage, and in case there was a deficiency after applying the mortgaged property to the payment of the debt, he would be liable for such deficiency. That case was decided after a full examination and consideration of all the reported decisions for and against the proposition. The rule thus adopted, in our view, is the correct one. A mortgagor sells the mortgaged premises to a third party

who, as a part or the whole of the consideration, agrees to pay the debt due the mortgagee. The agreement is to pay the whole debt, not a part thereof. Where there is no fraud the purchaser has received the entire consideration for the performance of the contract. He has assumed a liability directly to the mortgagee to pay the indebtedness. The mortgagee may proceed on such promise directly against him who has assumed the burden. It does not lie in the mouth of such promisor to say "I did assume the debt sued on and have received the consideration therefor, but I will not perform at the suit of the mortgagee as there is no privity between us." The right of the mortgagee to recover is not based on the privity of contract between the plaintiff and defendant, but on the fact that a contract has been made between the original debtor and a third party, whereby such third party, for a sufficient consideration, takes the property mortgaged and assumes the burden thereon. This contract the creditor may avail himself of and bring an action directly against the person thus assuming the debt. (*Shamp v. Meyer*, 20 Neb., 223; *Miliani v. Tognini*, 7 Pac. Rep., 279; *Lawrence v. Fox*, 20 N. Y., 268; *Farley v. Cleveland*, 4 Cow., 432; S. C., 9 Id., 639; *Merriman v. Moore*, 90 Penn. St., 80; *Putney v. Farnham*, 27 Wis., 187.)

It is probable that different grantors are liable in their order as sureties for the person last assuming the debt, but we need not determine that question.

Where a party purchases mortgaged property and assumes the mortgage debt, it is of the utmost importance to him that payments made on the debt be applied in satisfaction thereof. Payments might not be so applied if made to the mortgagor instead of the mortgagee.

The plaintiff in error admits that in an action in equity to foreclose the mortgage the right of the plaintiff below to maintain the action would be perfect, but it is contended that a different rule prevails in an action at law. Cases

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arising in states where the common law procedure prevails may be found sustaining this view, but the reasons therefor do not apply under the Code in which the distinctions between actions at law and suits in equity are abolished.

It is evident that the petition states a cause of action and the judgment in favor of the plaintiff below is right and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

27	841
36	860
37	841
50	873

ALDEN B. ATKINS V. HELEN C. GLADWISH.

[FILED NOVEMBER 13, 1889.]

1. **Pleading.** The issue in a cause having been made up, a trial had with a verdict and judgment for the plaintiff, a writ of error trial and reversal in the supreme court, and mandate to the district court, on the second day of the next term of said court the defendant applied to the court for leave to withdraw his answer for the purpose of moving an order requiring the plaintiff to make her petition more definite and certain, which leave was refused, except upon the condition that the defendant would agree to be ready for trial on the following morning: *Held*, That such condition was within the discretion of the court.
2. —: **INDECENT ASSAULT.** The words in the petition in an action for damages for an indecent assault, "Did then and there assault the plaintiff with foul and indecent purpose to do violence to her person and by force and intimidation to criminally know her, the said plaintiff," etc., after verdict, *held* sufficient.
3. **Witnesses: CREDIBILITY: INSTRUCTIONS.** An instruction in the following language, "If the jury believe that any witness in this case has knowingly sworn falsely to any material matter in this case, then you are instructed that this would justify you in disregarding the testimony of such witness entirely," approved.
4. **Evidence: INSTRUCTIONS.** Where, upon a trial, one witness testifies to a certain fact material to the issue, it is not error for the court to instruct the jury as to the law arising upon such fact, although such fact may be denied by other witnesses.

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

J. Hall Hitchcock, and *E. W. Thomas*, for plaintiff in error :

The petition was fatally defective in alleging an assault merely and not traversible facts. (1 Hilliard on Torts [3d Ed.], 179; *Stivers v. Baker*, 9 S. W. Rep. [Ky.], 491; *B. & M. R. Co. v. Kearney County*, 17 Neb., 515; *Thomson v. Stetson*, 15 Id., 112; *O'Donohue v. Hendrix*, 13 Id., 257; *Farrar v. Triplett*, 7 Id., 240; *Bell v. Sherer*, 12 Id., 409.) As to the ninth instruction: *Buffalo County v. Van Sickle*, 16 Neb., 363; *Blanchard v. Pratt*, 37 Ill., 246; *Yundt v. Hartrunst*, 41 Ill., 10; *Goeing v. Outhouse*, 95 Ill., 347; *Crabtree v. Hagenbaugh*, 25 Ill., 240; *McCraney v. Crandall*, 1 Ia., 117; Wharton, Ev., secs. 412, 1080; 86 Am. Dec., 331, N.; *Pease v. Smith*, 61 N. Y., 483; *Nelson v. Voree*, 55 Ind., 458; *Mack v. State*, 48 Wis., 286; *State v. McCartney*, 17 Minn., 64; *Schuck v. Hagar*, 24 Minn., 39.) The eighth instruction must have misled the jury. (Sacketts, Instructions, p. 19; 2 Thompson on Trials, sec. 2295; *Bradley v. Coolbaugh*, 91 Ill., 148; *Smathers v. State*, 46 Ind., 447; *Paine v. Kohl*, 14 Neb., 581.) The testimony as to the feud in the district should have been admitted. (*Jacobs v. Shorey*, 48 N. H., 100; *Drew v. Wood*, 6 Fost. [N. H.], 363. As to misconduct of plaintiff's attorney: *Bolar v. Williams*, 14 Neb., 388; *Cropsey v. Averill*, 8 Neb., 160; *Fitzgerald v. Fitzgerald*, 16 Neb., 415; *Carr v. State*, 23 Neb., 761; *Smith v. People*, 8 Colo., 457.

Lamb, Ricketts & Wilson, and *A. E. Howard*, for defendant in error :

By pleading to the petition, the right to have it made more definite and certain was waived. (*Fritz v. Grosnicklaus*, 20 Neb., 413; *Bell v. Sherer*, 12 Id., 409.) The ob-

jection should have been in the form of a demurrer. (*Stivers v. Baker*, 9 S. W. Rep. [Ky.], 491; *Roberts v. Taylor*, 19 Neb., 188.) As to the ninth instruction: *Dell v. Oppenheimer*, 9 Neb., 457; *Gandy v. Pool*, 14 Id., 101; *State v. Shelledy*, 8 Ia., 489; *Minick v. People*, 8 Colo., 452; *Liddy v. R. Co.*, 40 Mo., 511; *State v. Thomas*, 78 Id., 327; *State v. Gee*, 85 Id., 647; *James v. Mickey*, 2 S. E. Rep., 130; Thompson on Trials, secs. 2423-5; *Post v. Garrow*, 18 Neb., 688; *R. V. R. Co. v. Fink*, 18 Id., 93; *B. & M. R. Co. v. Schluntz*, 14 Id., 425; *S. C. R. Co. v. Brown*, 13 Id., 317; *People v. Righetti*, 66 Cal., 185. As to the eighth instruction: *Matthewson v. Burr*, 6 Neb., 320; *Parish v. State*, 14 Neb., 67; *R. Co. v. Finlayson*, 16 Id., 584; *Gray v. Farmer*, 19 Id., 71. The alleged misconduct of counsel was not sanctioned by any act of the trial court and cannot be complained of here. (*Bradshaw v. State*, 17 Neb., 147; *McLain v. State*, 18 Id., 154; 1 Thompson on Trials, sec. 962, and cases cited.) The damages are not excessive. (Cf. *Craker v. R. Co.*, 36 Wis., 679.) Two juries have passed on the evidence and the litigation should not be prolonged. (*Dunbar v. Briggs*, 18 Neb., 94.)

COBB, J.

The plaintiff sued the defendant in the court below on the complaint that on November 9, 1886, while she was alone in her school room where she was teaching, at the village of Smartville, in Johnson county—her school room was situate so remote from any house that alarm could not be given—and while so pursuing her duties the defendant, without her knowledge, came to her school room and did then and there assault her with foul and indecent purpose to do violence to her person, and by force and intimidation to criminally know her; that she was greatly alarmed and by reason thereof she suffered and still suffers great men-

tal anguish, humiliation, and bodily pain, to her damage in the sum of \$10,000; with prayer for judgment.

The defendant's answer was a general denial.

At a second trial in the court below, on May 16, 1889, the first having been reversed in this court on error (25 Neb., 390), the defendant moved to withdraw his answer, with a rule on the plaintiff to make her petition more definite and certain, which was denied by the court unless the defendant agreed to go to trial the following morning, to which the defendant excepted on the record.

There was a trial to a jury with verdict for the plaintiff of \$500, to which the defendant excepted, with motion for a new trial, which, upon argument, was overruled and judgment was entered upon the verdict.

The defendant brings the cause again to this court on the following errors:

I. In refusing to compel plaintiff to make her petition specific and definite by stating the facts constituting the assault.

II. In admitting any testimony under the petition and in overruling the demurrer.

III. The petition was too vague and indefinite to set out a cause of action.

IV. In overruling the motion for nonsuit filed immediately after plaintiff's evidence was introduced.

V. In giving to the jury instructions asked by plaintiff, paragraphs 1, 2, 3, 4, 5, 6, 8, and 9.

VI. And instructing the jury that "the intent with which the alleged assault was committed was important as showing the aggravated character of the injury."

VII. And in instructing the jury that "if they believed that any witness had knowingly sworn falsely to any material matter, that alone would justify the jury in entirely disregarding the testimony of such witness."

VIII. In refusing to give instructions asked by defendant in paragraphs 1 and 2.

IX. In giving instructions by the court, 1, 4, and 5.

X. For errors of law excepted to on the trial.

XI. For excessive verdict, not supported by evidence, and given under the influence of passion and prejudice.

XII. In sustaining the objections of plaintiff's attorney to questions asked of defendant by his attorney as to alleged facts testified by plaintiff, and as to truth or falsity of her allegations, and asking him to tell the truth touching such charge.

XIII. In refusing to allow defendant to prove that there was quarreling and dissension in the school district, and that the parents of witnesses who testified for the plaintiff entertained feelings of hostility against the defendant which influenced the witnesses.

XIV. In not sustaining the objection to the evidence offered by the plaintiff on rebuttal, and permitting evidence then to be given that should have been given, if at all, on the examination in chief, and tending to contradict evidence drawn from defendant's witnesses by cross-examination by plaintiff's attorney.

XV. On account of the misconduct of plaintiff's attorney in stating to the jury in his closing address that the case had once been tried and a jury had found him guilty of the charge.

XVI. In overruling the motion for a new trial.

The first error assigned is that the court erred in refusing the application of the defendant for leave to withdraw his answer and present a motion for an order requiring the plaintiff to make her petition more definite and certain. Except upon the condition that the defendant would agree to be ready for trial on the following morning, the application was denied.

This application was made on the 16th day of May, 1889. It appears that issue was joined in the case on the 28th day of April, 1887. Then followed a trial and judgment in the district court, a writ of error trial and

judgment of reversal in the supreme court, and a mandate to the district court. The term of the said court began on the 15th day of May; the said application of the defendant was made on the second day of the term, and upon the fifth regular term of the court after the joining of the issue in the case.

It cannot be denied as a rule of pleading that by answering to the merits of a petition a defendant thereby waives all objections to its form, nor can the equally well established rule be questioned that a pleading once filed can only be withdrawn upon leave of the court. Such leave cannot be claimed as a matter of right, by any suitor, but will be granted *ex gratia*, or denied, in the discretion of the court. It is true that the discretion here spoken of is a judicial and not an arbitrary one. Its use will not be controlled, but its abuse will be corrected by an appellate court. There had been a trial of the case at bar on the merits, the plaintiff had given her evidence in which she had detailed the facts and circumstances of the alleged assault, her evidence had gone into a bill of exceptions, and had been of record in both courts for a year. The pleadings which it was sought to unsettle had been of record for two years. Under these circumstances the court was asked to extend this favor. Had it granted it unconditionally, it would have been a doubtful, if not a dangerous, exercise of discretion, but to grant it on condition that the plaintiff would not thereby lose a term of court, was certainly within a reasonable and proper discretion.

The second assignment is that the court erred in admitting any evidence under the petition. This point is partly discussed in the brief under the first assignment as well as under the second. The points of law stated in *maximic* form by plaintiff in error in the brief will not be questioned, amongst others that "if a petition fail to state a cause of action it will not support a judgment," and "if the facts stated in the petition do not constitute a cause of

action, filing an answer by the defendant is not a waiver of such defect." But while I am of the opinion that the petition now under consideration was originally subject to a motion to make it more definite and certain, and probably to one to strike certain words from it, as irrelevant matter, yet that all of its defects are of that character which is cured or waived by being answered; or, as was formerly expressed, "by pleading over." The words of the petition, "did then and there assault the said plaintiff," are, as I conceive, the statement of a fact and not a mere conclusion; but it is so indefinite a statement that, upon proper and seasonable motion, the pleader would be required to state the charge with greater definiteness and certainty, but it would still be the same fact. In many cases the dividing line between the statement of a fact and a conclusion is so obscure as to be difficult to define, and in such cases, in this practical age, and under our liberal system of pleading, a court will generally adopt the construction, which the parties themselves by their acts appear to have placed upon such language in a pleading.

In justice to counsel, I will say that they were not in the case when defendant's answer was made.

The seventh assignment of error is, that the court erred in giving the following instruction: (No. 9.) "If the jury believe that any witness in this case has knowingly sworn falsely to any material matter in this case, then you are instructed that this would justify you in disregarding the testimony of such witness entirely."

The maxim, "*Falsus in uno, falsus in omnibus*," is one of general acceptance; but there is quite a diversity of opinion in the reported cases as to how it should be expressed in an instruction to a jury. It is not my purpose to compare the instruction above quoted with those which have been approved or disapproved in the courts of other states, but to say that I do not find either the weight of authority or the reason of the case to indispensably require such

charge to be qualified by the addition of the words "unless corroborated." Indeed, if the witness may not be believed unless corroborated, but may not be disbelieved if corroborated, even then credence is given alone to the corroborating testimony, and not to that of the implicated witness.

The giving of the eighth instruction requested by the plaintiff is also assigned for error, on the ground that by giving it the court assumed that it was proven that the defendant pointed a revolver at the plaintiff. The following is the instruction: (8.) "You are instructed that wantonly and recklessly pointing a revolver at another, when but a few feet away, under such circumstances as would naturally lead such other to believe it to be loaded, would be an assault, whether such revolver was in fact loaded or not, if you find from the evidence that the act of the person holding such revolver was such as to cause a reasonable person to believe that he intended to do harm with it." While it might probably be admitted that the weight of the evidence was against the testimony of the plaintiff that defendant did point a revolver at her, yet the fact remained that the plaintiff on the stand testified positively that he did. That, as I conceive, was sufficient to warrant the court in charging the jury as to the legal character of such act. Were this not so, the charge would in most cases be confined to a narrow compass.

It is also assigned for error that the court refused to allow the defendant to prove that there was quarreling and dissension in the school district, and that the parents of three or four witnesses of tender age who have testified against defendant, as well as the said witnesses themselves, were influenced by feelings of hostility against him, and that such feelings influenced the testimony of such witnesses.

It appears from the bill of exceptions that upon the trial Miss Julia Pitman was called and sworn as a witness on

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the part of the plaintiff. She testified that she was eighteen years of age; that she was attending school near Smartville, where Miss Gladwish taught in November, 1886; that she remembered the circumstance of Mr. Atkins and Mr. Dillon coming to the school house one morning, along about the first of December of that year; that Mr. Murphy and Mr. Creaney came in soon after Miss Gladwish had come. She was asked to state what conversation she heard there between Miss Gladwish and Mr. Atkins touching what occurred on the 9th of November previous, and answered as follows: "Well, the first thing I heard Miss Gladwish ask Mr. Atkins why he came there. He said in the first place he came to see how much coal there was in the coal house. Then she asked him why he didn't go to the coal house. He said he wanted to see how things looked inside the school house. I don't remember just how the conversation run, I remember the principal part of it. She asked him what he wanted to act the way he did for, and draw his revolver. He said he did it in boyish play. Then she told him, further on in the conversation, he had no right there, because she was trying to avoid him. He said yes, he knew it, and he came to see what she was doing it for. She told him she knew he would not have come unless he knew there was no one at Murphy's. He said how should he know. She said: 'You saw Mrs. Murphy at Richardson's.' He said at first he didn't; then she said he did, because Mrs. Murphy told her so. He said then that he saw her there. He said that he had a right to carry a revolver; that he was an officer of the law, and he said, I believe, that he was under heavy bonds — forty or forty-five thousand dollars bonds — and he had a right to carry a revolver, etc." On her cross-examination she testified, among other things, as follows:

Q. Have your people been on bad terms with Atkins?

A. They certainly have not been on very good terms with him.

Q. There has been a good deal of dissension and quarreling in the school district, has there not?

A. Why, yes, quarreling I suppose among the children, the same as other places.

Q. Your father's family has been in opposition to Atkins, have they not? (Objected to, as incompetent, immaterial, and irrelevant. Objection sustained.)

Mary Langley was sworn as a witness for the plaintiff. Upon her examination she testified that she was fifteen years old past; that she was one of the scholars in Miss Gladwish's school; that she remembered the occasion of Atkins and Dillon coming to the school house one morning before Miss Gladwish was there; that witness came afterwards with Miss Gladwish; that Mr. Murphy and Mr. Creaney and Maggie and Sadie Otis also came with witness and Miss Gladwish. Witness then stated the conversation that occurred between the plaintiff and defendant, substantially as the same was stated by the former witness. She was cross-examined by counsel for defendant as follows:

Q. Your father lives in this school district you have been asked about?

A. Yes.

Q. You have been going to this school Miss Gladwish taught?

A. Yes.

Q. There has been a good deal of trouble and dissension in that school district, has there not? (Objected to, as incompetent, immaterial, and not affecting the credit of the witness. Sustained.)

Q. Has your father's family, including yourself, been in opposition to Atkins and taken an opposite part against Atkins? (Objected to, same as last above. Sustained.)

Q. Have you yourself been in opposition to Atkins, and do you now entertain a friendly feeling towards Atkins?

A. No, sir.

Q. You did not; you mean you are on bad terms?

A. We are not on very good.

It is true that it has been laid down as a correct rule of law, and to which I concede that the relation of a witness to either party to the cause in which he testifies, whether of peculiar friendship or hostility, is a fact material to the issue and may be shown either by the testimony of the witness himself, or by other evidence. But this is as far as I think any court has gone ; and I know of no distinction between witnesses who, from their tender age and sex, would be likely to be under the influence of parents or others than those not likely so to be. The defendant had the benefit of this rule in being permitted to show that these witnesses were not friendly to him. I do not think that there was error in the refusal of the court to allow these witnesses to be asked as to the extent of the quarreling and dissension existing in the school district, nor do I think that any answer which they could have given to the questions ruled out would have taken from or added to the weight of their evidence.

It appears from a special bill of exceptions in the case, that while addressing the jury in his closing argument the counsel for the plaintiff used the following language : " No wonder that those witnesses entertained feelings of hostility against defendant, the old bald-headed fiend, knowing as they did what he had done, and that one jury had found him guilty of the charge." To the use of such language defendant's attorney objected and asked the court to restrain the attorney ; thereupon the court said to the attorney that such talk was improper, and told the jury not to consider it. Thereupon the attorney desisted. This is assigned for error.

If upon the attention of the court being called to the above language of counsel in summing up to the jury it had refused to stop him and express its disapprobation of the language to the jury, such refusal would probably have been reversible error. But the court, having, on the con-

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trary, stopped and reprimanded the counsel, did all that good practice required of it, and I do not think the misconduct of the attorney in the use of the language quoted was of that flagrant character which under the statute would vitiate a verdict *per se*.

Defendant claims that the damages awarded by the jury are excessive. From a careful consideration of the evidence, while I can easily conceive that a jury might have found the issue for the defendant, I cannot easily conceive how, finding for the plaintiff at all, their verdict could have been for a less sum.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

STATE, EX REL. ATTORNEY GENERAL, V. REPUBLICAN
VALLEY & WYOMING R. CO.

[FILED NOVEMBER 20, 1889.]

SUMMONS: RETURN. Under the provisions of section 68 of the Code, where a summons is sent to a county other than that in which the action is brought, the plaintiff may have the summons made returnable on the second Monday after its date, instead of the third or fourth Monday thereafter, if he so elect.

ORIGINAL action in nature of *quo warranto*.

MOTION to quash summons.

T. M. Marquett, for the motion.

William Leese, Attorney General, contra.

No briefs filed.

PER CURIAM:

This is an original action brought in this court, and service was had upon the chief officer of the company in Douglas county. The summons was made returnable on the second Monday after its date and was served and returned within the time limited.

The attorney for the defendant now moves to quash the summons because it was made returnable on the second Monday after its date instead of the third or fourth Monday thereafter. Section 66 of the Code provides that:

"Whenever the time for bringing parties into court is not fixed by statute, the summons shall be returnable on the second Monday after the day of its date, but when issued to any other county than the one in which the action is brought, it may be made returnable at the option of the party having it issued, on the third or fourth Monday after its date. It shall state the day of the month on which it is returnable."

This is section 59 of the Ohio Code, as it existed in 1858, and the proper construction of this section was before one of the district courts of that state in *Devol v. Culver*, 1 W. L. M., 587-8, and it was held that it is optional with the plaintiff whether he will have the summons issued out of the county where the action is brought, returnable on the third or fourth Monday. It is said:

"As we read it, all summonses may be made returnable on the second Monday after the date thereof, whether issued within or without the county where the action is brought; but that it is optional with the party, in case the summons is issued to another county, to enlarge the time of its return; and this elongated time cannot go beyond the third or fourth Monday. If, then, service can be had on a summons issued to another county, in time to have it returned by the second Monday, it may be so issued; in case it can-

not be served in that time, then the plaintiff may direct it to be made returnable on the third or fourth Monday. This last clause of section 59 is made for the benefit of the plaintiff; it does not extend the time for answer, as the summons may be served at any time during its life, the officer being only required to return the summons at the time therein stated. Whether, therefore, a summons, sent to another county, is made returnable in two, three, or four weeks, the length of time allowed the defendant to answer is the same, as the service is not required to be made only so long before its return as may be necessary for the officer to make that return on the day named therein."

This, in our view, is a correct construction of the statute, so far as the return of the summons is concerned, and we adopt the same. The motion is therefore overruled.

MOTION OVERRULED.

THE other Judges concur.

J. F. SEIBERLING V. JOHN DEMAREE, ADMINISTRATOR,
ETC.

[FILED NOVEMBER 20, 1889.]

Negotiable Instruments: AUTHORITY TO RECEIVE PAYMENT.

In an action on a promissory note, the execution, delivery, and consideration of the note were admitted by the defendant, who pleaded payment; there was evidence that the note was given in part payment for a reaping machine, sold by the plaintiff to the defendant through the agency of N. & M., who forwarded the note to the plaintiff; that about the time the note matured defendant paid the amount due thereon to N. & M., who informed him that they did not have the note, but would send and get it and forward it to him, which they failed to do; there was no evidence of authority or agency on the part of N. & M. to receive pay-

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ment of the note for the plaintiff, nor of ratification of such payment by him. An instruction by the court submitting to the jury to find such authority or agency, *held*, error. The jury should have been directed to find for the plaintiff.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

T. C. Munger, and *W. H. Snelling*, for plaintiff in error:

Defendant in error was bound to see that the agents had his note in their possession (*Williams v. Walker*, 2 Sandf. Ch. [N. Y.], 325, [359]; *Osborne v. Kline*, 18 Neb., 344-7-9); especially would this be true in case of payment before maturity, as it would be the maker's duty to guard against a sale by the holder to an innocent purchaser. (*Coffman v. Bank*, 41 Miss., 212; *Davis v. Miller*, 14 Gratt. [Va.], 7.) Having failed in this regard, defendant in error's payment does not discharge him. (*Howard v. Rice*, 54 Ga., 52; *Paris v. Moe*, 60 Id., 90; *Wheeler v. Guild*, 20 Pick. [Mass.], 545; *Smith v. Kidd*, 68 N. Y., 130; Daniel, Neg. Inst. [3d Ed.], sec. 1227; Randolph, Com. Paper, sec. 1450.)

Pound & Burr, for defendant in error:

The question of the agent's authority to receive payment was the only one at issue, and was properly submitted to the jury, which found in favor of such authority.

COBB, J.

The cause is brought to this court on error to the district court of the county of Lancaster.

The plaintiff in error complained against the defendant in the court below on the following promissory note:

"LINCOLN, July 14, 1881.

"On or before the first day of January, 1883, L. Kinchloe, of Lincoln postoffice, county of Lancaster, state of

Nebraska, promise to pay to the order of J. F. Seiberling, of Akron, Ohio, with exchange or express charges, seventy-five dollars, with interest from date at the rate of ten per cent per annum, and for value received I ? hereby with the payee hereof, that if judgment is rendered hereon that any and all personal property I may have when execution is issued on such judgment may be levied on and sold to satisfy such judgment, hereby expressly waiving all rights to such property under exemption laws of this state. Payable at office of Marsh Bros., Mosher & Co.; a discount of——if paid when due.

“For the purpose of obtaining credit I, L. Kincheloe, hereby certify that I own in my own name in fee simple 80 acres of land in section 31, town 9, range 7, county of Lancaster, state of Nebraska, with 70 acres improved, worth \$1,000, which is not incumbered by mortgage or otherwise except \$..... I own \$500 worth of personal property over and above all indebtedness and exemptions. For value received I, the undersigned, do hereby sell and mortgage unto the payee hereof one Empire Reaper Mower combined. Provided, that if the undersigned shall pay the said debt, then this mortgage shall be void. In case of default I authorize the said mortgagees to seize and sell the said property and pay the said debt with expenses incurred; or if the mortgagees shall at any time feel unsafe or insecure, then they may seize and sell the property; if from any cause said property shall fail to satisfy said debt and expenses, I covenant and agree to pay the deficiency.

“LAWRENCE KINCHELOE.”

No part of said note has been paid and there is now due the plaintiff thereon the sum of \$75 with interest at ten per cent per annum from July 16, 1881, and the plaintiff prays judgment for the sum of \$120 and costs.

The defendant answered, denying each and every allegation of the petition, except such facts as therein admitted specially to be true, to-wit, the making, execution, and

delivery of the note as mentioned, but says that the said note is fully paid and discharged, and should be canceled and delivered to this defendant, etc.

The plaintiff replied, denying that the note had been paid or discharged, or any portion thereof.

There was a trial to a jury with verdict for the defendant, and a motion to set aside the verdict, and for a new trial, which was overruled, with judgment for defendant's costs.

To all of which the plaintiff excepted on the record and brings the case to this court for review on the following assignment of errors :

1. The court erred in admitting in evidence the receipt given by Nahrung & Meyer to defendant.

2. In giving instructions 2 and 3 to the jury on its own motion.

3. In refusing to give 1, 2, and 3, asked by plaintiff.

4. The verdict is not sustained by sufficient evidence, is contrary to law, and ought to have been set aside on the plaintiff's motion for a new trial.

The cause was tried in the lifetime of Lawrence Kinche-loe, the defendant, who, being produced as a witness in his own behalf, testified that he gave the note sued on in part payment for a machine which he bought of plaintiff; that he bought it in a house on "O" street; that he bought it from Mr. Nahrung. In answer to the question, "Who did you buy it from?" he answered, "from Mr. Nahrung;" that he bought the machine and gave the note July 14, 1881; that on the 1st day of August, 1882, he paid the note and interest to Nahrung at the same place; that he paid him \$83.15, and took a receipt therefor, signed Nahrung & Meyer, which was produced in evidence; that at the time that he paid the money and took the receipt Mr. Nahrung told him that he did not have the note there at that time, but that he would take the money and give him a receipt and would send him the note in a week or two;

that he would send and get the note and send it to him at Saltillo; that he never did send it, and when he came to town some time afterwards to see him he had sold out where he was doing business, and had left.

The deposition of the plaintiff was read in his own behalf. He testified that he was the owner of the note, describing it; that neither the whole or any part of it had ever been paid to him; that he had never authorized any one to collect the said note or receive the money thereon except Marsh Bros., Mosher & Co., and W. H. Snelling, attorney; that he never had any business relations with Nahrung & Meyer, of Lincoln, Neb., except as agents to sell machinery and take notes in payment thereof; that they had no authority to collect notes after the same were taken.

The following instruction was given to the jury by the court, and excepted to by the plaintiff:

"3. If you find from the evidence that the defendant paid Nahrung & Meyer the amount of the note in question you are instructed that such payment would not of necessity release the defendant, but you must then inquire whether or not the evidence shows that said Nahrung & Meyer had authority from the plaintiff to collect said note. The burden of proof is upon the defendant to show such authority by a preponderance of evidence. If you find from the evidence that Nahrung & Meyer had such authority from the plaintiff, then your verdict should be for the defendant. If the evidence fails to show such authority in Nahrung & Meyer, then your verdict should be for the plaintiff for the amount of the note and interest to date."

Instructions were requested by the plaintiff, but it is not deemed necessary to set them out.

Had there been evidence tending to prove or show authority or agency on the part of Nahrung & Meyer to collect the said note or to receive money thereon for the plaintiff, the instruction above copied would have been

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proper; but there was no evidence upon which authority or agency could be found by the jury. The evidence of the defendant himself taken in connection with the note sued on showed that the authority and agency of Nahrung & Meyer extended only to selling the machine and taking the note, when it terminated absolutely. The note was made payable at a bank quite disconnected with Nahrung & Meyer. Indeed there was no circumstance connected with the case which amounted to the slightest legal evidence of authority or agency on the part of Nahrung & Meyer to receive payment of the note. The giving of the instruction was error. Instead of giving it the court should have directed a verdict for the plaintiff.

The judgment of the district court is reversed and the cause remanded to that court for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

ELLEN A. DAVIS V. JOHN D. DAVIS, ADMINISTRATOR, ETC.

[FILED NOVEMBER 20, 1889.]

County Court: APPEALS FROM: STATUTES: REPEAL. The act of February 28, 1881, providing for an appeal from the decision of the county court, in certain matters, is complete in itself, and repeals by implication the conflicting provisions of sections 234, 235, 236, 237, and 238 of chapter 23 of Compiled Statutes. Under this act, *held*, that an appeal bond is to be filed, without further notice, within thirty days from the date of the order or judgment appealed from, and transcript of the proceedings of the county court to be transmitted to the clerk of the district court within ten days after filing the bond and perfecting the appeal. (*Malick v. McDermot's Estate*, 25 Neb., 268; *Bazzo v. Wallace*, 16 Neb., 293.)

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Paul Charlton, for plaintiff in error:

The appeal was taken and perfected in time. (Comp. Stats., ch. 20, secs. 42-46; *Casey v. Peebles*, 13 Neb., 7; *Bazzo v. Wallace*, 16 Neb., 293; *Morgan v. Stittigan*, 10 Western Law Journal, 74; *Geddes v. Rice*, 24 O. St., 60; *Wadsworth v. Wadsworth*, 15 Pac. Rep., 447; Code, sec. 895; *Monell v. Terwilliger*, 8 Neb., 362; *Roesink v. Monnell*, Id., 146; *Glore v. Hare*, 4 Neb., 132; *Malick v. McDermot's Estate*, 25 Neb., 267.) The act of February 28, 1881, comprising secs. 43-46, ch. 20, repealed by implication the act of 1873, relied on by defendant in error. (1 Shars. Blackstone, 88, notes 33, 34; Potter's Dwarrris on Statutes, 113, note 9.) Said act is mandatory and embraces every matter of probate jurisdiction.

Mahoney, Minahan & Smyth, for defendant in error:

The act of 1881, which, it is claimed, governs this case, is unconstitutional under sec. 11, art. 3, Const., in that it provides for the right of appeal, and for the forfeiture of the same; the latter subject not being expressed in the title.

COBB, J.

This proceeding is brought on error from the district court of Douglas county.

On August 9, 1888, the plaintiff in error filed her claim in the county court of said county against John D. Davis, administrator of the estate of Margaret Griffith, deceased, for boarding, lodging, and attendance in sickness of deceased from June, 1883, to January, 1888, amounting to \$752.50, which, upon hearing, was disallowed December 6, 1888.

On December 24, following, application for leave to appeal was filed, and on January 2, following, an appeal bond was filed and approved by the county judge and on January 12, following, the transcript of the proceedings of the county court, together with the petition of the appellant, was filed in the district court, and process issued and was served on defendant.

On February 26, 1889, the defendant moved to dismiss the appeal for the reason that neither the bond, nor the transcript, was filed within the time provided by law; and on May 9, following, the defendant's motion was sustained and the appeal dismissed, to which the plaintiff excepted, and which is assigned as error in the proceedings in the court below.

The only question presented is that of the validity and sufficiency of the appeal. In the case of *Malick v. Estate of McDermot*, 25 Neb., 267, it was held that "The act providing for an appeal from the decision of the county court in certain matters, approved February 28, 1881, is complete in itself, and repeals by implication, so far as there is a conflict, sections 234, 235, 236, 237, and 238 of chapter 23 of the Compiled Statutes;" and that "An appeal bond is to be filed within thirty days from the date of the order or judgment appealed from, and no notice of an appeal is required." It appears from the record that the appeal bond in this case, in the county court, was filed and accepted on the second of January, 1889, twenty-seven days only after the date of the order and judgment of the court adverse to the plaintiff's claim. The act of February 28, 1881, provides: "In all matters of probate jurisdiction appeals shall be allowed from any final order, judgment, or decree of the county court to the district court, by any person against whom any such order, judgment, or decree, may be made, or who may be affected thereby. All appeals shall be taken within thirty days after the decision complained of is made." The bond was

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therefore within the provisions of the statute, which further provides (sec. 5) that "when such appeal is taken, the county court shall, on payment of his fees therefor, transmit to the clerk of the district court, within ten days after perfecting such appeal, a certified transcript of the record and proceedings relative to the matter appealed from."

It further appears from the record that the transcript in this case was transmitted to the clerk of the district court on January 12, 1889, "within ten days after perfecting the appeal," in accordance with the act of February 28, 1881. The order of the district court was therefore erroneous, and is reversed, the appeal reinstated, and the cause is remanded for further proceedings in accordance with law.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

BERTHA FREY ET AL. V. ELLA E. OWENS ET AL.

[FILED NOVEMBER 20, 1889.]

An Amendment of a petition in equity, allowed by the district court, after a finding and judgment on the merits, under a state of facts and circumstances set out at length in the opinion, *held*, properly allowed and made.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

S. P. Vanatta, for plaintiff in error:

The agreement as to the final decree being solemnly executed, and sanctioned by the court, cannot now be amended by it; nor should it be set aside on account of a blunder, or even of fraud, unless the evidence of the latter be conclu-

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sive. The instrument itself is evidence not to be overcome by unsatisfactory oral testimony. (*Parlin v. Small*, 68 Me., 290; *Brown v. Blunt*, 72 Id., 415; *Martin v. Berens*, 67 Pa. St., 459; *Cannon v. Jackson*, 40 Ark., 417; *McCall v. Bushnell*, 42 N. W. Rep. [Minn.], 545; *Caldwell v. Dewey*, Id., 479; *Owen v. Yale*, Id. [Mich.], 817.)

Ballou & Browne, and *J. B. Strobe*, for defendants in error :

A suitor's rights will not be sacrificed on account of mistake or of an attorney's neglect. In furtherance of justice, courts may correct their judgments. (*Sharp v. Mayor*, 31 Barb., 578; *Irving v. Bank*, 6 O. St., 81; *Com. v. Weymouth*, 2 Allen [Mass.], 144; *King v. Price*, 6 East. T. R., 323; *Burnside v. Ennis*, 43 Ind., 411; *Lee v. State*, 32 O. St., 113; *U. S. v. Harmison*, 3 Sawyer [U. S. C. C.], 556. The court properly allowed defendant in error to amend the petition after decree. (Code, secs. 144, 145; *Harris v. State*, 24 Neb., 803; *Voland v. Wilcox*, 17 Id., 50; *Gregory v. Tingley*, 18 Id., 319; *Mills v. Miller*, 3 Id., 95; *Burley v. Millard*, 11 Id., 286; *Porter v. Holt*, 11 S. W. Rep., 494.)

COBB, J.

This proceeding in error is brought to review a decree of the district court of Cass county.

The complainants in the court below, Ella E. Owens, May Stowell, and Elmer E. Stowell, exhibited their bill against Bertha Frey, widow of John, John Frey Jr., Bertha Frey Jr., George Frey, Clemma Frey, Henry Frey, Tobias Frey, Jacob Frey, and Jerome Frey, minor heirs of said John Frey, deceased, setting up that on March 12, 1862, Eleanor Newhouse conveyed by warranty deed to Castilla Jane Kirkpatrick, Mary Samantha Kirkpatrick, and Naomi B. Kirkpatrick the south half of the southwest quarter of the northwest quarter of the southwest

quarter of section 3, township 12 N., range 12 E., in Cass county, Nebraska, the said Eleanor at that time being the *bona fide* and legal owner of said premises; that the grantees in said deed were the only heirs of William H. Kirkpatrick, and the object of said deed was to vest the title in said grantees, and of their share of their father's estate, the said Kirkpatrick having been in his lifetime a former husband of said Eleanor Newhouse, and she was the mother of the grantees in said deed, which deed was duly filed for record May 19, 1862, and recorded in book E, p. 271.

They further allege that Naomi B. Kirkpatrick departed this life December 2, 1878, under twenty years of age, without issue; that Mary Samantha Kirkpatrick, married to John W. Brice, departed this life June 11, 1872, aged thirty-one years, leaving one child, Mary Brice, born in May, 1870, and married to Elmer E. Stowell, one of the plaintiffs; that Castilla J. Kirkpatrick was married to R. M. Owens and departed this life May 2, 1874, aged twenty-four years, leaving one child, Ella E. Owens, born in February, 1870; that they are the sole surviving heirs at law of the estate of the grantees in said deed; that the land described was all of the estate which they inherited from their parents and constitutes their sole property in their own right; that since their mother's decease they have lived with their grandmother, Eleanor Newhouse, except at limited periods, while they resided with other relatives; that they had not, prior to 1888, money or means under their control; that no legally constituted guardian has ever had or taken charge of their said estate with a view or purpose of protecting their interests therein; that they were until February and May, respectively, in 1888, under the age of eighteen years.

That on September 5, 1873, the county treasurer executed and delivered to S. N. Merriam a tax deed upon said premises, of record in book T, p. 82, the same having been sold for the taxes of the year —, which sale was made with-

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out authority of law, there having been no legal assessment, and the requirements of law were not complied with by the purchaser to obtain said deed; that one of the plaintiffs, Mary Stowell, was then a minor under four years of age; that said deed is void, and if good for anything it is only for the proof of the amount of taxes paid by said Merriam, and was filed for record March 28, 1874.

That on May 8, 1874, the county treasurer issued one other tax deed to said Merriam, conveying said lands with other lands therein, which deed was filed for record May 9, 1874, and which was based upon the sale made on the illegal assessment and levy, and the laws were not sufficiently complied with to obtain said deed, which is void upon its face, and if good for anything it is only for the proof of the amount of taxes paid for the same; that both of the plaintiffs herein were the owners of said premises, and were minors under the age of five years at the date of said deed, and had no notice or knowledge of the proceedings to obtain either of said deeds.

That on July 13, 1878, the county treasurer issued another tax deed to said Merriam for said premises upon a sale for the taxes of 1870, as shown by book X of deeds, p. 102; that the sale was illegal, and the deed void for the reasons stated in the two prior deeds mentioned, the owners and plaintiffs being infants under the age of nine years at the date of the expiration of the time of redemption.

That on November 25, 1881, the county treasurer issued a certain other tax deed to said Merriam purporting to convey said premises, which deed and the proceedings on which it is based are illegal and void.

That on December 27, 1886, the county treasurer issued a certain other tax deed attempting to convey said premises to J. P. Mathews, based on the sale of the same for the taxes of 1883; that Mathews afterwards conveyed the same by deed to W. D. Merriam, who afterwards conveyed the same by deed to said John Frey; that in the said pro-

ceedings to obtain said deed said Mathews caused notice to be served on said Frey, the occupant of said premises, who accepted service; that said Frey was in collusion with said Mathews in the service and acceptance of notice, and was a party to the procuring of said sale for taxes, and that it was in substance and effect the serving of notice by John Frey upon himself, and so far as he was concerned was fraudulently obtained and should be so declared by the court; that all of this occurred on taxes levied subsequently to Frey's possession of this land; that no other valid notice was served on defendants, nor did they have actual knowledge of the fact that the premises had been sold for the year 1883, or for any other year or years in any of the deeds mentioned; that at the dates of each the plaintiffs were minors under the age of eighteen years, and under such legal disability that they had no right or authority to act had they known of said different sales, purchases, and execution of tax deeds; that the lands were taxed, listed, and assessed in the name of another aside from the owner as in all the prior deeds; that there was no notice as required by law; that the assessment, listing, levy, and sale upon which said deed was based does not in any manner conform to the laws of this state; that the said deeds are void upon their face, and that at the time the date of redemption expired in all the deeds aforesaid the plaintiffs were minors.

That S. N. Merriam and wife, by W. D. Merriam, their attorney in fact, on May 10, 1883, conveyed by deed of that date the said premises to John Frey, who departed this life — —, 18—, leaving as survivors the defendants herein; that no other persons are interested in said conveyance of said Merriam and wife, except the defendants; that in the year 1883 said Frey entered upon and made sundry improvements of said premises, consisting of plowing the land and building a residence and occupying the same, the house of the value of \$350 and other im-

provements \$150, a total of \$500, and no more; that there is in the aggregate, based upon the first year that said land was farmed, and the successive years up to the present time, the sum total that the defendants have received, the benefit and product of the crop on said land of 240 acres, or an average of forty acres each year, and that a reasonable value for the use and occupation of said premises has been \$3 per acre each year, making a total benefit received by defendants of \$720, and during all this time prior to February and May, 1888, respectively, the plaintiffs were infants in law under the age of eighteen years.

The plaintiffs pray that the defendants be summoned to answer the matters alleged, that the said deeds be declared void, and the cloud thereby resting over plaintiff's title to said premises, by the several deeds mentioned, be fully removed and that by decree of the court the plaintiff's title be freed from all adverse claims, and that defendants be barred from ever asserting any right or title thereto, and that possession of said premises be decreed to these plaintiffs. But if the court find that by virtue of the deeds aforesaid the defendants are entitled to any equities whatever in said premises by the payment of taxes, that then the court ascertain the exact amount by an accounting to be made for the value of the rents and profits by the defendants received, and permit the plaintiffs to redeem said premises from the tax sales aforesaid by paying the amount into court for the use and benefit of defendants, and grant such other and further relief as the plaintiffs may be entitled to.

The defendant, Bertha Frey, for herself and for the minor defendants, answered, denying each and every allegation of the complaint, and denied that the plaintiffs are heirs at law of W. H. Kirkpatrick as stated, or that they have any right or interest in and to the land described.

And for further answer set up that if the plaintiffs ever had any right or interest in and to said land the same

is barred by the statute of limitations, as more than ten years elapsed since they became of age and before the bringing of this suit; and that she and the minor defendants are the sole owners of said land, and are entitled to the possession and to all the rents and profits thereof.

There was then a stipulation entered into by the parties for the settlement of this suit as follows:

"The defendants agree to give the plaintiffs a decree as prayed for, and also a decree setting aside the warranty deed of S. N. Merriam, by W. D. Merriam, his attorney in fact, to John Frey for said land, if the plaintiffs want such decree, and give plaintiffs possession of the land by the first day of March, 1889. In consideration thereof the plaintiffs agree to pay into court the amount of taxes paid on said land by the defendants and their grantors, with the rate of interest thereon allowed by the court, and they further agree that this shall be a full settlement of all claims and demands now existing between the parties in relation to the south half and the northwest quarter of the southwest quarter of section 3, township 12, range 12, in Cass county, Nebraska.

"The payment into court of the amount of said taxes shall release the plaintiffs from all liens on account of the payment of taxes, and defendants agree that the lien of Richie Bros., if any, shall be paid out of said amount of taxes so paid into court and the plaintiffs to have the land described free from any liens thereon. This agreement to be approved by the court on behalf of the minor defendants."

Subsequently the answer of the guardian *ad litem* for the minor defendants denied each and every allegation of the plaintiffs. On November 26, 1888, there was entered a decree, on the submission of the cause to the court, under the stipulation, "that the matters alleged in the petition are true; that the several tax deeds set forth, as well as the deed from S. N. Merriam and wife, by W. D. Mer-

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riam, their attorney in fact, to John Frey be set aside as to the lands described, and that the same be decreed null and void as to said lands.

"That the defendants and all persons claiming by, through, or under them be forever barred from claiming any right, title, or interest in or to said lands or any part thereof, save and except only the plaintiffs, who shall pay into court, for the use and benefit of the defendants and their grantors, the amount of taxes found to be due to defendants or their grantors upon said premises as found and reported by D. A. Campbell, the referee, appointed herein, and upon the payment of said sum into court the plaintiffs shall take said premises free and clear from all rights and liens by reason of the payment of any taxes on said premises by said John Frey or his grantors and all rights of defendants thereto. It was further decreed by consent of the parties that the plaintiffs shall have possession of the premises on or before March 1, 1889, and the plaintiffs shall be forever barred from bringing or prosecuting any suit or suits against the defendants for any cause of action now existing in relation to the south half and the northwest quarter of the southwest quarter of section number three, township number twelve, of range number twelve in Cass county, Nebraska, or for any damage for the use or occupation or detention of said lands in any manner, and that the defendants pay the costs of this action.

"SAMUEL M. CHAPMAN,

"Judge District Court.

"We consent that the above decree be signed by the judge and entered of record as the final decree in said cause.

"W. L. BROWNE, *Attorney for Plaintiffs.*

"S. P. VANATTA, *Attorney for Defendants.*"

On November 27, 1888, the referee's report was filed in said court as follows:

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"W. $\frac{1}{2}$ S. W. $\frac{1}{2}$ and S. E. $\frac{1}{2}$ S. W. $\frac{1}{2}$ Sec. 3, Tp. 12, R. 12 E.

Year		Principal	Interest.	Total.
1870	Sold to S. N. Merriam, Sept. 4, 1871.....	\$15 07	\$39 47	\$54 54
1871	Paid by Merriam, June 14, 1872.....	18 75	36 84	55 59
1872	Paid by Merriam, May 22, 1873.....	26 97	49 98	76 95
1873	Paid by Merriam, April 30, 1874.....	36 36	63 68	99 99
1874	Paid by Merriam, January 15, 1875.....	39 60	65 53	105 13
1875	Paid by Merriam, February 5, 1876.....	18 45	28 19	46 64
1876	Paid by Merriam, April 30, 1877.....	15 30	21 11	36 41
1877	Paid by Merriam, June 8, 1878.....	12 86	16 02	28 88
1878	Sold to S. N. Merriam, November 20, 1879.....	18 15	29 82	47 97
1879	Paid by S. N. Merriam, April 30, 1880.....	15 00	15 45	30 45
1880	Paid by S. N. Merriam, October 14, 1881.....	14 47	12 24	26 71
1881	Paid by S. N. Merriam, October 12, 1882.....	19 38	14 05	33 43
1882	Paid by S. N. Merriam, September 28, 1883.....	18 90	11 72	30 62
1883	Sold to J. P. Mathews, November 3, 1884.....	17 43	10 44	27 87
1884	Paid by J. P. Mathews, December 31, 1884.....	17 56	6 66	24 21
1885	Paid by J. P. Mathews, November 10, 1886.....	17 22	3 36	20 58
1886	Paid by A. E. Alexander, October 31, 1887.....	16 38	1 63	18 01
		\$337 36	\$126 14	\$763 50

"The foregoing is a correct statement of amounts paid in purchasing at tax sale the land described by S. N. Merriam and J. P. Mathews, together with amounts of subsequent taxes paid by said parties and A. E. Alexander, as appears from tax list, with interest thereon as per order of court, on amounts paid in purchasing at tax sale September 4, 1871, forty per cent per annum for first two years from date of sale, and twelve per cent per annum to date. The rate on sales to S. N. Merriam, November 20, 1879, and to J. P. Mathews, November 3, 1884, is at twenty per cent for first two years, and ten per cent for remainder of time to date. On subsequent taxes paid prior to November 20, 1879, interest is at the rate of twelve per cent per annum from date of payment to date. On subsequent taxes paid since that date interest is at the rate of ten per cent per annum.

D. A. CAMPBELL, *Referee.*"

Exceptions to this report were taken:

1. That there is not the amount of taxes due on the land described that is made to appear.

2. The report does not show that the amount of taxes so reported was paid on, or was a lien on, the land, but shows other lands than those claimed by the plaintiffs.

3. The amount of taxes so reported is not correct, as appears from the pleadings in the cause.

It is prayed that the report be set aside, and that the case be again referred to the referee to report under the direction of the court.

The plaintiffs next moved to amend their petition, the stipulation, and decree, so far as to correct a clerical error, especially as to the description of the land, and cause the same to read: "The south half of southwest quarter, and northwest quarter of the southwest quarter of section 3, township 12 north, range 12 east," for the reason that there is an error in the description contained in the petition.

And subsequently, on December 3, 1888, in open court, the cause was again heard, and considered on the plaintiffs' motion for leave to correct the description of the real estate contained in their said petition, and the court being fully advised in the premises doth find that the said petition was intended to and does describe the land in the tax deed as the south half of the southwest quarter, and the northwest quarter of the southwest quarter of section 3, township 12 north, range 12 east, sixth P. M., in Cass county, Nebraska; and the said plaintiffs were allowed to correct their petition accordingly, to which the defendants duly excepted, and the cause coming on for further hearing upon the exceptions to the referee's report, and the court being fully advised in the premises, overruled said exceptions.

The cause is brought to this court by the defendants on error. The errors assigned are as follows:

"1. That the court erred in allowing the plaintiffs to amend their petition so as to describe the land in controversy in said cause as the south half of the southwest quarter, and the northwest quarter of section 3, in township 12 north, of range 12 east, in Cass county, Nebraska, instead of the south half of the southwest quarter of the northwest quarter of the southwest quarter of section 3, township 12, range 12 east, in Cass county, Nebraska, as was in fact described in said petition.

"2. The court erred in finding that the plaintiffs in said cause intended to and did describe the land in said petition as the south half of the southwest quarter, and the northwest quarter of the southwest quarter of section 3, in township 12 north, of range 12 east, in Cass county, Nebraska.

"8. The court erred in overruling the defendant's exceptions to the report of the referee filed in said cause."

Section 144 of the Civil Code provides that "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." This section gave the district court ample power to permit the said amendment to be made at the time it was made. Where the mistake or omission to be corrected by amendment is one that does not show for itself, it is a matter of discretion on the part of a trial court as to the amount or character of evidence that it will require to establish it, so long as the principles of justice and fairness between the parties are not departed from. In the case at bar there was no legal description of land in the petition as originally drawn, although a somewhat similar form is sometimes followed by careless or incompetent draughtsmen. Forty acres of land, or one-sixteenth of a section, is the smallest subdivision known to the land laws of the United States, and, with the exception of city and village lots, is the smallest subdivision of land that can be legally described, *eo nomine*, and the

words used in the petition, before the amendment, if they are susceptible of any meaning, described five acres of land only. I think that the attention of the court had only to be called to the description to convince it that it was a proper case for amendment. But there was evidence by affidavit before the court sufficient to establish the fact of the mistake, and the necessity for an amendment.

If the defendants had entered into the stipulation relying upon the description of premises as contained in the original petition, and had thereby waived a just and equitable defense which they had to the petition as amended, not equally applicable to the same in its original form, and a showing to that effect had been brought to the attention of the trial court and an application to set aside and cancel the stipulation founded thereon, it would have been entitled to consideration and probably allowed, but it was not done.

The second assignment is embraced substantially in the first, and is sufficiently considered therewith.

The exceptions to the report of the referee are directed solely to the amount of taxes found to have been paid by the defendants upon the lands involved in the action, and the principal and interest found due to them thereon, and required to be paid by the plaintiffs in redemption thereof, and the objection of the defendants is that the amount thereof as found is too large. In other words, the referee computed the taxes and interest, as paid by the defendants, upon the whole one hundred and twenty acres of land as described in the amended petition, instead of upon the five acres of land only, claimed to have been described in the original. Holding as we do that the amendment was one proper to be allowed and made, it follows that all of the assignments must be overruled and that the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

LINCOLN BRICK & TILE WORKS V. CYRUS M. HALL.

[FILED NOVEMBER 20, 1889.]

Appeal: TRANSCRIPT: FAILURE TO FILE IN TIME. Section 1011 of the Code requires the filing of a transcript from the judgment of a justice of the peace "within thirty days next following the rendition of said judgment." The fact that the transcript, after being received at the office of the attorney for the appellant, is laid aside by the person in charge of the office who did not know its character, and that it was not discovered till too late to file within the time limited, is unavailing to effect an appeal. The appellant, unless unable to procure a transcript from the justice, must see that it is filed as required by statute.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

P. O. Cassidy, for plaintiff in error:

The right to be heard in defense of the issues between the parties is not a jurisdictional one, and the fact that the appellee may have the case dismissed on motion, shows that if such motion were not filed the court would have jurisdiction, all that is necessary to give the latter being a proper showing of diligence (*Slaven v. Hellman*, 24 Neb., 646; *Converse Cattle Co. v. Campbell*, 25 Id., 37); and such showing was made in this case. Section 1011 of the Code is not mandatory, but leaves the court a legal discretion, in furtherance of justice, to grant appellants the right to be heard. (*Ordway v. Suchard*, 31 Ia., 481; *Burley v. Millard*, 11 Neb., 286; *Whereatt v. Ellis*, 35 N. W. Rep. [Wis.], 314; *Blair v. Mfg. Co.*, 7 Neb., 146; *Haggerty v. Walker*, 21 Id., 596; *O'Dea v. Washington Co.*, 3 Id., 118; *Mills v. Miller*, Id., 95; *Clutz v. Carter*, 12 Neb., 113; *Jean v. Hennessy*, 37 N. W. Rep. [Ia.], 771.)

Selleck & Lane, for defendant in error:

There was no motion below for a new trial as is required

27 874
39 522
37 874
41 701
27 874
44 137

in proceedings in error. (*Midland Pacific R. Co. v. McCartney*, 1 Neb., 398, cited and followed in almost every subsequent volume of reports.) The question presented below was a jurisdictional one, sec. 1011 of the Code is mandatory, and the court below could have done nothing but sustain the motion to quash. (*Verges v. Roush*, 1 Neb., 113; *Nuckolls v. Irwin*, 2 Id., 65; *Glore v. Hare*, 4 Id., 131; *Fox v. Meacham*, 6 Id., 530.) Even if the question was not jurisdictional, sound discretion required the ruling which was made, as proper diligence was not shown. (*Rogencamp v. Dobbs*, 15 Neb., 622; *U. P. R. Co. v. Marston*, 22 Id., 722.)

P. O. Cassidy, in reply:

The case is not one in which the law contemplates or requires a motion for a new trial. Unlike those cited by counsel for defendant in error, this case was brought on error from a decision of the district court affirming the judgment of a justice of the peace. *Converse Cattle Co. v. Campbell*, and *Slaven v. Hellman supra*, were such cases, and motions for a new trial were not filed therein. The granting of the right to be heard is discretionary. (*Dobson v. Dobson*, 7 Neb., 296; *R. V. R. Co. v. McPherson*, 12 Id., 480.

MAXWELL, J.

This action was commenced by the defendant in error on the 17th day of October, 1888, before a justice of the peace to recover of the plaintiff in error the sum of \$59, alleged to be due to said defendant in error for the board of one Wm. Armstrong, which, as was alleged, the defendant in error agreed to pay. On the 24th day of October a trial of the issues was had before the justice, which resulted in a judgment in favor of the defendant in error and against the plaintiff for the sum of \$69.40 damages and \$3.95 costs.

Afterwards on the 26th day of October, 1888, the plaintiff filed with said justice an appeal bond, which was duly approved. On the 26th day of November, 1888, the plaintiff filed the transcript in the office of the clerk of the district court of Lancaster county. On the 17th day of January, 1889, the defendant filed in the office of the clerk of the said district court his motion to enter up a judgment in the district court similar to the judgment in the justice's court, for the reason that the appellant had failed to perfect its appeal, by filing in the district court a transcript of the proceedings of the justice of the peace within the time allowed by statute, to-wit, thirty days after the judgment was rendered. On the 4th day of February, 1889, the plaintiffs filed in the district court their answer and affidavits resisting the motion for judgment. On the 23d day of February, 1889, the case came on for hearing on the motion for judgment, and the answer and affidavits, and the motion was sustained.

The affidavits on behalf of plaintiff in error to excuse the delay in filing the transcript state, in substance, that after the transcript was received from the justice it was laid aside by a young man in the office of the attorney of the plaintiff in error, and when discovered it was too late to file it within thirty days from the date of the judgment. Is the excuse offered sufficient? Sec. 1011 of the Code provides: "If the appellant shall fail to deliver the transcript and other papers, if any, to the clerk, and have his appeal docketed as aforesaid, within thirty days next following the rendition of said judgment, the appellee may, at the first term of the district court after the expiration of thirty days, file a transcript of the proceedings of such justice, and the said cause shall, on motion of said appellee, be docketed; and the court is authorized and required, on his application, either to enter up a judgment in his favor similar to that entered by the justice of the peace and for all the costs that have accrued in the court and award exe-

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cution thereon, or such court may, with the consent of such appellee, dismiss the appeal at the cost of the appellant, and remand the cause to the justice of the peace, to be thereafter proceeded in as if no appeal had been taken," etc. The requirement of the statute, that the transcript be filed within thirty days, is imperative. There is no condition that, in case the appellant, or any of his employes, be mistaken as to dates and circumstances, therefore he will be relieved from the consequences of his mistake. The appellant must be diligent and file his transcript within the time limited or the appeal will fail. No doubt where due diligence is shown in demanding a transcript and from any cause the trial court delays the delivery of the same for so long a time that it will be impossible to file it within the thirty days, the court will relieve the appellant, because the fault is with the court (*Dobson v. Dobson*, 7 Neb., 296), but there is no charge of that kind in the case under consideration.

The judgment of the district court is right and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

EDWARD P. DAVIS ET AL. v. C. H. SLOMAN.

[FILED NOVEMBER 20, 1889.]

1. Negotiable Instruments: USURY: AGENT'S BONUS IS NOT.

In an action upon three promissory notes the defense was usury and part payment. The testimony was conflicting as to the true nature of the transaction. One M. S. testified in substance that he acted as a broker for the borrowers and procured the loan for them and indorsed the original note for the borrowed money, for which he was promised by the borrowers the sum of \$400 for his services. *Held*, That an instruction set out in the

opinion was properly given, and that if M. S. acted as the agent of the borrowers in procuring the loan, the bonus received by him would not taint the transaction with usury.

2. —: SET-OFF. An instruction that the jury might find the whole of the set-off to which the defendants were entitled and prorate the same and deduct from the different notes the proper amount so found, *held*, not erroneous.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

R. S. Ervin, for plaintiff in error:

The instruction as to the loan, agency and commissions is erroneous, being misleading and without evidence to support it. (*Williams v. State*, 6 Neb., 334; *Holmes v. Boydston*, 1 Id., 358; *Dunbier v. Day*, 12 Id., 596; *Frederick v. Ballard*, 16 Id., 564; *Washington Ins. Co. v. Merchants', etc., Ins. Co.*, 5 O. St., 450; *Mutual Hail Ins. Co. v. Wilde*, 8 Neb., 431; *Housel v. Thrall*, 18 Id., 487; *U. P. R. Co. v. Ogilvy*, Id., 638; *Newton Wagon Co. v. Diers*, 10 Id., 285; Thompson on Charging the Jury, sec. 68, p. 97; *City Belt v. Goode*, 31 Mo., 128.) There is error in the instruction assessing the amount of recovery.

Offutt & English, and *H. C. Brome*, for defendant in error:

The testimony warrants the first instruction complained of. As to the second, a defendant cannot complain of errors personal to himself and not applicable to co-defendants unless he file a separate motion for a new trial and a separate petition in error. (*Long v. Clapp*, 15 Neb., 423; *Real v. Hollister*, 17 Id., 666; *Boldt v. Budwig*, 19 Id., 745; *Hoke v. Halverstadt*, 22 Id., 421.)

MAXWELL, J.

Three actions at law were brought in the district court of Douglas county upon three promissory notes given by the

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plaintiffs in error to the defendant in error. The actions were afterwards consolidated, whereupon the plaintiffs in error filed an amended answer setting up the defense of usury to the three notes, and for a second defense allege certain payments and set-offs against said notes. On the trial of the cause three separate verdicts were returned. One for \$1,563.87, one for \$734.99, and the third for \$734.99, and a motion for a new trial having been overruled, judgment was entered on the verdicts.

The testimony tends to show that on the 19th of September, 1887, the plaintiffs in error made a note for \$4,000 and delivered the same to M. H. Sloman, who thereupon drew a check on an Omaha bank in their favor for \$3,600. There is a conflict in the testimony as to the payee of this note. The defendants testify that it was drawn in favor of C. H. Sloman, while the plaintiff testifies that it was payable to the Bank of Commerce, of Omaha. The note was not produced on the trial and the testimony on that point is not entirely satisfactory. The business was transacted by Morris Sloman, the husband of the defendant in error.

He testifies that the money was borrowed for the plaintiffs in error of the Bank of Commerce, and that to procure the loan he indorsed the note and was to receive \$400 therefor. Hence the note was made for \$4,000, although the makers thereof received but \$3,600 thereon. This being the condition of the testimony, the court instructed the jury as follows:

"You are further instructed that so far as this action is concerned it is immaterial whether or not the note of \$4,000 executed in September, 1887, was made payable to the plaintiff, C. H. Sloman, or to the Bank of Commerce; under the pleadings and proofs, the plaintiff is entitled to a verdict less the amount due defendants as a set-off, which must be determined by you, under the evidence and instructions here given. And in arriving at a conclusion on that point you are instructed that if you find and believe

from the evidence under instructions given by the court, that in making the loan [to] the Kaufmans in September, 1887, the plaintiff acted simply as an agent of the Kaufmans in procuring said loan, and that the \$400 retained by them was agreed upon and was paid them by the Kaufmans as a commission for procuring said loan, then in that event the plaintiff would be entitled to receive such commission and the said \$400 could not be set off in this action."

The substance of Sloman's testimony is that he acted merely as a broker in procuring at their request a loan for the plaintiffs in error, and that to procure the same he was compelled to sign the note, and that the plaintiffs in error agreed to pay him four hundred dollars for these services. If this testimony is true, he would be entitled under the contract to the amount agreed upon. The truth or falsity of the testimony was for the jury to determine, but the question must be fairly submitted to them, which seems to have been done. The note seems to have been renewed on the 21st of December, 1887, by giving one note for \$2,100, due in sixty days, and one note for \$1,000, due in ninety days. Partial payments were also made on the notes, the exact amount of which is uncertain. On renewing the notes Sloman seems to have charged the plaintiffs in error \$200 for his services, but no particular point seems to be made on this.

Objection is also made to the fourth instruction, which is as follows: "In determining the amount of set-off to be allowed against each note sued upon, you may properly determine, first, the whole of the set off to which defendants are entitled, and then prorate the same and deduct from the different notes, and bring in your separate verdicts in each case, provided that if you find the \$1,000 note sued on in case No. 197, Docket 7, was a renewal of one of the October notes under instruction, then you can duly prorate as to the set-off proper in the other two

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cases." It is claimed that the effect of this is to charge some of the plaintiffs in error more than their just proportion of the amount due. So far as appears the makers of the notes are jointly liable thereon, and were jointly entitled to any set-off which might be proved against the notes. The case seems to have been tried on that theory and it is now too late to raise the objection. Upon the whole case there is no reversible error in the record, although we are not entirely satisfied that the whole scheme was not a device to evade the usury law; but the questions presented were peculiarly of a nature for the consideration of a jury, and we cannot say that the verdict is wrong.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JOHN CHARLES V. STATE OF NEBRASKA.

[FILED NOVEMBER 20, 1889.]

Burglary: REDUCTION OF SENTENCE. A young man, less than twenty-one years of age, of previous good character and habits, arrived in the city of Omaha in search of employment. He was without money, and fell in with several persons who induced him to drink intoxicating liquors, and thereafter persuaded him to burglariously enter a dwelling house in said city with one of their number. His associate escaped and he was found hiding in a closet in said house badly frightened. On an information being filed against him, he pleaded guilty to the charge of burglary and was sentenced to imprisonment in the penitentiary for ten years. *Held*, That while the crime of burglary was one of a grave character, which ordinarily should be severely punished, yet in this case the punishment was too severe, and the term of imprisonment would be reduced so as to expire November 27, 1889, the sentence dating from June 30, 1888.

ERROR to the district court for Douglas county. Tried below before GROFF, J.

G. M. Lambertson, for plaintiff in error.

William Leese, Attorney General, for the state.

MAXWELL, J.

The plaintiff pleaded guilty in the district court of Douglas county to a charge of burglary and was sentenced to imprisonment in the penitentiary for ten years, to date from the 30th day of June, 1888. He now, by proceedings in error, applies for a reduction of sentence. It appears from the evidence before us that the plaintiff arrived at the city of Omaha in the evening preceding the commission of the offense; that he was entirely without money and met some pretended friends, who invited him into a saloon to drink; that having imbibed a quantity of liquor his new found friends proposed to him that they enter the residence of John Sample of that city; that in pursuance of the invitation of his friends, he went with one of them and they entered Sample's residence.

The plaintiff appears to have been in a partially dazed condition and had neither arms nor money on his person. The pretended friend escaped from the house — a pistol being fired by Mr. Sample after him. Soon afterwards the plaintiff was found in a closet in Sample's house very much frightened. He was thereupon taken to jail and soon afterwards pleaded guilty to the charge. In his sworn statement the plaintiff says: "That he comes of good parentage; that he has never been arrested or convicted of any other offense; that he was only something over twenty years old — not twenty-one years old — at the date of the commission of this offense. Affiant says that he had left home to engage in business for himself about a year prior to the com-

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mission of this offense; that he worked in the Hot Springs for one Mrs. —, who kept a boarding house there over twelve months; that while so employed he became intimately acquainted with Messrs. — and one —, of —, Iowa, who were then boarding with Mrs. —; that on leaving the Hot Springs he came to Kansas City and expected to get employment there, but failing to get it came to Omaha on the night on which the burglary was committed; that he reached that town without any money, and there fell in with some associates who prevailed upon him to take one or two or more drinks of liquor, and under the influence of liquor he was induced to enter upon the enterprise and to commit the offense in question. Affiant says that he has always been a sober, industrious, and law-abiding young man, that when he entered the house in question he was unarmed and had no money upon his person or any weapons with which to injure any one. He had no counsel at the time of the trial and he was so mortified and so ashamed of the offense in question, and so fearful that the news, if conveyed to his mother, would kill her, that he did not notify his parents so that they could give him help, and he entered a plea of guilty without consultation with any lawyer or without communicating with his friends." This statement is fully corroborated by a number of reliable witnesses and seems to be substantially correct.

The crime of burglary is a serious one. The person who deliberately enters a dwelling for the purpose of larceny or robbery not unfrequently has determined in his mind and is prepared to commit the still greater crime of murder if necessary to effect his object or secure his escape. Such a case, when fully established, should be severely punished, and perhaps the full limit of the law is not excessive. The statute fixes the minimum punishment at one year and the maximum at ten. Between these periods the court has a discretion in fixing the term of

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imprisonment, the intention being that the court shall graduate it according to the facts of the case. It was never intended, however, to impose the full penalty of the law unless a case of great atrocity was shown. No doubt the prosecuting attorney and court were misled by his plea of guilty and hence failed to inquire into the circumstances, but nevertheless the sentence is entirely too severe and is conceded to be excessive by the attorney general. In Maxwell's Criminal Procedure, p. 661, it is said: "There is certainly a great difference in the character of the offense between the hardened villain who waylays and robs his victim, or who burglariously enters your dwelling at night with the intent to steal and murder if necessary, and the young man of previously good character, who has been guilty of some act which barely makes him criminally liable. In the one case the full punishment allowed by law, perhaps would not be too severe, particularly if the party had been previously convicted of a similar offense, while in the other, if the law will permit a punishment other than by imprisonment in the penitentiary and the consequent infamy, it might, and probably would, have the effect thereafter to make him a law-abiding citizen. In no case should the sentence exceed the bounds of just punishment. But little reformation may be expected from a prisoner smarting under a disproportionate and unjust sentence. The fact that he has been convicted of a crime does not authorize the courts to deprive him of those rights which the law still recognizes, nor to treat him as one having no rights."

The above expresses our views in this case. The sentence will be reduced under the provisions of the statute so as to expire on the 27th day of November, 1889.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

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2. Nor to exclude appraisal of goods replevied. *Id*..... 223
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5. Where principal witness was a woman of questionable character, but her testimony was corroborated by circumstances and by other witnesses, held, that the findings below would not be set aside for insufficient evidence. *Stevenson v. Valentine*..... 343
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 11. In such case, where plaintiff has been member and agent of a company, he cannot afterwards question its capacity as a grantee, and strict proof of its incorporation will not be required. *Buck v. Gage*.....311, 312
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 15. In an action of replevin for possession of personalty alleged to have been exchanged for a farm in another state, which defendant but not plaintiff had seen, as the former knew, proper for plaintiff to testify that defendant represented the property as worth \$3,000, knowing that it was not worth over half that sum; also that plaintiff relied upon the statements and made the transaction for that reason. *Cressler v. Rees*..... 518
 16. Not proper for plaintiff to testify that he had been engaged in the real estate business in Iowa and Nebraska, and knew the character and value of property there, it being conceded that he knew nothing of the farm in question, or of real estate values in its immediate neighborhood. *Id.*.....518, 519

17. In an action on an account stated, defendant set up for a counter-claim that the amount claimed was for intoxicating liquors sold by plaintiffs, who were wholesale dealers, without license. *Held*, That such answer amounted to a plea of confession and avoidance and rendered proof of their account by plaintiffs unnecessary, and upon proof by defendants of matter pleaded in avoidance, would amount to a full defense. *Gillen v. Biley*..... 163
18. In such case, it was incumbent on defendants to prove, at least *prima facie*, that plaintiffs sold the liquor sued for, without license. *Id.*..... 169
19. In an action for false imprisonment against three defendants, one of whom had procured the issuance by one of the others, a justice of the peace, of a warrant, by virtue of which the remaining one, a constable, arrested and imprisoned plaintiff, the warrant and complaint upon which it was issued are admissible in evidence. *Forbes v. Hicks* 117
20. In such action, where a part of the damages sustained by plaintiff consisted of the expenses of a *habeas corpus* proceeding in the county court, by which he was released from imprisonment, the county court docket, containing the entries of such proceedings, is also admissible. *Id.*
21. In an action upon *quantum meruit* for compensation for services performed at request of defendant, who afterwards denied the employment, not error to permit plaintiff to testify that defendant represented the services as worth, and guaranteed the payment of, a certain sum, etc.; the offer as to price not having been accepted by plaintiff. Such evidence would not establish an express contract as to price. *Walker v. Turner* 107
22. In such case, when defendant alleged in his answer that plaintiff's services were rendered exclusively for the water works company, and that he had been fully paid therefor, not error to reject a receipt for \$1,000 offered in evidence, given by plaintiff to the water works company, there being no proof that the employment or payment by the company was intended to cover the whole time of plaintiff and his efforts on behalf of defendant in securing the adoption of his pump. *Id.*..... 108
23. In an action for loss of means of support, by the suicide of the husband and father of the plaintiffs, which was alleged to have been caused by continued intoxication from liquor furnished by defendants, where there is proof tending to show that deceased had been under the influence of

such liquor for a considerable time, but that for a few days before the suicide he was sober, and that the deed was deliberate, physicians may testify in answer to questions as to the probable effect, in causing suicide, of the continued use of intoxicating drinks. *Poffenbarger v. Smith*..... 793

24. But in such case evidence is not admissible that on the day of the suicide deceased was charged with embezzlement. *Id.*.....793, 794

Exceptions. See INSTRUCTIONS, 1.

Executors and Administrators. See ADMINISTRATION OF ESTATES.

Exemption.

1. Debtor not deprived of, under secs. 521, 522, of the Code, by a judgment and order of sale, after attachment proceedings. *State, ex rel. Stevens, v. Carson*.....501, 502
2. Nor is he so deprived by the fact that he has transferred to his wife property claimed as exempt, and testified on the trial of an action in replevin (instituted by the wife against the sheriff who levied the attachment, and in which the property was held to be the husband's) that such property was his wife's and he had no interest therein. *Id.*.....501, 506

Experts. See EVIDENCE, 23.

Extradition.

Sec. 330, *et seq.*, Crim Code, relative to interstate extradition, intends that a charge must be pending against the accused in the state where the offense is alleged to have been committed, made before the proper authority, and in the required form; and a complaint before a magistrate in this state, which fails to allege that a charge is so pending, will not confer jurisdiction upon the magistrate. *Forbes v. Hicks*..... 116

False Imprisonment. See EVIDENCE, 18, 19. EXTRADITION.

False Representations.

1. Where a wife consents to sign a deed, conveying the homestead of which she and her husband are in possession, only upon the assurances of those employed by the grantee to procure the deed, in effect, that she would lose none of her rights thereby, the grantee is bound by such representations and the deed will be set aside. *Barker v. Barker* 135, 137

2. In such case, district court, not county court, has jurisdiction to set aside the deed. *Id.*

Fees. See CONSTABLES.

Fellow-Servants. See VICE-PRINCIPALS.

Fences.

1. Where it appears that city limits, with buildings thereon, extend along one side of certain necessary side tracks of a railway, the land on the other side not being platted, and that a cattle guard and fence would be inconvenient and unsafe for the company's employes, such company is not required to fence its tracks at that point. *C., B. & Q. R. Co. v. Hogan*..... 807
2. There can be no recovery for stock killed by engines at such a place, when neither the owner of the stock nor the company is guilty of negligence. *Id.*

Final Order.

1. Refusal of district court to dismiss a cause is not. *Grimes v. Chamberlain*..... 611
2. Ruling on a motion to discharge an attachment is. *Eckman v. Hammond*..... 614

Forcible Entry and Detainer.

1. Where it appears that an attorney is lawfully in possession of certain premises, by virtue of an agreement, in pursuance of which he obtained recognition of a client's claim to a half-interest in the same; that he collected rents and obtained a judgment of ouster against a tenant, who then took a lease from him; but that the client made a deed, not introduced in evidence, of her interest in the premises; there is not sufficient to show that the attorney is a trespasser, and his possession cannot be divested by force. *Estabrook v. Hateroth*..... 800, 801
2. The question of whether or not such possession had lawfully terminated, is one for the jury, and it is error for the court to direct a verdict for defendant. *Id.*..... 801

Foreclosure. See MORTGAGES, 2. SHERIFF, 2.

Foreign Laws. See EXTRADITION. LIMITATION OF ACTIONS, 1.

Forfeiture. See INSURANCE, 1, 2, 9.

Forgery. See PRINCIPAL AND AGENT, 2, 3.

Fraud. See PREFERENCES.

- Is a question of fact for the jury. *Springfield, etc., Ins. Co. v. Winn*..... 657

Fraudulent Conveyances. See CREDITOR'S BILL.

1. A deed executed by one free from debt, but which is concealed and not recorded, will not be upheld as against those to whom the grantor has subsequently incurred obligations. *Steele v. Coon* 597
2. A conveyance through another between husband and wife, though it will be closely scrutinized, is not necessarily fraudulent as against creditors, and will be upheld to the extent of the actual consideration passing. *Id.*..... 598
3. Such consideration does not include the value of a homestead conveyed as a part of the transaction, and the remainder to vest in the heirs of the holder of the general title thereto will not be regarded as adding to such consideration. *Id.*..... 599, 600
4. Under the circumstances of the case, *held*, that the title conveyed was subject to the equities and liens of the creditors. *Id.*..... 600
5. In an action in nature of creditor's bill, to subject certain property held in name of a wife to payment of debts of one who conveyed property to her husband, in fraud of creditors, the defense being that the property was the wife's separate estate, derived from her parents, and there being doubt and a conflict of testimony as to such separate estate, finding of trial court against same will not be set aside. *Hart v. Dogge*..... 284
6. In such case, where property purchased with money held in fraud of creditors advances in value at a rate beyond legal rate of interest, such creditors, nevertheless, in subjecting the property, will be restricted to purchase price with legal interest. *Id.*
7. In 1883, a husband in prosperous circumstances caused certain real estate to be conveyed to his wife. In 1886 the wife sold the same, realizing a large profit. She permitted the husband to apply the proceeds to the payment of the debts of a partnership of which he was a member, and which soon afterwards failed, when the husband repaid, out of partnership assets, the money received from her. This money the husband invested in real estate, at the wife's direction, taking the title in her name. A large sum of money was borrowed upon this property, and a house erected thereon, the whole amount expended being equal to the money borrowed on the property, plus that formerly loaned to the husband by the wife. *Held*, That an action in the nature of a creditor's bill to set aside the wife's deed to the property, should be dismissed. *Morse v. Raben* 145, 150

Fraudulent Representations. See CONSPIRACY. FALSE REPRESENTATIONS.

Garnishment.

A garnishee who before answer has notice that the defendant in the action had assigned the debt to another before notice of garnishment was served, must state that fact in his answer in order to be protected from an action by the assignee of the debt. *Coleman v. Scott*..... 82

Gift. See LIQUORS, 2.

Homestead. See FRAUDULENT CONVEYANCES, 3.

1. Is not abandoned by a wife, who, owing to ill treatment of her children, goes to another part of the county and remains, but returns frequently to take care of her husband; and on latter's death she becomes vested with a life estate in the homestead. *Lamb v. Wogan* 239
2. When selected from husband's separate property, title for life vests at latter's death in wife, exempt from all liability against husband or wife, except valid liens against husband. *Durland v. Seiler*..... 37
3. Widow's removal from such premises does not affect their exempt character. *Id.*

Husband and Wife. See ALIMONY. FRAUDULENT CONVEYANCES, 2-7. FALSE REPRESENTATIONS. HOMESTEAD, 2.

Impeachment. See WITNESS, 1.

Improvements. See COUNTY BONDS.

Increment. See FRAUDULENT CONVEYANCES, 6.

Indecent Assault. See EVIDENCE, 4. PLEADING, 3.

Indictment.

When made under sec. 11, ch. 50, Comp. Stats., charging that the accused did "sell and give away" intoxicating liquors, does not charge the offense of giving away upon a pretext under the provisions of the section; the words "give away" are mere surplusage, charging at most only a sale and delivery; and the indictment is not bad either for duplicity or uncertainty. *State v. Ball*.....604, 605

Indorsement. See JUDGMENT. PRINCIPAL AND AGENT, 1. PLEADING, 5.

Indorsee for collection may maintain action on promissory note in his own name, subject to all defenses of maker as against indorser. *Roberts v. Snow*.....430, 431

Information. See VARIANCE, 1.

Names of witnesses in a criminal prosecution cannot be added to, against objection, unless it be shown that they were not known earlier, and in time to give accused notice. *Gandy v. State*.....732-734

Infringement. See TRADE NAMES.**Injunction.** See EJECTMENT, 5. ELECTRIC LIGHT WIRES, 1.
PRACTICE, 6. RELIGIOUS SOCIETIES.**Instructions.** See ASSUMPSIT, 1. BONDS, 2. LIQUORS, 1.
PRACTICE. WITNESSES, 2.

1. When not excepted to at the trial, cannot be considered on review. *Holloway v. Schooley*.....556, 557
2. Refused in case stated, as not applicable to or based on the evidence. *Barlass v. Braash*.....220, 221
3. An instruction upheld on first consideration, found to be erroneous on rehearing. *Klosterman v. Olcott*..... 686
4. Not error to refuse, where those asked are but the negative propositions of those given. *Aultman v. Trout*..... 212
5. Court may instruct jury as to the law of a matter testified to by one witness, though it is denied by others. *Atkins v. Gladwish*..... 848
6. A general exception to, insufficient; each specific instruction, claimed to be erroneous, must be distinctly pointed out and excepted to. *Walker v. Turner*.....104, 109
7. When erroneous, cannot be cured by another instruction in behalf of parties whose rights are prejudiced. *Id.*
8. Failure or refusal of judge to read to the jury an instruction marked and filed as given, is reversible error. *McDuffie v. Bentley*..... 388
9. Where a party requests an instruction which it was not error to refuse, he cannot assign as error the giving of the same changed so as to be slightly less objectionable. *Amos v. Townsend*.....823, 824
10. In a prosecution for rape, *held*, erroneous in blending two propositions, one of which would not warrant a conviction, and in referring ambiguously to "such intent." *Johnson v. State*..... 693
11. When entitled "Instructions given by the court on its own motion," and so placed in the record as to be clearly distinguishable from those presented by the parties, comply sufficiently with terms of act of February 25, 1875. *Gillen v. Riley*.....171, 172

Insurance.

1. A policy covering realty and various classes of personalty, the latter not being specifically named, is not entire, and a mortgage on the realty, given in violation of a condition in the policy against incumbrance or sale of any of the insured property, will not prevent a recovery for the destruction of the personalty. *State Ins. Co. v. Schreck*..... 536
2. Nor will mortgages on the personalty, if paid and canceled prior to its destruction. *Id.*..... 536-538
3. Where, in answer to plaintiff's questions, the insured testified that such mortgages had been paid, and the jury so found, plaintiff cannot afterwards object that such evidence is insufficient, nor that it is incompetent, even though the issue of payment is not raised by the pleadings. *Id.*..... 538, 539
4. The insured's positive and uncontradicted testimony that two agents of the company were at the fire, receiving and agreeing to give notice to the latter, and that soon after the adjuster came and adjusted the loss, is sufficient proof of notice of loss; the policy not requiring it to be written or furnished to a particular person. *State Ins. Co. v. Schreck*..... 539
5. Where the proof shows that the insured property is situated on the northwest quarter of the section, instead of the northeast as described in the policy, the variance is not material, and the insured will not be compelled to seek a reformation of the policy in a court of equity before he can recover. *Id.*..... 540, 541
6. Where an insurance agent contracts to insure certain property and afterwards states that the policy is executed and in his possession but fails to deliver it; and after the property is destroyed claims that it was insured, not in the company contracted with, but in another for which he is also agent; but subsequently delivers a policy of the original company, made to expire before the destruction of the property, such policy is void, the parol contract to insure is not merged therein, and the trial court may ignore the question of merger in its instructions. *Neb. & Ia. Ins. Co. v. Seivers*..... 549-552
7. In such case, unnecessary to show service on the company of proof of loss, within the time commonly allowed by it; and an instruction that the adjuster's presence at the fire did away with the necessity of proof of loss, though error, works no prejudice to the company. *Id.*..... 550, 552, 553

8. In such case, where the company stipulates to admit all in reference to the agent's authority, except "the money matter," an instruction that the agent was "duly authorized to make contracts for defendant," is proper. *Id.*..... 551
9. A policy is not avoided by a willful misrepresentation by the insured as to the amount of his loss, provided its actual amount is in excess of the policy; even though the latter contains a provision that "all fraud or attempts at fraud, by false swearing or otherwise, shall forfeit all claim on this company," etc. *Springfield, etc., Ins. Co. v. Winn.*.....649, 654, 657

Interest.

1. Where twelve per cent is agreed upon in a promissory note, and is the maximum legal rate at the time, but before the note matures such rate is reduced to ten per cent, the holder is nevertheless entitled to the contract rate. *Richardson v. Campbell.*..... 648
2. But no interest will be allowed on interest coupons attached to such note, though they provide that they shall draw the maximum legal rate from maturity. *Id.*..... 649

Intoxicating Liquors. See LIQUORS.

Joinder of Parties. See PARTIES. RELIGIOUS SOCIETIES, 2.

Judgment. See ATTORNEY, 5. EJECTMENT, 4, 5. REPLEVIN, 2, 5.

1. In former case, adhered to. *Martin v. State.*..... 325
Olds Wagon Co. v. Benedict...... 344
2. Where controlling facts do not sustain, will be set aside. *Coleman v. Scott.*..... 83
3. When rendered against the makers and indorsers of a promissory note, and paid by one of the indorsers under execution, no defense of suretyship being set up, such payment is a satisfaction and cancellation of the judgment; and the paying indorser cannot, by virtue of an assignment to him of the judgment by the plaintiff, levy on the land of a co-defendant. *Potvin v. Meyers.*.....756, 757

Jurisdiction. See COURT. DISMISSAL, 1. OFFICERS.

1. The district, not county court has, to set aside a deed obtained by false representations. *Barker v Barker* 137
2. Courts of general equity and common law jurisdiction not necessarily limited in exercise thereof by statutory provisions. *Earle v. Earle.*..... 280
3. Hence courts of equity may decree alimony in separate suit for it independent of divorce. *Id.*..... 283

4. Not conferred upon a magistrate before whom a complaint is made charging one with the commission of a crime in another state, if it fails to allege that a charge of committing the crime is pending in such state, made before the proper authority and in the required form. *Forbes v. Hicks*116, 117

Jurors.

1. Are not disqualified by views expressed on any other subject than their own impartiality; hence not by views as to the legal presumption of the innocence of the accused, or as to the equal credibility of all witnesses. *Gandy v. State*707, 727, 732
2. One who states on his *voir dire* that he has formed a pretty strong opinion as to the guilt of the accused, and one which would take considerable evidence to remove, that if what he had heard was true he was prejudiced, and that he could not say whether or not he could not sit impartially, is incompetent as a juror. *Thurman v. State* ... 631
3. Error in overruling a challenge for cause, of such person, is not cured by the fact that he is afterwards peremptorily challenged by counsel for the accused, and latter is entitled to a new trial. *Id.*..... 633

Jury. See FRAUD. INSTRUCTIONS.

Justice of Peace. See APPEAL, 2.

1. Has no authority to charge a jury. *Burke v. Magee*..... 157
2. Cannot be required by *mandamus* to make an order in a case after it has been taken to the district court, his judgment reversed, and the cause retained for trial. *State, ex rel. Rudabeck, v. Livey* 56

Laches. See APPEAL, 1. FRAUDULENT CONVEYANCES, 1.

A deed executed by one free from debt, but which is concealed and not recorded, will not be upheld as against those to whom the grantor has subsequently incurred obligations. *Steele v. Coon*..... 597

Landlord and Tenant. See FORCIBLE ENTRY AND DETAINER. MILL DAMS.

Lease.

Set out and construed. *Culver v. Garbe*.....320, 325

Letter Carriers. See BAILMENT.

License.

Power to imprison for failure to pay fee of, does not apply to a mere occupation tax. *State v. Green*..... 67

Liens. See ATTORNEYS, 5. SHERIFF, 2. TAXES, 5-7.

Semble, there are none, of vendors in Nebraska. *Durland v. Seiler*..... 37

Limitation of Actions. See MORTGAGES, 2. TAXES, 2, 5, 6, 7.

1. It is a sufficient defense to an action, if it is barred by the statute of limitations of another state in which defendant resided at time of service upon him. *Howe v. Aultman*... 255
2. Where a purchaser at tax-sale takes no deed, an action upon his certificate to foreclose his tax-lien is barred, after expiration of time allowed owner to redeem. *Shepherd v. Burr*..... 435
3. One who is in the adverse possession of land does not impair his right to rely on the statute of limitations, by purchasing the land at tax sale and receiving and recording a tax deed, nor is the running of the statute suspended thereby. *Griffith v. Smith*..... 53-55

Liquors. See EVIDENCE, 6, 7, 8, 23, 24. INDICTMENT.

1. Instructions in action for loss of means of support caused by, examined and discussed. *Sellers v. Foster*..... 126-134
2. Gift of, when unaccompanied by intention to evade the law, not necessarily a crime. *State v. Ball*..... 604
3. Where an appeal is taken to the district court from the action of a city council granting license to sell, and such action being affirmed there, the cause is removed to the supreme court, a *mandamus* will not be granted by said court, requiring the council to recall the license, as long as the cause is pending therein. *State, ex rel. Foster, v. Barton*. 476
4. In an action on an account stated, defendant set up for a counter-claim that the amount claimed was for intoxicating liquors, sold by plaintiffs, who were wholesale dealers, without license. *Held*, That such answer amounted to a plea of confession and avoidance, and rendered proof of their account by plaintiffs unnecessary. *Gillen v. Riley*... 163
5. In such case, it was incumbent on defendants to prove, at least, *prima facie*, that plaintiffs sold the liquors sued for without license. *Id.*..... 169
6. A liquor dealer, having a license in his own city or county, may conduct a wholesale business in any part of the state and is not required to obtain a license at the place of sale. *Id.*..... 166

Lis Pendens. See MANDAMUS, 2.

Mail. See BAILMENT.

Mandamus.

1. Will not issue to compel justice of peace to make an order in a case after it has been taken to the district court, his judgment reversed and the case retained for trial. *State, ex rel. Budabeck, v. Livsey*..... 56
2. Will not be granted by the supreme court, requiring a city council to revoke a saloon license, while a cause removed from the district court, which has sustained the action of the council in granting the license, is pending in the supreme court. *State, ex rel. Foster, v. Barton*..... 476
3. Lies to compel a railway company to deposit with county judge the amount of an award duly made, of damages for right of way from which no appeal has been taken. *State, ex rel. Farmer, v. G. I. & W. C. E. Co*..... 698
4. Such remedy is available to one who has not the legal title to the land taken but holds it as a timber claim, as he is entitled to compensation for injury to his possession. *Id.*

Marshaling of Assets. See PARTNERSHIP, 1.

Master and Servant. See VICE-PRINCIPALS.

Maxims.

1. *De minimis non curat lex.* Does not apply to a debt of \$8.50 improperly covered by an order of attachment, and latter will be dissolved where such debt is included. *Meyer v. Evans* 371
2. *Falsus in uno, falsus in omnibus.* Applied to testimony. *Atkins v. Gladwish* 847

Mayor. See MUNICIPAL CORPORATIONS, 3, 4.

Measure of Damages. See DAMAGES, 2, 3.

Meeting of Minds.

Evidence examined and found not to establish. *Morrill v. Davis* 782

Merger. See INSURANCE, 6.

Mill Dams.

Where *ad quod damnum* proceedings, to secure right to overflow land by constructing a mill dam, are compromised by owners leasing a part of the land conveying such right, and stipulating that lessee's rights shall be the same as if *ad quod damnum* proceedings had been completed, assignees of such lease acquire a vested right in stream and water within leased property, and owners will be enjoined

from constructing thereon two dams and a ditch connecting them, by which quantity of water in assignee's reservoir would be reduced, and permanency of their dam endangered. *Culver v. Garbe*.....323-325

Misjoinder of Causes. See ATTACHMENT, 2.

Mistake. See AMENDMENT. VARIANCE.

Mortgages. See CHATTEL MORTGAGES. INSURANCE, 1. SURETYSHIP.

1. A purchaser of mortgaged real estate, who has assumed the mortgage debt as a part of the consideration, may be sued directly thereon by the mortgagee. *Keedle v. Flack*.. 840
2. A petition to foreclose a mortgage, given to secure two notes, was filed soon after the first matured, stating the facts as to both notes but asking foreclosure only as to the first. After both notes matured, no further pleadings having been filed, a decree for the amount due on both notes was taken and the premises sold under the decree. *Held*, That such sale was voidable, not void, and that an action to redeem, commenced ten years later, could not be maintained unless without it the mortgagor would suffer injustice. *Likes v. Wildish* 155

Municipal Corporations. See ELECTRIC LIGHT WIRES. FENCES. VILLAGES.

1. The provisions of sec. 86, art. 1, ch. 14, Comp. Stats., limiting municipal appropriations to amount of annual appropriation bill do not apply where a proposition to borrow money for a specific purpose has been sanctioned by a majority of the legal voters of the municipality. *State, ex rel. Fuller, v. Martin*..... 452
2. In such case the money borrowed and placed in the treasury is appropriated for the purpose intended, and is subject to the disposal of the municipality, without the ordinance required by the statute above cited. *Id*...452, 453
3. Mayor and council have power, implied at least, from necessities of the case, to compromise and settle claims against the municipality. *Id*..... 455
4. Mayor is chief executive officer of the city, and it is his duty to execute all ordinances, resolutions, etc., duly passed, whether, as a matter of opinion or sentiment, they meet his approval or not. *Id*..... 456

Negligence. See CONTRIBUTORY NEGLIGENCE. VICE-PRINCIPALS.

1. Railway company not liable for killing of stock without,

- at a place where a fence is not required. *C., B. & Q. R. Co. v. Hogan*..... 807
2. A hotel clerk who receipts for a valuable registered letter directed to a guest at the hotel, but which is lost before reaching him, is liable to the carrier, who is required by the post-office department to bear the loss. *Joslyn v. King*.....40, 41
- Negotiable Instruments.** See INTEREST. JUDGMENTS, 2. PARTIES, 2, 3. PRACTICE, 6. PRINCIPAL AND AGENT. SUMMONS, 1. SURETYSHIP. USURY, 4, 5.
1. An instrument bearing no date of payment, but providing that "on default of prompt payment of the interest for thirty days after it is due, then this note * * * shall be due and collectible," is a negotiable promissory note payable on demand. *Roberts v. Snow*..... 429
2. An indorsee for collection may maintain an action on a promissory note in his own name, but subject to all defenses of maker as against indorser. *Id*.....430, 431
3. Are not discharged when given in part payment for a reaper, and the amount thereof paid to agents for the sale of such machine, who had neither possession of nor authority to receive payment for the same. *Seiberling v. Demaree*..... 859
4. Where it appears that the makers of notes are jointly liable and entitled to any set-off which might be proved, it is not error to instruct the jury that they may find the whole of the set-off, prorate the same, and deduct from the notes the proper amount so found. *Davis v. Stoman*.....880, 881
- Notice.**
1. Waiver of, to manufacturing company as to failure of warranty, in contract for sale of threshing machine. *Aultman v. Trout*.....210, 211
2. Of dissolution, must be brought home to one dealing with a partnership, in order to affect his rights in respect thereto. *Stoddard Mfg. Co. v. Krause*..... 89
- Occupation Tax.**
- When reasonable and lawful, may be levied by a village, but must be collected by levy and sale of property, not by arrest and imprisonment. *State v. Green*..... 67
- Officers.** See CONSTABLES. SHERIFF.
- Where county is divided, officers of old territory have no jurisdiction over new county. *State, ex rel. Malloy, v. Clewenger*..... 424

Onus Probandi. See PRESUMPTIONS.

1. Upon plaintiffs to show good faith of transfer to them of a note before maturity, where the original transaction is shown to have been tainted with usury. *Blackwell v. Wright*..... 275
2. On one claiming title by accretion to show that government sale and survey of land claimed, were unauthorized and in violation of claimant's rights. *Bissell v. Fletcher*.. 583

Opinion Evidence. See EVIDENCE, 23.

Options. See WAGERING CONTRACT.

Parties. See APPEARANCE. ATTACHMENT, 3-5. CONSPIRACY. COUNTIES, 2. INDORSEMENT. MORTGAGES, 1. PLEADING, 5.

1. All occupants are necessary, in ejectment, unless so in privity with a co-defendant as to be concluded by a judgment against him. *Tarkington v. Link*.....828, 829
2. While the name "The People's Bank" does not of itself show legal capacity to sue, yet if a note is given to the bank by that name, the makers are estopped to deny its capacity to sue thereon. *Bair v. People's Bank*..... 580
3. A note will be presumed to have been so given where the finding of the court below was to that effect, and the record shows that such note was introduced in evidence, though no copy thereof is attached to the record. *Id.*
4. One who claims right of way under a contract, but was not before the court below, must be made a party, where it is apparent that he has an interest in the subject-matter of the suit, before the supreme court will determine his rights. *Koenig v. C., B. & Q. R. Co*..... 705
5. An action against "C. C. and H. R., in business under the firm name of C. & R.," is an action not against the firm but the individual members thereof, and the fact that one of them cannot be served with summons within the county where the action is pending before an inferior court, does not prevent the court from having jurisdiction over the party duly served who has appeared generally in the case. *Rowland v. Shephard*..... 500

Partnership. See CONSPIRACY. FRAUDULENT CONVEYANCES, 7. PARTIES, 5. SPECIFIC PERFORMANCE. USURY, 4.

1. Right of administrator of late member of insolvent firm, inferior to that of the firm creditors, they having a primary claim to partnership assets. *Banks v. Steele*..... 141
- 58

2. Where terms of written contract of, are ambiguous, construction thereof by parties to contract as evinced by their acts, is entitled to great if not controlling influence. *Rathbun v. McConnell*..... 244
3. An ostensible partner, retiring from a firm, must prove at least constructive notice of dissolution, to the creditors of the continuing firm or partner, in order to be relieved from liability to such creditors. *Stoddard Mfg. Co. v. Krause*..... 89
4. Where parties purchase the interest of one of two partners, knowing that the remaining partner is indebted to the old firm, the interest of such parties in the debt is not of a fiducial character, and a mortgage or transfer of his property by the indebted partner, will not be annulled at their suit, their remedy being by creditor's bill. *Warren v. Peabody*..... 234

Paupers. See TOWNSHIPS, 1, 2.

Performance. See ACCEPTANCE, 2, 3.

Perjury. See WITNESSES, 2.

1. Falsity of statement of accused, in prosecution for, cannot be established by contradictory oath of one witness; there must be in addition at least corroborating facts and circumstances equal to the testimony of a witness and establishing a preponderance of evidence against the accused. *Gandy v. State*..... 734
2. No amount of corroboration of the doubtful or equivocal testimony of a witness can sustain a conviction for. *Id.* 743
3. A willful misrepresentation under oath by an insured as to the amount of his loss, if its actual amount exceed the policy, though it would probably subject him to a prosecution for perjury, will not avoid the policy, even though it provides that false swearing, etc., shall forfeit all claim on the company. *Springfield, etc., Ins. Co. v. Winn* ...654, 657

Petition. See AMENDMENT. CONSPIRACY. MORTGAGES, 2. PLEADING, 3. PRACTICE, 5. VARIANCE, 3.

In an action founded upon the receipt of goods from plaintiff by defendant, examined and held, to state a cause of action. *Buck v. Reed*.....70-73

Pleading. See AMENDMENT. ATTORNEYS, 5. DEMURRER. EVIDENCE, 22. INDICTMENT. JUDGMENT, 2. PRACTICE, 5, 6. USURY, 3. VARIANCE.

1. In an action to quiet title failure to allege exclusive, ad-

- verse possession for ten years, not material error after judgment, where proof shows possession to have been of that character. *Tourtelotte v. Pearce*..... 62
2. Where answer fails to state a material fact (one necessary to show that defendant is entitled to make a certain defense), presumption is that it does not exist. *Cheney v. Dunlap* .. 404
3. In an action for damages for an indecent assault the words in the petition, "Did then and there assault the plaintiff with foul and indecent purpose to do violence to her person, and by force and intimidation to criminally know her," after verdict, *held*, sufficient. *Atkins v. Gladwish*841, 847
4. In an action for money had and received, payment need not be pleaded in order to admit proof that plaintiff gave certain claims to defendant to collect, taking as a receipt the note of the latter, who collected and paid in one of the claims, returning the others and receiving back his note. *Amos v. Townsend*.....816, 817
5. In an action by the indorsee of a promissory note, the makers of which set up the defense of usury against the indorser without recourse, who answered that at the time of the indorsement he informed plaintiff of all defects, a motion to require defendant to state in what manner he gave such information and to separate the second paragraph of his answer, showing what portion is relied on as defense and what as affirmative relief, set-off, etc., is properly overruled. *McDuffie v. Bentley*.....384, 385
- Practice.** See AFFIDAVIT. APPEAL, 1. APPEARANCE. BILLS OF EXCEPTIONS. CONTINUANCE. COURT. DEFAULT. DISCLAIMER. DISMISSAL. ERROR. EVIDENCE. EXCEPTIONS. FORCIBLE ENTRY AND DETAINER, 2. INSTRUCTIONS. JURORS. JUSTICE OF PEACE. NOTICE. PARTIES. PLEADING. REVIEW. TRANSCRIPT. TRIAL. VERDICT.
1. When a railway company, which has appealed from an award of damages for right of way, decides not to prosecute the appeal, the proper motion is to affirm the award, as such motion if sustained will carry interest and costs. *Robbins v. O. & N. P. R. Co.*..... 75
2. The statutory provision requiring trial judge to reduce to writing and file his instructions has no reference to rulings on points which arise during progress of trial, though necessarily made in hearing of jury. *Forbes v. Hicks*..... 117
3. Trivial departures by counsel, from correct rules of argument, not reversible error. *Id.*..... 118

4. Where a case is presented in supreme court upon transcript alone, without bill of exceptions, it will be presumed that the proceedings below were regular and the instructions correct, unless latter contain statements of the law which could not be correct in any possible case made by the proof under the pleadings. *Willis v. State...* 100
5. On the second trial of a case, after reversal by the supreme court of a judgment for plaintiff, the trial court may refuse defendant's application for leave to withdraw his answer and ask for an order requiring plaintiff to make her petition more definite and certain, except on condition that defendant should be ready for trial the next morning. *Atkins v. Gladwish*..... 846
6. Where the transfer of certain notes is enjoined and their cancellation ordered by the trial court, on the ground of usury, and the decree as to two of the notes affirmed by the supreme court, but the injunction dissolved as to the others, and the holder afterwards applies to said court to so modify the decree as to require the maker to pay the amount found due, as a condition of relief, such application will be denied, as it was not made in the original action, and would require a reconstruction of the pleadings. *Wilhelmsen v. Bentley*.....659, 680

Preferences. See CHATTEL MORTGAGES.

1. Common law regarding, is in full force in this state. *Davis v. Scott*..... 643
2. Of *bona fide* creditors, not necessarily fraudulent. *Britton v. Boyer*..... 526

Presumptions. See FRAUDULENT CONVEYANCES, 2. JURORS, 1. ONUS PROBANDI. PARTIES, 3. PLEADING, 2.

1. Are in favor of regularity of *nisi prius* proceedings; and where no good reason is shown for not applying the rule and the evidence is conflicting, the judgment below will be affirmed. *Schroeder v. Baker Mfg. Co.*..... 46
2. In favor of regularity of proceedings of district court and of its instructions, where case is presented in supreme court on transcript alone, without bill of exceptions; unless such instructions contain statements of the law which could not be correct in any possible case made by the proof under the pleadings. *Willis v. State*..... 100

Principal and Agent. See REAL ESTATE AGENTS. USURY, 1.

1. A traveling salesman, authorized to collect accounts for his employers, has implied authority to indorse, in name

- of latter, checks received in payment; and bankers who, in good faith, cash such checks for agent, are not liable to his employers if he embezzle the proceeds. *Lorton v. Russell*..... 378
2. A clerk and salesman, empowered to transact all the business of a store, has, in the absence of the proprietor, apparent, though he may not have the real, authority to receive, in payment for goods, a check, and to take the same to a bank to be cashed. *Levy v. Bank*.....563, 564
3. Where such check is afterwards shown to be forged the proprietor is bound to make it good. *Id*..... 564
4. Where there is no evidence to show that agents for the sale of a reaper are authorized to receive payment therefor, a purchaser of such machine who pays to the agents the amount of a note given in part payment, but not in their possession, is not discharged thereby. *Seiberling v. Demaree*..... 859
5. In such case, the court should direct a verdict for the payee. *Id*.

Principal and Surety. See SURETYSHIP.

Probate. See ADMINISTRATION OF ESTATES. COURT—COUNTY.

Process. See SUMMONS.

Public Policy.

Semble, might be taken as a guide in the absence of legislation; but will of legislature, as expressed in its last enactment, is best index to. *Fenton v. Yule*.....767, 768

Quantum Meruit.

In an action upon, for compensation for services performed at request of defendant, who afterwards denied the employment, not error to permit plaintiff to testify that defendant represented the services as worth, and guaranteed the payment of, a certain sum, etc., the offer as to price not having been accepted by plaintiff. Such evidence would not establish an express contract as to price. *Walker v. Turner*..... 107

Question of Fact. See FORCIBLE ENTRY AND DETAINER, 2. FRAUD. JURY. REPLEVIN, 4. REVIEW.

Railroads. See EMINENT DOMAIN. FENCES. MANDAMUS. REVIEW, 4.

When foreign corporations, cannot, under sec. 8, art. 11, Const., acquire right of way; nor can they do so indirectly

- through domestic corporations leased by them. *Keenig v. C., B. & Q. B. Co.*..... 704
- Rape.** See INSTRUCTIONS, 9. EVIDENCE, 4. PLEADING, 3.
1. To sustain a conviction of, it is not sufficient to show that accused *may* be guilty; it must appear beyond reasonable doubt that he is guilty of the specific offense charged. *Johnson v. State*..... 689
 2. Evidence *held* insufficient to sustain conviction of..... 687
 3. Delay in making complaint, is a strong circumstance showing that the charge is a fabrication. *Johnson v. State*..... 692
 4. In a prosecution for, where the testimony is conflicting, both as to resistance by the prosecutrix, and resort to force by the accused, it is error to refuse an instruction in substance pointing out the prejudice likely to be aroused by the nature of the charge, the difficulty of defending against it, and that it was not rape if, while she had power to resist, the woman consented, no matter how tardily, or after how much exercise of force. *Reynolds v. State*.....92, 93
- Ratification.** See DISCLAIMER, 2.
- Real Estate.** See ACCRETION.
1. Immaterial variance from proof in description of, in insurance policy. *State Ins. Co. v. Shreck*..... 540
 2. Evidence examined and found not to prove a contract for sale of. *Morrill v. Davis* 781
- Real Estate Agents.** See ACCEPTANCE, 1. REAL ESTATE, 2.
- Are entitled to commission when they bring about a contract for the sale of property listed with them, though one of the parties thereto afterwards refuses to comply. *Greenwood v. Burton*..... 812
- Redemption.** See MORTGAGES, 2.
- Mere purchaser of equity of, cannot avail himself of his grantor's usurious contract and plead it. *Cheney v. Dunlap* 404
- Reduction of Sentence.** See BURGLARY.
- Referee.** See EVIDENCE, 13.
- Reformation.**
- Not required of an insurance policy, in which there is an immaterial variance from the proof in describing property in order that insured may recover. *State Ins. Co. v. Schreck*.....540, 541

Rehearing. See INSTRUCTIONS, 3.

Religious Societies.

1. Where a church building is erected by voluntary contributions made with the understanding that said building is to be used for certain purposes of a religious nature, the contributors may enjoin a sale of the property, where inadequate reason is shown for such sale and the effect would be to divert the funds from the use intended.
Avery v. Baker 397, 398
2. Not necessary for all contributors to join in an action to restrain such sale. *Id.* 396

Remarks of Counsel. See ERROR, 3.

Remittitur.

1. Made a condition to affirmance of judgment. *Cressler v. Eees* 522
2. Ordered in case stated; costs in supreme court to be equally divided between parties. *Carter v. Munson* 179

Replevin. See APPEAL, 2. VARIANCE, 3.

1. Instructions in action of, examined and discussed.
Cressler v. Eees 519-522
Nollkamper v. Wyatt 571-576
2. Under sec. 192 of the Civil Code, where property has been delivered to plaintiff, not necessary to render judgment in his favor for possession of same. *Nollkamper v. Wyatt*, 576, 577
3. In case stated, bond in another action properly admitted, and appraisal of goods replevied properly excluded. *Barlows v. Braash* 222, 223
4. Question should be submitted of right of plaintiff to immediate possession of property when action was brought.
Fischer v. Burchall 247
5. Where there is a failure to give a replevin undertaking and the action proceeds under sec. 193 of the Code, it becomes in substance an action in *trover*; and when in plaintiff's favor, judgment should be for damages due him, not for return of property. *Philleo v. McDonald* 145
6. In action of, against a sheriff, who had levied an execution upon a stock of goods placed in a store, by a third party and stranger to the execution, who had the goods in his possession at the time of the levy, sheriff must show by competent proof his authority for the seizure, or plaintiff will be entitled to possession of goods and damages.
Schars v. Barnd 97, 98
7. In such a case, the jury, in estimating damages due

- plaintiff for illegal detention of property, will not be confined to net income of store at or about time of levy, but may consider all other elements of damage shown on the trial. *Id.*..... 96
- Return.** See SUMMONS, 2.
- Revenue.** See TAXES.
- Review.** See DISMISSAL. EVIDENCE, 5, 8, 13. INSTRUCTIONS, 3.
1. Instructions cannot be considered on, unless excepted to at trial. *Holloway v. Schooley*..... 557
 2. Where no particular questions of law arise and verdict is fully sustained by evidence, judgment will be affirmed. *Dickenson v. Pelton*..... 76
 3. Where there is evidence to support a finding of the district court, it will not be disturbed merely because the reviewing court does not view such evidence in the same way. *Morse v. Baben*.....150, 151
 4. Where the oral evidence as to the amount of damage to real estate from the construction of a railroad thereon is conflicting, and the jury examines the premises, the verdict will not be disturbed, though one for a much larger amount would have been sustained. *Fink v. E. V. E. Co.*..... 662
- Right of Way.** See EMINENT DOMAIN.
- Sale.**
1. Evidence examined, and found not to prove a contract for sale of real estate. *Morrill v. Davis*..... 781
 2. Terms of contract construed, and held that under them there was no sale. *Aultman v. Trout*..... 208
- Satisfaction.** See JUDGMENT.
- Sentence.**
- Of ten years for burglary, reduced. *Charles v. State*..... 884
- Service by Publication.** See AFFIDAVIT.
- Set-off.** See ATTORNEY, 1. NEGOTIABLE INSTRUMENTS, 4. PLEADING, 5.
- Sheriff.** See REPLEVIN, 6.
1. In an action of replevin against, by a third party and stranger to an execution levied upon goods in possession of latter at the time, sheriff must show by competent proof his authority for the seizure, or plaintiff will be entitled to judgment for possession of goods and damages. *Schars v. Barnd*.....94, 97, 98

2. Cannot be amerced for failing to pay to a third lienholder a portion of the proceeds of a foreclosure sale, the amount of which is not more than sufficient to satisfy two prior liens. *Russell v. Grimes* 816

Sidewalks. See TAXES, 3, 4. VILLAGES.

Specific Performance.

- In a suit by one partner against another for specific performance of contract of dissolution, *held*, that he could maintain the suit to protect his rights, but was not entitled to a final decree until he had performed all conditions imposed upon him by such contract, and paid in full the price agreed on for the other partner's interest in the late firm. *English v. Milligan*..... 339

Statute of Frauds.

1. Evidence examined and found to sustain the verdict, that the promise was direct and unconditional to pay for certain goods furnished a third party; was made prior to the delivery; and that such delivery was made upon the faith of the promise. *Lindsey v. Heaton* 667
2. Such promise is an original undertaking and not within the statute. *Id.*..... 668

Statute of Limitations. See LIMITATION OF ACTIONS.

- Effect of. *Tourtelotte v. Pearce*..... 62

Statutes. See INDICTMENT.

1. Ch. 47, Laws of 1881, is complete in itself and repeals by implication secs. 234-8, ch. 23, Comp. Stats. *Davis v. Davis*..... 861
2. An act approved February 26, 1889, amending subd. 2, sec. 25, ch. 18, Comp. Stats., does not conflict with sec. 11, art. 3, Const. (providing that an amendatory act must contain the sections amended), or of sec. 15 of the same, though that portion of ch. 18 embracing sec. 25 was passed March 30, 1887, and on the following day another act was passed amending the same, but was not inserted in the compilation of 1887, except as a foot note.
Fenton v. Yule758-764
Baird v. Todd.....784, 785
3. An act duly passed and filed with the secretary of state is in full force and open to amendment, though not inserted in a compilation generally in use. *Fenton v. Yule*.....758, 764
4. Though there be apparent confusion in the application of an act to provisions sought to be amended, yet where the intention of the legislature is not doubtful, the amendatory

- act, if not inconsistent with the title and subject-matter of the amended one, is valid. *Id.*.....764-768
5. Said act of 1889, by amending sec. 25, ch. 18, Comp. Stats., 1887, also amends by implication sec. 30 of the same chapter, and the vote therein required is to be understood as changed from two-thirds to a simple majority, though said section verbally remains as before. *Id.*.....765-767
6. Sec. 51 of the revenue law of 1889, declaring taxes to be a "perpetual lien" upon real estate, must be construed with reference to the provisions for redeeming the land within two years from the date of sale, and for procuring a tax deed, and was not intended to continue a tax lien after the remedies to enforce it had ceased. *D'Gette v. Sheldon*835, 836
7. The title of the act of February 28, 1881, regulating the license and sale of intoxicating liquors, is broad enough to cover a provision therein requiring the licensee or his bondsmen to pay all damages resulting from such sale and other provisions looking towards the regulation of the traffic; and such act is not, therefore, in conflict with sec. 11, art. 3, Const. *Poffenbarger v. Smith*.....791, 792

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Summons. See ATTACHMENT, 3. LIMITATION OF ACTIONS,
1. PARTIES, 5.

1. May be issued to other counties by county judge, and *semble* by justice of peace, to joint, or joint and several obligors, on a note sued on, where one or more of defendants is properly summoned in the county. *Bair v. People's Bank*..... 581
2. When sent to another county than that in which the action is brought, may, under sec. 66 of the Code, be made returnable on the second Monday after its date, instead of the third or fourth, if the plaintiff so elect. *State, ex rel. Attorney General, v. R. V. E. Co.*.....853, 854

Supervisors. See TOWNSHIPS, 2.

Supreme Court. See COURT—SUPREME.

Suretyship. See JUDGMENT, 2.

1. Where a note and mortgage include \$90 to be given to the mortgagee to indemnify him as surety on an appeal bond and he has not been required to suffer loss thereon, a decree of foreclosure in his favor will be reduced \$90 with the 12 per cent interest allowed by the decree. *Smith v. Atkins* 250

Taxes. See COUNTIES. COUNTY BONDS. LIMITATION OF

ACTIONS, 2, 3. OCCUPATION TAX. STATUTES, 6.
WORDS AND PHRASES, 1, 2, 3.

1. Townships, by failing to levy, cannot avoid liability for support of paupers. *Waltham v. Mullally*..... 490
2. One who is in the adverse possession of land does not impair his right to rely upon the statute of limitations by purchasing the same at tax sale, and receiving and recording a tax deed, nor is the running of the statute suspended thereby. *Griffith v. Smith*.....53, 54
3. A charge levied by a city against property along which it has constructed a sidewalk, is a tax, and differs from one imposed for general revenue only in its purpose or policy, not in its method of enforcement. *Wilson v. Auburn*..... 440
4. Irregularities in the assessment do not invalidate such tax, nor can its collection be enjoined under sec. 144, ch. 77, Comp. Stats., as having been levied for "an illegal or unauthorized purpose." *Id.*..... 441
5. Sec. 51 of the revenue law of 1869, declaring taxes to be a "perpetual lien" on real estate, must be construed with reference to the provisions for redeeming the land within two years from the date of sale, and procuring a tax deed, and was not intended to continue a tax lien, after the remedies to enforce it had ceased. *D'Gette v. Sheldon*.....835, 836
6. Under sec. 180, art. 1, ch. 77, action to foreclose tax liens must be brought within five years after expiration of time to redeem. *Id.*..... 834
7. Under the revenue law of which said section is a part, one who has been in the open, exclusive, notorious, adverse possession of real estate for a period of ten years, thereby acquires an absolute title, free from liens of any taxes existing thereon prior to the commencement of said period. *Id.*.....829, 835

Timber Claim.

Holder of, entitled to compensation for injury to his possession, and *mandamus* lies to compel a railway company to deposit with county judge the amount of an award of damages for right of way through such claim. *State, ex rel. Farmer, v. G. I. & W. C. E. Co.*..... 698

Townships.

1. In counties under township organization, are liable for support of paupers. *Waltham v. Mullally*..... 490
2. Supervisor is charged with care and support of paupers,

township is liable for a contract which he makes for such support, and its liability cannot be avoided by failure to levy taxes therefor. *Id.*

3. Board of, does not exercise judicial functions, and error does not lie to the district court from action of former in rejecting a claim. *Id.*

Trade Names.

A loan and trust company cannot appropriate the geographical word "Nebraska" as its trade name, and enjoin others in similar business from so using it, there being no conflict of interest nor liability of deceiving the public. *Nebraska Loan & Trust Co. v. Nins*..... 514

Transcript. See APPEAL, 1.

Where a case is presented solely upon, without a bill of exceptions, it will be presumed that the proceedings of the lower court were regular and the instructions correct, unless latter contains statements of the law which could not be correct in any possible case made by the proof under the complaint upon which the proceedings below were founded. *Willis v. State*..... 100

Trial. See CONTINUANCE. INSTRUCTIONS. JURORS. VERDICT.

1. The statutory provision requiring trial judge to reduce to writing and file his instructions, has no reference to rulings on points which arise during progress of trial, though necessarily made in hearing of jury. *Forbes v. Hicks*..... 117
2. Trivial departures by counsel, from correct rules of argument, not reversible error. *Id.*..... 118
3. One who on cross examination asks a witness an immaterial question, is concluded by the answer and will not be permitted to call a witness to contradict it. *McDuffie v. Bentley*..... 386
4. Failure or refusal of judge to read to the jury an instruction marked and filed, is reversible error. *Id.*..... 388

Trover.

Replevin becomes, where there is a failure to give a replevin undertaking, and the action proceeds under sec. 193 of the Code. *Philleo v. McDonald*..... 145

Undertaking. See ATTACHMENT, 3. BONDS.

Usury. See INTEREST. PRACTICE, 6.

1. If one acts as the agent of the borrowers in procuring a loan, the bonus received by him does not taint the transaction with. *Davis v. Sloman* 890

2. As a defense is personal to the borrower, and a mere purchaser of the equity of redemption cannot avail himself of his grantor's defense on a usurious contract and plead it. *Cheney v. Dunlap*..... 404
3. Where a transaction is shown to be tainted with, and burden of proof is upon plaintiffs to show *bona fides* of transfer to them of promissory note, before maturity, verdict against them will not be reversed as contrary to evidence. *Blackwell v. Wright*..... 276
4. In such case, where a member of the firm, suing on the note as a *bona fide* purchaser, was called as a witness by defendant, and it was shown by him that usurious interest was generally charged by the payee's bank (a member of the firm controlling which was a brother of witness) such testimony, though not conclusive against plaintiffs, is competent as a circumstance to be considered with other facts tending to establish notice of defense. *Id.*..... 272

Variance. See INSURANCE, 5.

1. Where the name of a prosecuting witness is alleged in an information to be John M. Thayer, but he testifies that it is Jeremiah, the variance is fatal to conviction. *Gandy v. State* 745
2. A description in a policy locating property insured in the northwest instead of the southeast quarter of a section, as the proof shows it to be, is not material enough to require a reformation of the policy. *State Ins. Co. v. Schreck*, 540, 541
3. Where an original petition and affidavit for replevin, described the property as seven head of horses, setting out certain brands, and an amended petition describes it as three mares, three horses, and one colt, setting out the same brands, there is no variance. *Nollkamper v. Wyatt*, 569, 570

Vendor and Vendee. See MORTGAGES, 1.

Vendor's Lien.

- Semble*, there are none in Nebraska. *Durland v. Seiler* 37

Venue.

1. Power to order change of in criminal cases confined to district court of county where offense was committed. *Gandy v. State* 721
2. When change of is ordered from one county to another, county attorney of latter and not of former county should prosecute. *Id.*.....725, 726

Verdict. See CONSPIRACY, 2. ERROR, 2. REVIEW, 2, 3. USURY, 3.

1. Found to be excessive and judgment reversed unless remittitur ordered. *Gifford v. Faubion* 44
2. When supported by the evidence, where the facts have been fairly submitted to the jury, judgment will not be reversed. *City of Fremont v. Brenner* 408
3. Erroneous when arrived at by adding the amounts of damage estimated by each juror, and dividing the sum by the whole number of jurors. *Burke v. Magee*..... 157

Vice-Principals.

1. Law of, as distinguished from fellow-servants, discussed. *C., B. & Q. E. Co. v. Sullivan*.....679, 682
2. Criterion is nature of duties not rank of employe. *Id*..... 681
3. One clothed by a corporation with superintendence of a distinct department is such. *Id*..... 673
4. Instruction, *held*, too broad and indefinite as failing to distinguish between acts of and those of fellow-servants. *Id*..... 682

Villages. See OCCUPATION TAX.

Are municipal corporations, and under the same obligations as cities to keep their streets and sidewalks in a safe condition. *City of Wahoo v. Reeder*..... 773

Voir Dire. See EVIDENCE.

Wagering Contract.

1. In an action to recover for services rendered and money advanced in buying and selling grain for future delivery, where the evidence shows that what was called delivery consisted in settling losses on the board of trade; that defendants had neither ability nor intention to deliver, receive, or pay for grain, of which facts plaintiffs had notice, and there is no evidence as to the intention of the other parties to these nominal transactions, the latter are mere wagers and a verdict for defendants will not be disturbed. *Watte v. Wickersham*.....473, 474
2. In such case, evidence of defendants that they were unable to pay for the grain, controlled no elevators, etc., were engaged in other business than handling grain, and did not have any of it in their possession, is admissible as showing the intentions of the parties and the real character of the transaction. *Id*..... 475

Waiver. See ESTOPPEL.

Of written notice to manufacturing company, as well as to

local agent, of failure of warranty in a contract for sale of threshing machine, occurs where, in obedience to verbal notice to local agent, company sends an expert who attempts to adjust the machine and fails. *Aultman v. Trout*.....210, 211

Warranty.

When terms of, require written notice of failure of, to company manufacturing a threshing machine, as well as to local agent, and verbal notice is given to latter, who notifies the general agent, and an expert is sent, who attempts to adjust the machine and fails, the company waives the written notice. *Aultman v. Trout*.....210, 211

Water Rights. See MILL DAMS.

Witnesses. See CONTINUANCE, 4.

1. May not be impeached by party calling him, but such party may prove the truth by others, even though the first be thereby contradicted. *Blackwell v. Wright*..... 273
2. An instruction that if the jury believe that any witness had knowingly sworn falsely to a material fact, his testimony should be disregarded, is sufficient, and need not be qualified by adding the words "unless corroborated." *Atkins v. Gladwish*.....847, 848

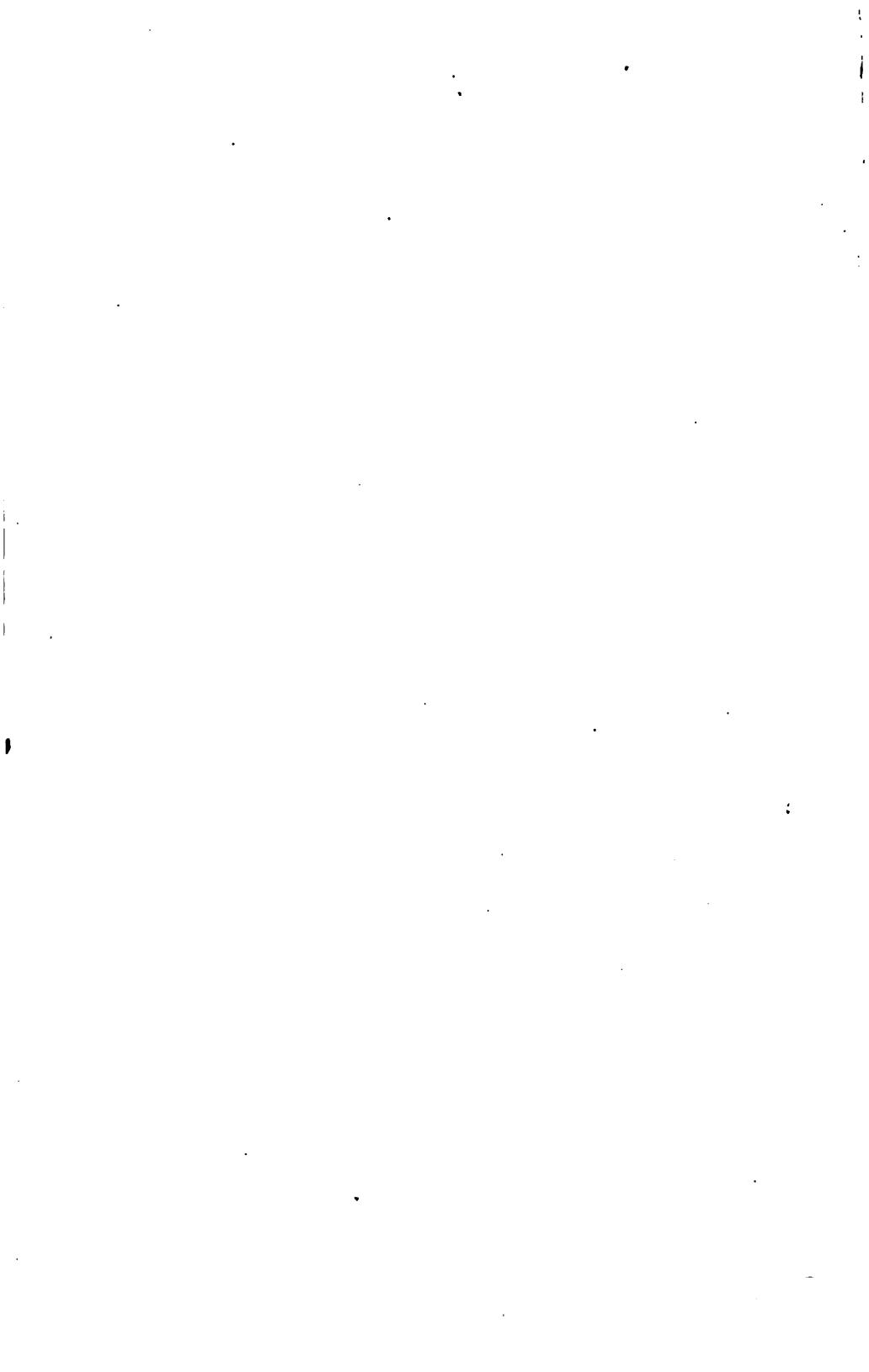
Words and Phrases.

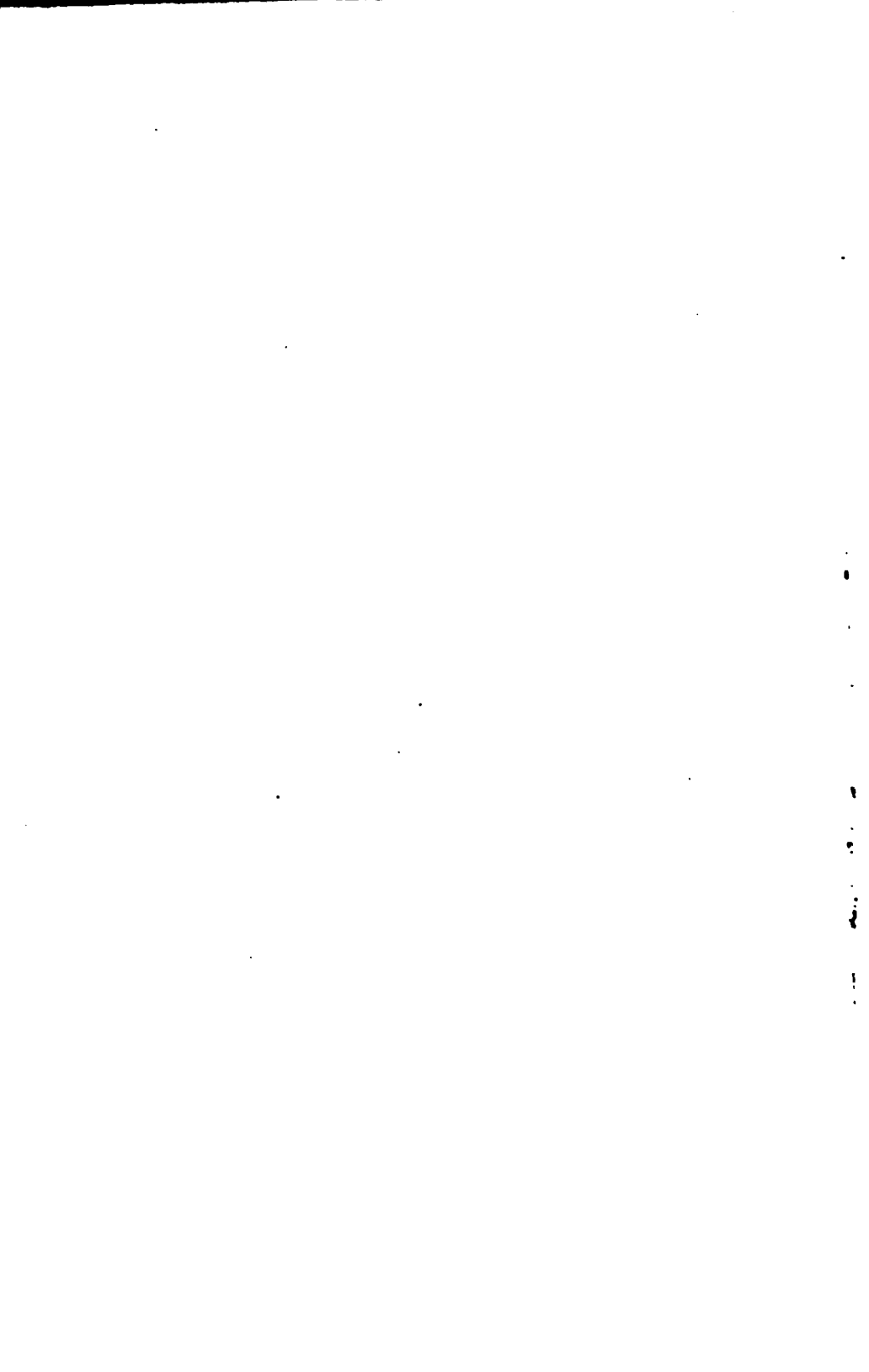
1. The word "perpetual," in sec. 51 of the revenue law of 1869, was not intended to continue a tax lien after the remedies to enforce it had ceased. *D'Gette v. Sheldon*...835, 836
2. Such word is used rather in the sense of "primary" or "paramount." *Id.* 836
3. A designation, in a proposition submitted for the erection of a court house, of the ground on which the same should be located, is mere surplusage, unless it appear plainly that the voters were misled thereby..... 768
4. The words "give away" in sec. 11, ch. 50, Comp. Stats., when quoted in an indictment charging that the accused did "sell and give away" intoxicating liquors, are mere surplusage, charging at most only a sale and delivery, and the indictment is not bad either for duplicity or uncertainty. *State v. Hall*.....604, 605

Work and Labor. See ASSUMPSIT. QUANTUM MERUIT.

Writs. See SUMMONS.







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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

1885—1886.

VOLUME XVIII.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

LINCOLN, NEB.:
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1886.

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A.D. 1886,

By GUY A. BROWN, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

Rec. May 12, 1886

THE SUPREME COURT

OF

NEBRASKA.

1886.

CHIEF JUSTICE,

SAMUEL MAXWELL,

JUDGES,

M. B. REESE.

AMASA COBB.

ATTORNEY GENERAL,

WILLIAM LEESE.

CLERK AND REPORTER,

GUY A. BROWN.

DEPUTY,

HILAND H. WHEELER.

DISTRICT COURTS

OF

NEBRASKA.

JUDGES.

J. H. BROADY,	FIRST DISTRICT.
S. B. POUND,	SECOND DISTRICT.
J. L. MITCHELL,	SECOND DISTRICT.
JAMES NEVILLE,	THIRD DISTRICT.
E. WAKELEY,	THIRD DISTRICT.
A. M. POST,	FOURTH DISTRICT.
W. H. MORRIS,	FIFTH DISTRICT.
T. L. NORVAL,	SIXTH DISTRICT.
J. C. CRAWFORD,	SEVENTH DISTRICT.
WILLIAM GASLIN, JR.,	EIGHTH DISTRICT.
F. B. TIFFANY,	NINTH DISTRICT.
F. G. HAMER,	TENTH DISTRICT.

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J. B. STRODE,	SECOND DISTRICT.
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WILLIAM MARSHALL,	FOURTH DISTRICT.
MANFORD SAVAGE,	FIFTH DISTRICT.
THOMAS DARNALL,	SIXTH DISTRICT.
GUY R. WILBER,	SEVENTH DISTRICT.
W. S. MORLAN,	EIGHTH DISTRICT.
N. D. JACKSON,	NINTH DISTRICT.
H. M. SINCLAIR,	TENTH DISTRICT.

STENOGRAPHIC REPORTERS.

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JOHN T. BELL, . . .	THIRD DISTRICT.
MYRON H. WHELER, . . .	FOURTH DISTRICT.
S. A. SEARLE, . . .	FIFTH DISTRICT.
FRANK TIPTON, . . .	SIXTH DISTRICT.
EUGENE MOORE, . . .	SEVENTH DISTRICT.
S. M. NEVIUS, . . .	EIGHTH DISTRICT.
E. CARKHUFF, . . .	NINTH DISTRICT.
F. M. HALLOWELL, . . .	TENTH DISTRICT.

REPORTER'S NOTES.

The volume of laws quoted as the "Revised Statutes," refers to the edition prepared in 1866 by E. Estabrook.

The volume of laws quoted as the "General Statutes," refers to the edition prepared in 1873 by Guy A. Brown.

The volume of laws quoted as the "Compiled Statutes," refers alike to the first edition, 1881, and second edition, 1885, compiled by Guy A. Brown.

Acts of various years are cited by reference to volume of laws and the year in which they were passed.

This volume contains a report of decisions handed down prior to Jan. 9, 1886, except those previously reported, and some cases in which rehearings have been granted.

The syllabus in each case in this volume was prepared by the judge writing the opinion, in accordance with rule 23.

The court, at the January term, 1885, adopted new rules, which went into effect June 6. These rules appear in an appendix at the end of this volume.

Lincoln, April. 1, 1886.

PRACTICING ATTORNEYS.

Admitted since the publication of Vol. 17, and prior to
Jan. 9, 1886.

HUGH J. DOBBS,
J. A. GRIMISON,
S. E. HOSTETTER,
E. N. KAUFFMAN,
JOHN L. KENNEDY,

T. L. LEWIS,
JOHN W. LYTLE,
THOMAS C. MUNGER,
J. S. SHROPSHIRE,
GEORGE H. STUART.

The following amendments to rules were adopted at the July term, 1885:

Rule 3. [FAILURE OF PARTIES TO APPEAR.]—Whenever a cause is reached in its regular order on trial of cases, and either party appears in person or by attorney, the cause shall be continued to the next regular term, unless abstracts and briefs of both parties are on file, in which case it shall be submitted to the court in the same manner as if oral argument had been had.

Rule 4. [SUBMISSION OF CAUSES.]—Whenever a cause is regularly reached, and the plaintiff in error or appellant fails to appear, and his abstract is not on file, the defendant may have the case dismissed, or may submit it either with or without argument. When the defendant makes default, and there is due proof of service of summons in error or notice of appeal having been made in the cause, and abstract and brief of plaintiff are on file with proof of service thereof within the time provided by rules 7 and 8, the plaintiff may proceed *ex parte*.

The following additional rule was adopted:

Rule 27. All motions made or submitted to the court shall be in writing; and notice thereof, except motions for rehearing, shall be served on the adverse party or his attorney of record at least one day before the hearing. Such notice shall conform to the provisions of section 574 of the code, be served by a sheriff, constable, or any disinterested person, who shall be entitled to fees allowed by law for service of a summons. The return of any such officer or affidavit of any such person shall be proof of service.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JULY TERM, 1885.

PRESENT:
HON. AMASA COBB, CHIEF JUSTICE.
" SAMUEL MAXWELL, } JUDGES.
" M. B. REESE, }

DAVID E. SAYRE ET AL., APPELLEES, V. WILLIAM H.
THOMPSON ET AL., APPELLANTS.

18	33
62	22m

1. **Creditor's Bill: PETITION.** Where after judgment and before the issuance of execution thereon, the defendant removed to another county, and the plaintiffs issued an execution to the original county, which was returned wholly unsatisfied for want of goods or lands, upon a creditor's bill being brought to subject a certain other judgment to the payment of said first named judgment, on the ground that said last named judgment was held in secret trust for the debtor in said first named judgment, and said bill contained an averment "that the said defendant, William H. Thompson, has no property whatever subject to sale on execution," *Held*, Sufficient.
2. —: **DEFENSE: ESTOPPEL.** W. H. T., a merchant, being indebted to S., sold his entire stock to L., taking time notes in payment, and afterwards, upon a colorable sale thereof, transferred said notes to B. S. brought suit against W. H. T., and attached the goods in the hands of L., claiming that the sale from W. H. T. to L. was fraudulent and void. L. replevied

the goods. Afterwards, S. abandoned his attachment, and by stipulation released all claim for a return of the goods. B., having sued L. on the notes and obtained judgment, S. brought a creditor's suit against B. and others to have the judgment of B. against L. applied to the payment of his judgment. *Held*, That B. is estopped to set up and claim as a defense to such suit that S. obtained satisfaction of his debt by means of his attachment of the said goods.

3. ———: ATTORNEYS' LIEN. S. and P., the attorneys who obtained the judgment for B. against L., having been made defendants in said creditor's suit for the purpose of cutting off their lien on said judgment for their fees, *Held*, That no question of notice of such attorneys' claim of lien could arise in said case, and that if such question could arise, that actual notice is sufficient under the statute.

APPEAL from the district court of York county. Heard below before NORVAL, J.

Sedgwick & Power, for appellants.

Brown & Ryan Brothers, for appellees.

COBB, CH. J.

This is an action in the nature of a creditor's bill, brought by certain judgment creditors of William H. Thompson against said Thompson, together with W. A. Brown, Samuel H. Sedgwick, and Frederick C. Power, for the purpose of subjecting a certain judgment at law recovered in the district court of York county by the said W. A. Brown against one James Lemon to the payment of the judgments of the said plaintiffs against Thompson.

Plaintiffs, by their petition, after setting out their several judgments against Thompson, the issuing of executions thereon respectively, and their return wholly unsatisfied, and the insolvency of Thompson, proceed to charge as follows: "That for some years prior to the 26th day of April, 1880, the defendant William H. Thompson was engaged in keeping a store of general merchandise in the

said city of York, Nebraska, carrying on the business of a general merchant at said place, and that the claims for which the said several judgments * * * were rendered were for goods purchased by the said Thompson on credit and for money used in his said business * * * that the said Thompson being considerably indebted, for the purpose of cheating and defrauding his creditors and for the purpose of placing his goods and property beyond the reach of his creditors * * * and particularly the plaintiffs, did, on the 26th day of April, 1880, pretend to sell and did deliver to one James Lemon all his goods merchandise, book accounts, and property subject to execution or legal process, for the consideration of six thousand dollars, five hundred dollars of which was paid at the time of said pretended sale, and for the balance of five thousand five hundred dollars the said Thompson took the unsecured notes of the said Lemon, payable as follows: Five hundred dollars payable in sixty days after the date of the sale, and five hundred dollars every two months thereafter, thus extending the time for the payment of said notes over the period of twenty-two months, all of which was done by the said Thompson with the view and for the purpose of cheating and defrauding his creditors and particularly these plaintiffs.

* * * "That the said defendant Thompson, for the purpose of hindering and defrauding his creditors in the collection of their just claims, and particularly the plaintiffs, did send and remove the aforesaid notes of the said James Lemon out of the state of Nebraska, and beyond the jurisdiction of the courts of this state, and secreted said notes that they might not be made subject to the payment of the debts due his creditors, and especially these plaintiffs, whereby these plaintiffs and each of them were wholly unable to come at the same or any part of them.

* * * "That on the 10th day of July, 1882, ten of the said notes were sued by W. A. Brown in the district

court of York county, as the owner of the same, and judgment was rendered by said court in favor of W. A. Brown, against James Lemon, on the 18th day of September, 1883, for the sum of six thousand eight hundred and seventeen dollars and eighty three-cents, which said judgment is still wholly unsatisfied and of record appears to be the property of the said W. A. Brown. The plaintiffs allege that the assignment under which the said defendant W. A. Brown claims to be the owner of, and as such sued upon, said notes, was fraudulent and colorable only, and was made by said Thompson and received by said Brown with that intent, and for no other purpose, and as part of the scheme of said Thompson to cheat, hinder, and delay the creditors of the said defendant Thompson in the collection of their just claims, and especially to hinder and defraud these plaintiffs.

* * * "That said assignment was without consideration, and was made solely for the purpose of placing said notes and the avails thereof beyond the reach of the creditors of the said Thompson, and particularly of these plaintiffs. And the said defendant W. A. Brown has no equitable right to or interest in the same, but that he holds them for the use and benefit of the said defendant Thompson," etc., with the usual allegations of conspiracy and confederation against the defendants Thompson and Brown.

The plaintiffs, in and by their said petition, also allege that the defendants Sedgwick & Power, as attorneys, brought the action for the said defendant W. A. Brown on the notes given by Lemon as heretofore stated, and obtained judgment on the same as in said petition before stated, and for such services said Sedgwick & Power have pretended to file an attorney's lien on said judgment for the sum of one thousand dollars, as the alleged value of their services in obtaining the said judgment against Lemon, as aforesaid, which said sum of one thousand dollars the plaintiffs allege is greatly in excess of the value of

said services, even if the said Sedgwick & Power are entitled to a lien on said judgment for said services, etc., with prayer for injunction and relief, etc. And also "that the court inquire and ascertain whether the said Sedgwick & Power are entitled to a lien on said judgment for their services, and if such lien shall be allowed an enquiry be had as to what said services were reasonably worth," etc., with prayer for general relief.

Each of the defendants, except Thompson, answered, and replications being made thereto, the pleadings present the several questions hereinafter stated.

A trial was had to the court, a jury being waived. The court found all the allegations of the plaintiffs' petition to be true excepting as to the lien of Sedgwick & Power. And further found in favor of the defendants Sedgwick & Power, in respect to their said lien, that their services as such attorneys in prosecuting said notes to judgment were rendered in good faith, were of the value of seven hundred and fifty dollars, that no part thereof has been paid, that a written notice of such lien was duly filed, of which the said James Lemon and each of the plaintiffs had actual notice.

A final judgment was entered in accordance with the said findings, from which the cause is brought to this court on two appeals.

The appeal of W. A. Brown, defendant, presents the following points:

1. Are plaintiffs entitled to relief by creditor's bill before the issuance of an execution against their debtor directed to the sheriff of the county in which he resided at the time of its issuance, and its return unsatisfied in whole or in part?
2. Are the plaintiffs entitled to proceed by creditor's bill after having caused to be levied upon and seized by the sheriff of the county, upon executions issued by them against their judgment debtor, sufficient goods and chat-

tels to satisfy their said judgments as the property of said judgment debtor, and upon the same being replevied by one James Lemon, having by stipulation released and surrendered all claim thereto and of a return thereof?

3. The finding of the court that, "Afterwards said Thompson transferred said notes so taken to his co-defendant, W. A. Brown, in whose name suit was brought on ten of said notes, against said James Lemon, and judgment thereon recorded therein in this court on the 18th day of September, 1883, for the sum of \$6,817-⁸³/₁₀₀ and costs; that said judgment is wholly unsatisfied, that the said purchase of the said notes by Brown from the said Thompson, and recovery of judgment, was a part of the fraudulent scheme and device of the said Thompson and the said Brown to hinder, defraud, and delay the creditors of the said Thompson, especially the plaintiffs, in the collection of their just debts and judgments due from the said Thompson, and that therefore the said W. A. Brown is the equitable trustee of the plaintiffs as to their above named judgments," etc., is not sustained by the evidence, and that the judgment is not sustained by the evidence.

Upon the first point, the Nebraska cases cited by counsel for defendants fall short of sustaining their position. The case of *Weil & Cahn v. Lankins*, 3 Neb., 384, decided but a single point, to-wit: "That an attaching creditor cannot maintain an action in the nature of a creditor's bill to have an alleged fraudulent conveyance from his debtor set aside, such action can only be maintained by a judgment creditor." The other two cases cited—*Weinland v. Cochran*, 9 Neb., 482; *Crowell v. Horacek*, 12 Id., 622—simply follow this and go no further.

The case of *Reed v. Wheaton*, 7 Paige's Chan., 663, goes further, and holds that "where a creditor's bill is founded upon a judgment in the supreme court or a decree of the court of chancery, so that an execution thereon may be issued to any county, the complainant must show affirm-

actively in his bill that he has exhausted his remedy by issuing an execution to the county in which the defendant resided at the time when such execution was issued, or he must state in his bill some sufficient legal excuse for issuing his execution to a different county."

In that case it appeared from the pleadings that the defendant, who had formerly resided in Genesee county, where the judgment was rendered, had at the time of the issuance of the execution to the sheriff of Genesee removed across the line into Niagara county, and then lived at a place in the latter county about ten miles from his former residence, "and that if an execution had been issued to that county it could have been levied upon personal property, which he had there and which was subject to sale on execution, sufficient to have satisfied the debt and costs."

This case is followed by that of *Mer. and Mechanics Bank v. Griffith*, 10 Paige, 519; also, by *Wheeler v. Heenman*, 3 Sand. Ch'y, 650, and *Smith v. Fitch*, Clarke's Ch'y, 188.

In the former of these cases the court queries, "Whether a positive averment in the bill that the defendant has no real or personal estate whatever in the county where he resides, which is liable to a levy and sale by execution, would be a sufficient legal excuse to authorize the filing of a creditor's bill upon the return of an execution issued to another county."

This query, I think, should be answered in the affirmative. Such an averment would present an issue which the plaintiff would be bound to prove, and upon its proof the necessary fact, and the only one which the return of an execution issued to the proper county would tend to prove, would be established before the court.

In the case at bar the petition contains the following allegation: "That the said defendant, William H. Thompson, has no property whatever subject to sale on execution." This allegation is not denied by any of the defend-

ants and must therefore be taken to be true, and while it is not as full as it might and should have been, it will in view of the other facts admitted and proved in the case be held sufficient.

Upon the second point it appears from the answer of defendant Brown, and reply of plaintiffs thereto, that upon the commencement of the several original actions against the defendant Thompson by the respective plaintiffs therein, writs of attachment were issued in each of such cases, and goods attached thereon sufficient to satisfy each of said claims. Said goods were afterwards replevied by Lemon, who claimed the same under a sale to him by defendant Thompson. The several plaintiffs in said actions—joint plaintiffs in the case at bar—finally yielded to this claim of Lemon and submitted to the replevin suit.

I think that the most that can be claimed for this part of the proceeding is, that the plaintiffs thereby ratified the sale from Thompson to Lemon. Brown, by bringing suit and recovering judgment against Lemon on the notes given by him to Thompson upon said sale, also ratified the said sale, and is estopped to deny the ownership of Lemon in said goods, or to predicate any defense upon the fact of plaintiffs' recognition of such ownership. I therefore deem it unnecessary to discuss or decide upon the question of law raised by counsel for defendant on this point.

The third point attacks the findings of the district court on the merits of the case. The defendant W. A. Brown claims to be a *bona fide* purchaser of the Lemon notes for their full value without notice of any infirmity or defense, and in his deposition taken to be used on the trial in his suit against Lemon on the said notes, which deposition was also introduced and admitted as evidence on the trial of the case at bar, he testified that he bought the notes, ten in number, calling for five hundred dollars each, from W. H. Thompson, on or about the first day of January, 1881; that he paid \$2,250 down on the said purchase, and gave

Thompson his own notes, to-wit: Four notes for four hundred dollars each and one for two hundred and fifty dollars. That the money which he paid down he had had for a long time; that a part of it, over one thousand dollars of it, he brought with him from Iowa when he came to this state. That he took the money which he paid Thompson, at the time he paid him, out of a trunk in which he had always kept it. That the trunk was kept in the store-room at the railroad depot. That his business was that of telegraph repairer on monthly wages. That his wages averaged \$70 per month. •

There was a large amount of testimony taken and introduced on the part of the plaintiffs, mostly in the form of depositions of witnesses residing in the state of Iowa, at and near the place of the former residence of the defendant Brown, as to his business, property, and means while he resided there, and at the time of his departure for this state. It is not deemed necessary to quote any of this testimony, but only to say that upon careful examination of it I think it amply sufficient, in a case of fraud, to call upon the said defendant to show by evidence other than his own that he possessed the money which he claims thus to have parted with, and to explain the source from which it was derived more explicitly than he has done. He also stated in his deposition above referred to, that after paying Thompson the \$2,250 at the time of the purchase of the notes, he had a large amount of money—over fifteen hundred dollars left. It appears from the deposition of the father-in-law of Brown, and he is substantially corroborated by a dozen or more of his neighbors, that Brown left Iowa for Nebraska in the fall of 1879, and at that time he was absolutely without money, property, or means of any kind, and that for the following two years he had supported his family, consisting of a wife and two children, who remained in Iowa. It seems to me that if he in fact acquired the sum of four thousand dollars, over and above his personal expenses and

what he contributed to the support of his family, within the time intervening between the time of his leaving his home in Iowa and the date of the alleged purchase of the notes in question, he would be able to show from what source and in what manner he acquired it; and I think there was sufficient evidence against him to cast upon him the burden of making such showing. And in the absence of any evidence on his part tending to support his own claim of possessing the money which he claims to have paid for the notes, I think the evidence on the part of the plaintiffs sufficient to sustain the findings of the court.

The appeal of the plaintiffs raises the question of the finding of the district court in favor of the defendants Sedgwick & Power sustaining their claim to a lien upon the judgment against Lemon for the amount of seven hundred and fifty dollars, their fees in the case in which said judgment was rendered. The plaintiffs, by their petition, question the amount due the said Sedgwick & Power for their services and disbursements in obtaining the said judgment, but do not directly deny their right to a lien for whatever such services and disbursements were really worth. Plaintiffs, in their reply to the answer of Sedgwick & Powers, "say that the attorneys, Sedgwick & Power, were not entitled to have and enforce an attorney's lien against said judgment for their services in recovering the same, for the said attorneys have never served upon James Lemon, the judgment defendant, a notice of said claim of a lien," etc.

Our statute provides, Comp. Stat., Ch. 7, Sec. 8: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment, upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party."

This I understand to be but a re-enactment of the common law.

Weeks, in his work on Attorneys at Law, p. 609, quotes Lord Mansfield as saying, in *Welsh v. Hole*, 1 Doug., 338 : "An attorney has a lien on the money recovered by his client for his bill of costs ; if the money come to his hands he may retain the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court they will prevent its being paid over until his demand is satisfied. I am inclined to go still further, and to hold that if the attorney gives notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice."

I do not see how the question of notice could arise between attorney and client, but only between the attorney of the successful party to a suit or proceeding and the unsuccessful party, who is, by force of the judgment in such suit or proceeding, held to the payment of money, and then only where such party claims to have paid such money to some other party without notice of the lien of such attorney. If the question of notice could not have arisen between Brown and his attorneys as to their fees, I don't see how it can arise between them and the plaintiffs, who seek to be declared the *cestui que trust* of Brown as to the said judgment. Even if the question of notice does arise between them, they, as well as Lemon, have actual notice of the claim of defendants Sedgwick & Power, and that is all that is necessary to comply with the terms of the statute, as I understand it. As to the amount of the said lien or the value of the services of said Sedgwick & Power in prosecuting said notes to judgment, whatever might be the opinion of this court were the question presented to them originally, it cannot be questioned that the finding and judgment of the court on that branch of the case as well

as upon the other is amply sustained by the evidence. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., concurs.

REESE, J., having been of counsel in a collateral proceeding, took no part in the decision.

JAMES G. McCLAY, JR., WILLIAM MANGAN, AND JOHN FORD, PLAINTIFFS IN ERROR, V. NANCY WORRALL, DEFENDANT IN ERROR.

1. **Liquors: DAMAGES BY SALE OF: ACTION BY PAUPER.** A poor person dependent for support upon a relative, according to the provisions of chapter 67, Comp. Stat., may, in his own name and for his own benefit, maintain an action against a vendor of intoxicating drinks for the loss of such support, caused by the death of such relative, when such death occurs in consequence of the traffic of such vendor in intoxicating drinks, without any action of the county commissioners in that behalf.
2. **Challenge to Jurors.** When such action is brought against two or more defendants they are entitled to no more peremptory challenges of jurors than where the action is against a single defendant.
3. **Instructions.** Certain instructions prayed by defendants and refused by the court examined, and *Held*, Properly refused.

ERROR to the district court for Nemaha county. Tried below before BROADY, J.

Stowell & Kelligar, J. C. Watson, E. W. Thomas, and G. B. Beveridge, for plaintiffs in error.

Osborn & Taylor, for defendant in error.

18	44
22	158
23	159
18	44
27	133
18	44
33	87
18	44
35	222
18	44
36	114
18	44
40	731
18	44
42	308
18	44
44	444
18	44
45	831
18	44
48	865
18	44
53	669
18	44
56	648

COBB, CH. J.

This action was brought by the defendant in error for the loss of her support, in the homicide of her only son, Davis S. Worrall, who was killed by one Mark Hall, on the 4th day of July, 1884, at North Auburn, Nemaha county. The action was brought against the plaintiffs in error, James G. McClay and William Mangan and John Ford, co-partners in business as Mangan & Ford, on the ground that they, being at the above date saloon keepers at said place engaged in selling intoxicating liquors, both the said McClay and Mangan & Ford, at their respective saloons sold and furnished to the said Mark Hall and the said Davis S. Worrall intoxicating liquors, which they then and there drank, that they thereby became intoxicated and by reason of such intoxication they became engaged in a wrangle, and the said Mark Hall assaulted the said Davis S. Worrall with a billiard cue and killed him, thereby causing the loss of support to his aged mother, the plaintiff.

It was proved on the trial that the plaintiff is fifty-nine years of age, that she is a widow, and has been for twenty-one years; that she is and has been for the last ten years of delicate and failing health, and unable to perform manual labor except to a very limited extent; that she has no property or means, except a very few cheap household goods; that she has for ten years, up to the time of the death of her son, Davis S. Worrall, lived with and been supported by him by means of his labor; that she has no son now living; that she has four daughters all of whom are married, and none of whom have any property or means for the support of plaintiff. It also appears that the said Davis S. Worrall was, at the time he was killed as aforesaid, of the age of twenty-three years, and unmarried; that he was engaged in cultivating rented land; that he owned a team and a few agricultural implements, but was in debt for a portion of them; that he was a strong, healthy man, industrious and of good habits.

It was also proved, as well as admitted in the pleadings, that at the time of the death of Davis S. Worrall the defendants, McClay by himself and Mangan & Ford together as partners, were engaged in selling malt, vinous, and intoxicating liquors at Auburn. It was also proved that on the day in question, and before the altercation in which Davis S. Worrall lost his life, both McClay and Mangan & Ford at their respective saloons in Auburn, by themselves and their respective barkeepers, sold and furnished both to Davis S. Worrall and Mark Hall, the man who killed him, intoxicating liquors at different times, which they severally drank, and by means of which they both became intoxicated; that by reason of such intoxication they quarreled and Hall struck Worrall with a billiard cue, from the effect of which he soon afterwards, and on the same day, died.

The jury found a verdict for the plaintiff, and assessed her damages at one thousand dollars. The cause was brought to this court on error.

The first error assigned was raised by demurrer to the petition and by objection to the introduction of any testimony under it, on the ground of the insufficiency of the petition to state a cause of action. The point is stated by counsel in their brief in the following language:

“*First.* Because she does not belong to either of the classes named in the statute upon which she founds her action.

“*Second.* Because her claim is for support as a pauper, and she does not show that her pauperism in any way grows out of or is justly attributed to the liquor traffic, and if she claims as a pauper she has no right of action for support in her own name, under the provisions of the Slocum law. The law by Sec. 17 having provided a specific remedy to compel the support of paupers, that remedy must be strictly followed.

“*Third.* That if she had a legal right to support at the hand of her adult son, Davis S., which she could enforce in

this action, that legal right depended upon the provisions of chapter 67 of the statutes relating to paupers, and before she could recover in this case she must allege facts in her petition and prove the same on the trial establishing a full compliance with the provisions of that act, and in addition she must allege and prove that Davis S. was of sufficient ability to support her as is contemplated by the pauper act, all of which she fails to do."

The following is the provision of statute above referred to—Sec. 1, chap. 67, Comp. Stats.: "Every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers, or sisters of such poor person, if they or either of them be of sufficient ability; and every person who shall refuse to support his or her father, grandfather, mother, grandmother, child, or grandchild, sister or brother, when directed by the county commissioners of the county where such poor person shall be found, whether such relative shall reside in the same county or not, shall forfeit and pay to the county commissioners, for the use of the poor of their county, such sum as may be by the county commissioners adjudged adequate and proper to be paid, not exceeding ten dollars per week, for each and every week for which they or either of them shall fail or refuse, to be recovered in the name of the county commissioners, for the use of the poor aforesaid, before a justice of the peace or any other court having jurisdiction; *Provided*, That whenever any persons become paupers from intemperance or any other bad conduct, they shall not be entitled to support from any relative except parent or child; *And provided further*, That such poor person entitled to support from any such relative may bring an action against such relative for support, in his or her own name and behalf."

This statute declares the liability and legal obligation of

the relatives designated to support the class of poor persons therein named, and provides the manner by which the poor fund of the county may be reimbursed in cases where such relatives, being of sufficient ability, shall neglect or refuse such support after being required to furnish it. But it also provides that such poor person may avail himself of the right to support therein declared, without resort to the overseers of the poor. It was clearly the object of the second proviso to the section above quoted to open an avenue to the compulsive support of the class of persons therein contemplated, not through the poor-house, but through the courts of justice. In such cases it is the court and not the county commissioners as overseers of the poor which may decide upon the status of such poor person and the ability of the relative to furnish such support.

The case at bar was brought under the provisions of chapter 50, and the plaintiff need only invoke the provisions of chapter 67 for the purpose of establishing one link in the chain of law constituting her right to recover, to-wit: The legal obligation resting upon a son of whatever age, being of sufficient ability, to support his aged, infirm, and destitute mother. Sec. 13 of chapter 50, Comp. Stat., provides that, "The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic," etc. The context sufficiently shows that the traffic here mentioned is the traffic in malt, spirituous, and vinous liquors and any intoxicating drinks, and by the provisions of section 11, the provisions of section 13 are made to apply to all persons engaged in such traffic, whether licensed or not.

The foundation of the plaintiff's right to damages against the plaintiffs in error is, that by means and in consequence of their traffic she has sustained the loss of that support which the law of the state as well as the law of nature gave her a right to, at the hand of her son. *Non constat* that but for his untimely death in consequence of such traffic

she would ever have occasion to invoke the laws of the state against him for such support. It may be and is granted, that in an action under the proviso above quoted by one relative against another for support, the ability of such relative would have to be alleged and proved, and it is equally true that in the case at bar the plaintiff must have alleged and proven facts sufficient to establish a legal and reasonable expectancy that but for his death her son would have continued in the future as in the past to possess the ability to support her. This she has done, and none the less so because his ability as proved consisted less in accumulated property than in strong arms and a willing heart.

The second error assigned is, because the court erred in refusing to allow the defendants below the number of challenges they were entitled to by law, and in refusing to allow to each of the defendants three peremptory challenges they were entitled to by law. This point is not urged in the brief and may be considered as abandoned. It may not be out of place, however, to observe that it was held by this court in the case of *Kerkow et al. v. Bauer*, 15 Neb., 150, that a suit of this character may be brought "against any and all persons jointly or severally who sold, gave, or furnished any intoxicating liquor which was drunk by him on the day or about the time of such intoxication," and there can be no doubt of the correctness of such holding. When such action is a joint one as to the defendants, they are, however numerous, but one party to the action, and are all together entitled to no greater number of peremptory challenges of jurors (if any) than though there was but a single defendant.

The third assignment of error is based upon the claim of the inadmissibility of any testimony under the pleadings, and presents the same question as that considered under the first head.

The fourth error assigned is predicated upon the refusal

of the court to give to the jury instructions Nos. 2 and 3 of instructions prayed by defendants.

These instructions present the same point as that presented under the first error assigned, and which we have already considered sufficiently for the purposes of this opinion.

The fifth is upon the refusal of the court to give instructions numbered 4, 5, 6, 7, 8, 9, and 10 of defendants' prayers, and the giving of instructions 5, 6, and 7 of plaintiff's prayers.

The prayers of defendants above referred to appear in the record as follows:

"No. 4. And the jury are instructed that under the statutes above named it is incumbent upon the plaintiff to prove the intoxication of Davis S. Worrall and Mark Hall, and that the defendants, while the said Mark Hall and Davis S. Worrall were disqualified by intemperance, sold or gave Mark Hall or Davis S. Worrall intoxicating liquors which contributed to their intoxication.

"No. 5. The jury are instructed that it is incumbent upon the plaintiff to prove that the damage to the means of support of plaintiff was caused solely and alone from intoxication, and that these defendants either sold or gave intoxicating liquors which contributed to or caused the intoxication.

"No. 6. The jury are further instructed that if any other cause conspired with the intoxication to produce the death of Davis S. Worrall, and that the cause of such death cannot be traced directly and proximately to intoxication, and that intoxication was not wholly or in part induced by sale or gift of intoxicating liquors by these defendants, then they must find for defendants.

"No. 7. In determining whether the intoxication was the immediate or proximate cause of the death of the deceased, the jury should consider whether the causes which actually produced the death were such as naturally resulted as a consequence of the intoxication, and of such kind as

might have been reasonably anticipated by a reasonable person. If they were not such then the intoxication cannot in law be regarded as the immediate and proximate cause of the death, and the defendants are not responsible therefor.

"No. 8. In determining whether an act is the proximate cause of an injury, the legal test is, was the injury of such a character as might reasonably have been foreseen or expected as the natural result of the act complained of? A party is not, in law, chargeable with results which do not naturally and reasonably follow as the consequences of his conduct.

"No. 9. An act is the proximate cause of an event only when, in the natural course of things and under the peculiar circumstances surrounding it, such an act would naturally produce the event, and in order to create a legal liability for damages the injury must be such as a man of ordinary experience and sagacity could foresee might probably ensue from said act. The relation of cause and effect must be shown to exist between the act complained of and the injury, and this relation of cause and effect cannot be made out by including the illegal act of a third party.

"No. 10. The damages to be recovered in an action must always be the natural and proximate consequence of the wrongful act complained of. If a new force or power has intervened, of itself sufficient to stand as the cause of the mischief or injury, the first must be considered as too remote."

The first of the above instructions (No. 4) is to the effect that in order to hold the defendant liable for the damages resulting from the intoxication of the persons named, they must be shown to have been already intoxicated when the defendants furnished them intoxicating liquors. Such is not the law. The defendants are liable for furnishing the means of intoxication—as well the first draught by which the state of intoxication was initiated as

subsequent ones by which it was continued and inflamed. And such would be true even were it in proof, which it is not in this case, that defendants furnished the first draught while the subject of the intoxication was perfectly sober, and the liquors which intensified and completed the intoxication were furnished by other parties, so that when the careful and responsible liquor dealer sells a glass of brandy to be drank as a beverage, he takes the chance of his customer completing the intoxication thus began at the bars of less careful dealers and upon a lower grade of intoxicating liquors; and where legal damages result from such intoxication, each dealer is equally liable. See *Elshire v. Schuyler*, 15 Neb., 561.

By the 5th and 6th prayers the court is asked to tell the jury that the plaintiff cannot recover unless the death of Davis S. Worrall was caused solely by the traffic of the defendants. I understand the law to be otherwise, and that if—whatever the fatal cause was—if it was inspired or contributed to by the state of intoxication caused in whole or in part by the said traffic of the defendants, they are liable.

The 7th, 8th, 9th, and 10th prayers were predicated upon the theory that it is necessary to a recovery in an action of this kind that the death or damage should be the natural and logical result of the act of selling or giving intoxicating liquors, and that the traffic of the vendor must be the proximate and not the remote cause; also, that the death or damage must be such as might have been reasonably anticipated by a reasonable person.

In addition to what is above stated, attention is called to the provision of the statute. The language of section 13, chap. 50, when we consider the subject to which it is applied, forbids the construction that the damages therein spoken of must be direct or proximate. In that sense, how is it possible that a traffic—that is, selling an article—could damage any one? Possibly the purchaser would be

directly and proximately damaged to the extent of the price, providing he paid for the article purchased, but clearly that is not the damages which the legislature had in view when they enacted the statute. Again, it is quite possible that an individual might be damaged by the use of the article trafficked in to the extent of his health or of his life. But who will say that the drinking of alcoholic liquors logically follows its sale and purchase. But how can the traffic logically or proximately damage the community? Clearly in no way, and the statute expressly provides that those engaged in the traffic shall pay all damages which the community may sustain by reason thereof. Such damages may be indirect and remote as long as they can be traced to the traffic as the inspiring, aggravating, or assisting cause.

It is not necessary, as it appears to me, that the damage should be such an one as might be foreseen or anticipated by a reasonable person as a consequence of such traffic, or that it should naturally flow therefrom. A man under the influence of intoxicating liquor does not act naturally, nor do the rules laid down by Locke or Bacon afford any clue to the dark and devious paths which he may follow to his own destruction or that of others.

None of the instructions express the law as applicable to the facts of the case, and there was no error in their refusal.

The other points assigned as error in the petition in error, not being urged in the brief or at the hearing, will not be examined.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	54
21	571
18	54
40	203

JAMES PHILPOT, PLAINTIFF IN ERROR, V. THE SANDWICH MANUFACTURING CO., DEFENDANT IN ERROR.

SAME V. SAME.

1. **Infant.** Contracts of an infant, other than for necessities, are voidable only, and upon coming of age he may affirm or avoid in his discretion.
2. ——. If an infant purchase personal property and give his promissory note therefor, he can not, upon arriving at the age of twenty-one years, retain the property and plead infancy as a defense to the note.

ERROR to the district court for Nemaha county. Tried below before BROADY, J.

J. H. Haldeman, for plaintiff in error.

E. H. Wooley, for defendant in error.

MAXWELL, J.

These are two cases between the same parties, in which substantially the same questions are presented, and they will be considered together. The actions were brought upon certain promissory notes given by the plaintiff and one John Beadle for certain machinery. The defense set forth in the answers was, that "the said James Philpot was an infant within the age of twenty-one years." On the trial, a jury being waived in each case, the court made special findings of fact, which in the first case submitted are as follows:

1st. The court finds that when the defendant James Philpot signed the note sued on in this action, he was an infant under the age of twenty-one years, and that he arrived at his majority on or about March 10, 1883; that after the maturity of said note, and after said Philpot had

arrived at full age, and before commencement of this action, he, said Philpot, made payments on said note, and promised the agent of plaintiff, who held said note for collection, that he would pay the balance due on said note if the defendant Beadle did not pay the same, and if plaintiff could not get said balance of said Beadle. That said Beadle did not and has not paid said balance, and plaintiff has not and could not get said balance of said Beadle. That when said Philpot made said promise he did not know he was not legally liable to pay said note, and that there is due and unpaid on said note the sum of \$58. To which Philpot excepts.

2d. As a conclusion of law, the court finds that the defendant, James Philpot, is liable to plaintiff on said note, and that plaintiff is entitled to recover thereon against said Philpot said sum of \$58.

The finding in the second case is substantially the same as in the first, except as to payment and the amount.

There is a want of harmony in the decisions in regard to the liability of an infant upon his obligations. Thus, Coke states the rule to be that an infant will not be bound by a personal obligation even where it is given for necessities. Co. Litt, 172b.

In *Keam v. Boycott*, 2 H. Black, 511, Chief Justice Eyrie laid down the doctrine that where the court could pronounce the contract for the benefit of the infant as for necessities, it was valid; where the court found the contract prejudicial to the infant it was void; and in cases where the benefit or prejudice was uncertain the contract was voidable only. Judge Story declared these instructions to be founded on solid reason. 1 Mason, 82. In this country the courts, at the present time, generally divide the contracts of an infant into those for necessities, which are binding upon him; and other contracts, which are voidable at his election on coming of age. The well settled rule, therefore, is that a negotiable note of an infant is not void but voidable only. *Goodsell*

v. Myers, 3 Wend., 479. *Wright v. Steele*, 2 N. H., 51. *Best v. Givens*, 3 B. Mon., 72. *Keil v. Healy*, 84 Ill., 104. *Irwin v. Irwin*, 9 Wall., 617. After an infant has arrived at the age of twenty-one years he may disavow or ratify any contracts not made for necessities. In the absence of any statute providing how a contract shall be ratified, any one of three modes ordinarily will be sufficient. 1st. An express ratification. 2d. Acts which imply an affirmance. 3d. The omission to disaffirm in a reasonable time. The particular acts which constitute a ratification must necessarily depend to a great extent on the nature of the contract. When it is executed and beneficial to the infant—as where he has purchased real estate—it vests in him the freehold until he disagrees to it, and the continuance in possession after he is of age is an implied confirmation of the contract. So as to a lease. *Delano v. Blake*, 11 Wend., 85. *Jones v. Phenix Bank*, 4 Seld., 228. And an infant can not be permitted to retain personal property purchased by him, and at the same time repudiate the contract upon which he received it. *Kitchen v. Lee*, 11 Paige, 107. *Lynde v. Budd*, 2 Id., 190. *Deason v. Boyd*, 1 Dana, 45. *Cheshire v. Barrett*, 4 McCord, 241. *Ottman v. Monk*, 3 Sandf., 431. He who asks equity must do equity. In the case at bar the purchase was a joint one. The plaintiff, after coming of age, so far as appears, made no offer to return the property, but still retains possession. He also made payments on the notes. This we regard as a sufficient affirmance of the contract. The law which enables a party who has purchased property during infancy to disaffirm on coming of age, is to be used as a shield and not as a sword—as a means by which he may be discharged from a contract which he deems prejudicial. The object is not to enable him to rob others of their property, but upon making restitution to be discharged from the contract. The fact that when Philpot made the promise, after coming of age, to pay the notes, he did not know that he was not

legally liable to pay said notes, is not material in this case, and need not be considered, there being a sufficient ratification by other acts of the plaintiff. The plaintiff in error has the property, the fruit of the contract. There is no claim or charge that it was of less value than the price agreed to be paid. Honesty and fair dealing require that he should pay for the same. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

QUIN BOHANAN, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **MURDER: VERDICT OF LOWER DEGREE ON SECOND TRIAL.** Where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial.
2. **JURORS: COMPETENCY.** If upon examination of a juror it is shown that he has an opinion founded upon newspaper reports, and it shall satisfactorily appear that the character of such opinion is such that it will not interfere with his rendering an impartial verdict, it is not error to admit him to the jury.
3. **ATTORNEY: ARGUMENT OBJECTED TO, EXCEPTIONS MUST BE TAKEN.** When it is alleged that an attorney, in the argument of a cause on trial to a jury, went outside of the record and appealed to the passions and prejudices of the jury, the attention of the court should be called to the language and conduct of the attorney by the proper objection and a ruling had thereon by the court. If the objection is overruled and an exception taken to the ruling, the question may be reviewed in the supreme court upon the decision of the trial court. Without such ruling and exception there is nothing for the reviewing court to consider.

18	57
45	277
45	896

18	57
46	449
18	57
54	133

18	57
459	167

ERROR to the district court for Otoe county, where the cause was taken on change of venue from Lancaster county. Tried below before POUND, J.

C. E. Magoon and *O. P. Mason*, for plaintiff in error, cited: *Stuart v. Commonwealth*, 28 Gratt., 950. *People v. Gilmore*, 4 Cal., 376. *Barnett v. People*, 54 Ill., 325. *People v. Knapp*, 26 Mich., 112. *State v. Martin*, 30 Wis., 216. *Dawson v. State*, 65 Ind., 422. *Warnock v. State*, 6 Tex. App., 450. *State v. De Laney*, 28 La. Ann., 484. *Miller v. State*, 58 Ga., 200. *Guenther v. People*, 24 N. Y., 100. *Jones v. State*, 13 Tex., 184. *State v. Smith*, 53 Mo., 139. *Johnson v. State*, 29 Ark., 31. *Cooley Cons. Lim.*, § 328, and cases cited. 1 Bishop *Crim. Law*, § 676. 1 Wharton *Crim. Law*, § 550, and cases cited. *State v. Lessing*, 16 Minn., 75. *State v. Belden*, 38 Wis., 120. *Brennan v. People*, 15 Ill., 517.

William Leese, Attorney General, and *J. B. Strode*, District Attorney, for the State, cited: *State v. Behmer*, 20 Ohio State, 572. *Jarvis v. State*, 19 Id., 585. *Leslie v. The State*, 18 Id., 394. *People v. Keefer*, 3 Pac. Rep., 818. *State v. McCord*, 8 Kan., 232. *State v. Tweedy*, 11 Iowa, 350. *Sanders v. The State*, 85 Ind., 318. *State v. Morris*, 1 Blackf., 37. *Commonwealth v. Arnold*, 6 *Crim. Law Mag.*, 61. *Baldwin v. The State*, 12 Neb., 64. *Cooley Cons. Lim.*, 327.

REESE, J.

The plaintiff in error was indicted by the grand jury of the February term, 1882, of the district court of Lancaster county. There was but one count in the indictment. The crime charged was murder in the first degree. A trial was had at the following May term of court, which resulted in a conviction of murder in the second degree. Plaintiff in error then brought the cause into the supreme

court, where the judgment of the district court was reversed and a new trial ordered. See *Bohanan v. The State*, 15 Neb., 209. A change of venue was then taken by which the place of trial was removed from Lancaster to Otoe county. On the second trial the jury found him guilty of murder in the first degree. A motion for a new trial was made and overruled, and the court imposed upon him the penalty of death. He now prosecutes error in this court.

Prior to the commencement of the last trial the plaintiff in error filed in the district court a plea of former acquittal of the charge of murder in the first degree. This plea contained a recital of the facts of the previous trial on the same indictment, and the conviction thereon of murder in the second degree and his sentence to the penitentiary for life. To this plea the state made answer, alleging that the plea ought not to be sustained for the reason that on defendant's own motion the verdict and judgment were set aside and a new trial granted. Plaintiff in error demurred to this answer. The demurrer was overruled. The plea was held bad and the first trial held not a bar to a prosecution for murder in the first degree, as charged in the indictment.

During the progress of the trial plaintiff in error requested the court to instruct the jury as follows:

"10. If the jury find from the evidence that at the May term, 1882, of the district court of Lancaster county, in the state of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon such trial was found guilty of murder in the second degree, and judgment was rendered against him upon such finding, then, as a matter of law, the jury in this case cannot find the defendant guilty of murder in the first degree."

The court refused to give this instruction, but instructed the jury as follows upon that question:

"11. You should not be influenced in the least by any thing that any other jury may have done."

To the refusal to give the first above quoted instruction, and to the giving of the second, plaintiff in error excepted.

By the foregoing it will be seen that the question here presented is, whether or not the verdict of the jury on the first trial, finding plaintiff in error guilty of murder in the second degree, is such an acquittal of the crime of murder in the first degree as would protect and shield plaintiff in error from the danger of a conviction of the higher crime on the second trial—the verdict and judgment having been set aside upon his own motion and request. The question here presented is a new one in this state, and is one of great importance. The question is not new in the sense of its never having decided in other states; but, unfortunately, the decisions of the courts of last resort in other states, upon the question here presented, have not been uniform. The doctrine contended for by plaintiff in error has, to a greater or less extent, been declared by the supreme courts of Virginia, California, Tennessee, Illinois, Michigan, Iowa, Mississippi, Wisconsin, Indiana, Alabama, Texas, Missouri, and Arkansas. It is not deemed necessary to notice the decisions of all those states, as some of them are simply *dictu*, and some are in cases dissimilar to the one at bar, but we will notice the reasoning in what we deem the leading cases upon the subject.

In *The People v. Gilmore*, 4 Cal., 376, the accused was indicted for murder. Upon trial the jury rendered a verdict of guilty of manslaughter, which was set aside on the prisoner's motion, and a new trial ordered. On the second arraignment he pleaded a former acquittal. Chief Justice Murray, in writing the opinion of the court, which at that time (1854) consisted of himself and Mr. Justice Heydenfeldt, argues the question at some length and with ability, but to the mind of the writer his deductions are not conclusive. From the opinion I quote as his first proposition

as follows: "A conviction for manslaughter is an acquittal of the charge of murder, and the verdict, though general in its terms, must, by legal operation, amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guilty. The reason is obvious; if such were not the case the party after undergoing punishment for manslaughter might be arraigned and tried again for murder, notwithstanding he had been compelled to answer this charge upon the first trial, and the jury had passed upon the same." This is undoubtedly correct so long as the verdict of the jury is allowed to stand. It must be conceded that until the accused himself procures the cancelation of the verdict the judgment must be a complete protection against another prosecution for the same crime. So also would be a verdict of not guilty. But where the prisoner upon his own motion procures a verdict to be set aside, the rule should be otherwise. In support of his conclusion the learned writer cites *Hart v. The State*, 25 Miss., 378, and quotes as follows: "The jury in such a case, in contemplation of law, renders two verdicts. The one acquitting him of the higher crime, the other convicting him of the inferior." It is quite difficult for us to adopt this proposition. The verdict in such case must be an entirety. The prisoner stands charged with the unlawful killing of the deceased. He is either guilty or not guilty. If found guilty it is the next duty of the jury to ascertain the magnitude of this guilt. When that is done the verdict of guilty is returned with a finding as to the grade of that guilt. At the time this decision was made the criminal code of California contained the following section: "A new trial is a re-examination of the issue in the same court before another jury after verdict has been given. It places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict can not be used or referred to either in evidence or in argument."

This section was not deemed sufficient to justify the court in putting the prisoner upon his trial for murder, but the court combats the power of the legislature to enact such a law by the following: "The constitution of this state has provided that 'no person shall be subject to be twice put in jeopardy for the same offense.' Now, if I am right, that a conviction for manslaughter is an acquittal for murder, it must follow that any law that would compel a party to be re-tried for murder in order to escape the minor offense, thereby putting the party in jeopardy, is in conflict with this provision of the constitution." Thus the learned judge in the discussion of the case goes beyond the rulings of any of the other courts. The supreme courts of Kansas, Indiana, Kentucky, North Carolina, and others, have not hesitated to follow such laws and apply the principle to capital cases. And in California, in a recent decision, the supreme court has, to the mind of the writer, fully overruled the holding in *The People v. Gilmore*. In *The People v. Keefer*, reported in 3 Pacific Reporter, 818, it is held that "on a plea of former conviction under an indictment for murder, the fact that defendant was convicted of murder in the second degree will not be a bar to a conviction of murder in the first degree on a re-trial." It is insisted that this decision was made under a provision of the statute enacted in 1874, which is as follows: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment." It will be observed that in essence this section does not vary materially from the one in force at the time of the decision in *The People v. Gilmore*. It can do little more than to place the parties "in the same position as if no trial had been had," as provided in the first act. But it is worthy of notice that a careful examination

of the opinion in *The People v. Keefer* fails to disclose any reference to the act of 1874. The decision, by an unanimous court, is based entirely upon another section of the criminal code, which was passed in 1856, which divided the crime of murder into two degrees, the first and second. The section, as amended April 19, 1856, is as follows:

“Malice shall be implied when no considerable provocation, or when all the circumstances of the killing show an abandoned and malignant heart. All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime and give sentence accordingly. Every person convicted of murder of the first degree shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the state prison for a term not less than ten years and which may extend to life.”

The court, in the opinion by Judge McKinstry, uses the following language: “The indictment charges the crime of *murder*, and the defendant was not acquitted of murder by the first verdict. In dividing the crime of murder into two degrees the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain

lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment. *People v. Haun*, 44 Cal., 98. *People v. Doyell*, 48 Cal., 94. After the act of 1856, which divided the crime into murder of the first and second degrees, *murder* remained and it still remains the unlawful killing of a human being with malice aforethought. Penal Code, 187, 188. The malice may be express or implied; the express intent to kill or to commit one of the named felonies may be affirmatively established, or, the killing being proved, the malice may be implied, but in either case the crime is murder. The fact that a severer penalty is to be imposed in one case than the other does not change the effect of a previous conviction, and the defendant who on his own motion secures a new trial subjects himself to a re-trial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree."

It will be observed that the provisions of the amended act of 1856 are very similar to the provisions of sections three, four, and four hundred and eighty-nine of the criminal code of Nebraska, except that murder in the second degree is not specifically described. The sections above referred to are as follows:

SEC. 3. "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or, if any person, by willful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death."

SEC. 4. "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and on conviction thereof shall be imprisoned in the penitentiary not less than ten years, or during life in the discretion of the court."

SEC. 489. "That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession, in open court, the court shall proceed by examination of witnesses, in open court, to determine the degree of the crime, and shall pronounce sentence accordingly."

By section 19 of the act of California, passed in 1850, and which, so far as we are able to ascertain, still remains upon the statute books of that state, murder is defined to be "the unlawful killing of a human being with malice aforethought, either express or implied. * * *"

In *Baldwin v. The State*, 12 Neb., 61, the then chief justice, MAXWELL, in delivering the opinion of the court, in referring to the indictment which charged, in separate counts, the crime of murder in the first degree, says: "There is but one offense charged in the indictment in this case, viz.: The unlawful killing of Allen J. Yokum." If, therefore, there is but one offense charged in the indictment in the case at bar—the unlawful killing of James Cook—it would seem that the adjudications of the state of California may well be said to sustain the action of the trial court in placing the plaintiff in error upon his trial for murder in the first degree.

In *People v. Hann*, 44 Cal., 96, the supreme court, by Judge Belcher, in speaking of the division of the crime of murder into two degrees, says: "In making the division the legislature recognized the fact that some murders comprehended within the general definition are

of a less cruel and aggravated character than others, and, therefore, deserving of less punishment. It also recognized the fact that some murders of the less aggravated class are deserving of less punishment than others of the same class, and it accordingly provided that murders of the second degree should be punished by terms of imprisonment depending for their length upon the circumstances of each particular case. In all this, however, the legislature did not intend to say that murder of the second degree should be anything less or other than murder. It did not, indeed, attempt to define murder anew, but only to draw certain lines of distinction by which it might be told in a particular case whether the crime was of such a cruel and aggravated character as to deserve the extreme penalty of the law, or of a less aggravated character, deserving a less severe punishment." The same doctrine is held in *People v. Form*, 25 Cal., 361.

In *Brennan v. The People*, 15 Ill., 511, and in *Barnett v. The People*, 54 Ill., 325, the supreme court of that state have held that a defendant cannot upon a second trial be tried for a degree above that for which he was convicted upon the first. In *Barnett v. The People* the court simply follows *Brennen v. The People*, without argument or criticism. The decision in the latter case is based upon the cases of *Slaughter v. The State*, 6 Humph., 410; *Morris v. The State*, 8 S. & M., 762; and *Hurt v. The State*, 25 Miss., 378.

In *Slaughter v. The State* the plaintiff in error was indicted for murder in the first degree, and upon trial was found "not guilty of murder as charged in the bill of indictment, but they find him guilty of voluntary manslaughter in manner and form as charged in the indictment." On his motion a new trial was granted. At a subsequent term he filed a plea of former acquittal, setting out the proceedings and verdict of the jury. He contended that he was entitled to his discharge and that he could not

be tried for any crime under that indictment. The trial court held otherwise, and put him upon trial for manslaughter. Error was taken to the supreme court, and it was held that the trial court decided correctly. The question as to whether the plaintiff in error could have been convicted of a higher crime than manslaughter was in no sense before the court. Yet it is said that if he had been tried for murder, it would have been erroneous. It is quite probable that the *finding* of "not guilty of murder," by the verdict, would make no difference as to the power of the court to put the accused upon his trial on the whole indictment, yet the court refers to it as a verdict of acquittal.

Morris v. The State, 8 S. & M., 762, was a case where the defendant was put upon trial under an indictment containing four counts: 1st. With the forgery of a bank-note of the Bank of the State of North Carolina. 2d. With uttering and publishing as true a forged bank-note of the Bank of the State of North Carolina. 3d. With having in his possession certain forged bank-notes of the Bank of the State of North Carolina, with the intent to utter the same. The 4th was similar to the 3d. The verdict of the jury was guilty as charged in the second, third, and fourth counts. The verdict was objected to as imperfect, because there was no express finding upon the first count. The cause was taken to the supreme court (Mississippi) where the verdict was held good, but the cause was reversed for error occurring in the introduction of testimony. The judgment of reversal provided that the new trial should be confined to the second, third, and fourth counts, the plaintiff in error having been acquitted upon the first count. It will thus be seen that the question in the case at bar was not before that court for two reasons. First, the question did not arise in the case. Second, each count in the indictment was for a separate and distinct offense and not for different grades or degrees of the same offense.

The case of *Hurt v. The State* (25 Miss., 378) was one in which the plaintiff in error had been indicted for murder. He filed certain pleas in abatement, alleging the illegal organization of the grand jury which found the indictment. These pleas were overruled by the court and he was put upon trial, which resulted in a verdict of guilty of manslaughter in the third degree. His motion for a new trial being overruled, he alleged error in the supreme court, and a new trial was granted upon the ground that the plea in abatement should have been sustained. The judgment of the trial court was reversed, the court holding that its judgment of reversal should extend no further than to relieve him as against the verdict *against* him (manslaughter). As a new indictment would have to be found, and as a prosecution for the crime of manslaughter was barred by the statute of limitations, the prisoner was, upon his motion, discharged. The reasoning of the court in this case seems to be based upon the acknowledged and conceded fact that if a party charged with murder and convicted of manslaughter seeks no relief from the judgment of conviction, but allows it to stand unreversed and in full force, he cannot, after serving his term of imprisonment, be again prosecuted for murder. This is most certainly true. If the judgment stands unimpeached it is the final judgment in the case, and of course will stand as a protection to the party convicted. From this the court concludes that the other proposition must follow, viz.: That if the jury convicts of a lower grade of the same crime that conviction is necessarily an acquittal of the higher grade, and that acquittal must stand for all time, notwithstanding the verdict and judgment of conviction may be set aside. That the jury, in contemplation of law, renders two verdicts; one acquitting of the higher crime and the other convicting him of the lower, and that the verdict is not an entirety. Upon this theory we think that case, as well as *Brennen v. The People*, rests. And indeed the

same may be said of *The State v. Tweedy*, 11 Iowa, 350. *The State v. Martin*, 30 Wis., 216. *State v. Belden*, 33 Id., 120. *Jones v. State*, 13 Tex., 184. These latter cases are exhaustive and well written, and were it not that they all seem to be grounded upon what seems to us to be a false basis we could well follow them.

The case of *Johnson v. The State*, 29 Ark., 31, is a full digest of all the cases so holding, and, adopting the same reasoning, holds with them.

It is beyond the comprehension of the writer to say that the *character* of an act may be finally and forever decided upon and adjudicated, while the fact of the act itself is left untouched. Thus a person is indicted for murder in the first degree under the laws of Nebraska. Upon trial he is found guilty of murder in second degree. So long as that verdict and the judgment stand unreversed there is an adjudication that the act or crime was committed, and also fixing the character or quality of the act. Now it is very clear and easily understood that this judgment and verdict will protect the accused from another prosecution. But suppose a new trial is granted. There is no adjudication that any person has been killed nor that any crime has been committed. But it is said there is an adjudication that *if* the deceased was killed by the prisoner, it was not done of deliberate and premeditated malice! It is contended that such a verdict is severable; that there are in contemplation of law two verdicts—one of guilty of murder in the second degree, which has been set aside, and one of not guilty of murder in the first degree, which, by virtue of the constitutional provisions in the federal and state constitutions, must stand. This theory is also built upon what is considered the difference between an adjudication and having been once in jeopardy. It is true that this distinction does exist to some extent, but yet if the first verdict is worth anything to a prisoner, it must be upon the theory that he has been *acquitted* in so

far as the criminal quality of the act of killing is concerned, but no further.

In *Hurley v. The State*, 6 Ohio, 400, it is decided that the simple verdict of a jury is not a sufficient acquittal to entitle a defendant to its protection, but that to be of any force there must be a judgment on the verdict, citing 2 Hale's P. C., 243.

By the statutes of this state a new trial, after a verdict of conviction, may be granted, on the application of the defendant, for certain reasons which are set out in the act. See section 490 of the criminal code. A new trial is defined to be a re-examination of an issue of fact. Bouv. Law Dic. It is a re-trial of the facts of the case. In *Zaleskie v. Clark*, 45 Conn., 401, Judge Loomis, in writing the opinion of the court, says: "It is believed that it always has been used in the sense of a complete re-trial of the cause, except in certain instances mentioned by him. What else can a re-trial be than a re-examination of the facts in the same case?"

The principal case in which it has been held, in the absence of a statute to that effect, that a defendant can be re-tried upon the whole indictment is *The State v. Behimer*, 20 O. S., 572. In fact the supreme court of Ohio have uniformly so held. In *Hurley v. The State*, *supra*, it is decided that "a verdict in either a civil or criminal case must be considered an entire thing." In *Leslie v. The State*, 18 Ohio State, 390, the plaintiff in error was indicted for murder in the first degree. The indictment contained three counts, but each alleging and charging the same offense in the same degree. On the first trial he was found "guilty of murder in the first degree as charged in the first count of the indictment, and not guilty as charged in the second count of the indictment." Upon his motion a new trial was granted, and upon the second trial he was found "guilty of manslaughter, as charged in the third count of the indictment, and not guilty as charged in the

first and second counts of said indictment." Leslie then moved the court to discharge him, for the reason that on the first trial he was found guilty of murder in the first degree, as charged in the first count of the indictment and not guilty as charged in the second and third counts, and that upon the second trial he was found not guilty upon the first and second counts of the indictment, and guilty of manslaughter upon the third count, and that the verdict of manslaughter was irregular, illegal, and void. The motion was overruled; he was sentenced to the penitentiary, and took error to the supreme court. The conviction was affirmed.

In discussing the question of the entirety of the verdict, Judge White, who wrote the opinion, says: "Where the indictment, though consisting of several counts, is founded upon a single transaction the verdict is a unit, and lays the foundation for but a single judgment. A verdict of guilty upon one of the counts and of not guilty upon the others is followed by the same legal consequences as a verdict of guilty upon all the counts; and when in either case the verdict is set aside and a new trial granted on the defendant's motion, the case is opened for a re-trial upon the counts upon which he was acquitted as well as those upon which he was convicted."

But where the several counts of an indictment are for separate and distinct offenses the rule would of course be different, and it was so held in the case under consideration. The court says, further: "We think the principle contended for properly applies where there is a conviction and an acquittal on different counts for separate and distinct offenses, or where part of the defendants are acquitted and part convicted of the same offense. But where all the counts are for the same offense, and are varied merely to meet the proof, it has no just application."

The ruling in this case was followed in *Jarvis v. The State*, 19 Ohio State, 585. In the case of the *State v. Behimer*,

supra, Judge White, in writing the opinion of the court, thus states the question for decision: "The question for decision therefore is, whether the legal effect of granting a new trial was to set aside the whole verdict and leave the case for re-trial upon the same issues on which it was first tried, or, whether the re-trial was properly limited by the court to the degree of homicide of which the defendant had been found guilty, and to the inferior degree of manslaughter." The question is discussed at considerable length and with a good degree of logic and reason, and it was finally held that the defendant in the prosecution could be put upon a second trial upon the whole of the indictment the same as though there had been no previous trial and verdict. In the course of the opinion the learned judge makes use of the following language: "But the effect of setting aside the verdict finding the defendant guilty was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on his plea of not guilty was of his innocence, and the burden was on the state to prove every essential fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act, while the fact of the existence of the act was undetermined. This would be a verdict to the effect that if the defendant committed the homicide, he did it without deliberate and premeditated malice.

"There can be no legal determination of the character of the malice of a defendant in respect to a homicide which he is not found to have committed, or rather, of which, under his plea, he is in law presumed to be innocent."

Upon the question of the entirety of the verdict it is said; "But upon mature consideration we are of opinion that the verdict is severable only when there is a conviction or an acquittal on different counts for separate and distinct of-

fenses, or where there are several defendants; but that where there is but one defendant, and in fact but one offense, the verdict is entire."

The cause was taken to the supreme court upon the exception of the state's attorney, and the decision could in no way affect the rights of the defendant in the prosecution, but the rule of law was stated by the court as follows: "Where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial."

It must be conceded that in point of numbers this decision seems to be against the weight of authority. But it is apparently founded upon reason, and upon the advanced idea of American jurisprudence. That it is just, it seems to us can not be questioned. That it is necessary for the protection of the law-abiding citizen is equally clear, and the fact that many of the states have incorporated a provision to that effect in their criminal laws, gives weight and force to the statement. This decision was made in the year 1870. The criminal law of the state of Ohio was adopted by the legislature of this state in 1873, almost bodily, and by the one act entitled "An act to establish a criminal code," passed March 4th of that year. By it the entire criminal law of that state was substantially transferred to the statute books of Nebraska, and in which was the law governing new trials. In *Franklin v. Kelly*, 2 Neb., 104, Chief Justice Mason, in writing the opinion of the court, says: "The rule is well settled, that when a legislature re-enacts a statute upon which a construction has been placed, it does so with the construction annexed," citing a number of cases. In addition to which we cite 2 Bishop on Criminal Law, §905, and note from *Commonwealth v. Hartnett*, 3 Gray, 450. While it may be true that the Ohio decisions can not, with

strictness, be said to be a construction of any statute, yet they are a construction of that part of the criminal code which gives to the courts of the state the power to grant new trials, and therefore of the legal status of the person to whom the new trial has been awarded. To that extent, at least, it is proper to consult those adjudications as affecting the criminal code at the time of its adoption by this state.

But the Ohio cases are not without precedent. In *United States v. Harding*, Wallace (Jr.) Reports, 127, in the circuit court of the United States for the eastern district of Pennsylvania, Harding was found guilty of murder, and Grimes and Williams of manslaughter. Soon after the trial Judge Baldwin, the circuit judge, died. A motion for a new trial was made before and argued to Judge Randall, the district judge, but before passing on the motion he died. New judges were appointed, and upon their qualification the cause came on for decision. The order of the court was that a new trial be granted to Harding, and that as to Grimes and Williams the case be continued for one week, at the expiration of which they were to elect whether they would take a new trial or abide their former conviction. Judge Grier then addressed Grimes and Williams as follows: "William Grimes and John Williams—You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offense charged against you in this indictment, the penalty affixed to which is death; but you have been convicted of the minor offense of manslaughter. Your lives have been in jeopardy, and you have escaped. The constitution of your country declares that 'no person shall be twice put in jeopardy of life or limb for the same offense.' This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial except at your election and request. We be-

lieve that you have the right to waive the protection thrown around you by the constitution for the sake of obtaining what may seem to you a greater good. But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeited to the law. If you choose to run this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you. Before we enter of record an order for a new trial as to you, we will give you one week to ponder carefully on this subject, and consult with your counsel as to what will be your safest and best course."

In *State v. Commissioners*, 3 Hill (S. C.), 239, the defendants were indicted—in two counts—for obstructing a public street. The trial resulted in a verdict of guilty as charged in one count of the indictment, nothing being said as to the other. A new trial was granted upon the motion of the defendant. It was held that the next trial must be upon both counts of the indictment. In the opinion, Butler, J., says: "If the verdict of guilty had remained, it would have protected them, perhaps, against another indictment for the same offense. As long as a verdict of guilty remained on the record there was a finding. But what proceeding is there now on it? I consider all the proceedings on the indictment, since the finding by the grand jury, to be set aside at the instance and for the benefit of defendant."

As before stated, the states of Kansas, California, Indiana, and Kentucky have all held to the same doctrine. See *State v. McCord*, 8 Kansas, 232. *People v. Keefer*, *supra*. *Veach v. The State*, 60 Ind., 291. *Commonwealth*

v. *Arnold*, 6 Crim. Law Mag. (Ky.) But it is claimed by plaintiff in error that these decisions were made by virtue of the statutes of those states which provide in substance that when a new trial is granted the parties shall be in the same position as if no trial had been had, some also providing that the first trial and verdict shall not be referred to on the second trial, nor shall the first verdict be plead in bar of a conviction on the second trial either in the evidence or argument. It is true the decisions referred to have in some instances been predicated upon the statutes referred to, and did a similar statute exist in this state much of the trouble in this case would be obviated. But it may also be observed that if the clause in the bill of rights in both the federal and state constitutions—that a defendant shall not be twice put in jeopardy of life or limb for the same offense—is to be his protection, as argued by his counsel, it is quite clear that a simple legislative enactment of the states cannot override or take away this protection, and the enactments referred to would be unconstitutional and void, and would form no basis for the decisions. While many courts holding to the doctrine contended for by plaintiff in error have based their argument, to some extent, upon these constitutional provisions, we know of none holding the statutes authorizing a second trial upon the whole indictment void.

Again, should we adopt the reasoning of the court in *People v. Gilmore*, *supra*, in holding that the statute meant only that the parties should be in the same position with reference to the *undecided issues* in the case, then the force of the statutes, as a basis for the decisions referred to, is swept away, and the courts of those states may, in effect, be ranked with those so holding, without the aid of a statute. With that view of the case it might well be held, as in the case last referred to, that the statute gave no authority for the decision.

So far as the provision of the constitution of the United

States may be invoked, we take it as pretty well settled now that that provision governs the courts existing by virtue of the laws of the United States, and has no application to the state courts. *United States v. Keen*, 1 McLean, 438. *Baron v. Baltimore*, 7 Peters, 243. *Switchell v. Commonwealth*, 7 Wall., 321. *State v. Wells*, 46 Iowa, 662. *Fox v. Ohio*, 5 Howard (46 U. S.), 410. We hold, therefore, that the plaintiff in error was properly put on trial for murder in the first degree; the granting of a new trial having the effect of setting aside all the results of the former trial.

It is next contended that the court erred in overruling the challenge of plaintiff in error to a juror, J. W. B. McAllister, for cause. The examination of this juror was quite extended by counsel on both sides, as well as by the court, and it could serve no good purpose to transfer it to this already lengthy opinion. It is sufficient to say that if the juror had formed an opinion as to the guilt or innocence of plaintiff in error, it was solely upon reading newspaper reports published at the time of the homicide, of the truth or falsity of which he had no opinion, and upon which he seemed to base whatever opinions he had, if any existed. The opinion of the juror was clearly a hypothetical one and could in no way disqualify him. *Curry v. State*, 5 Neb., 415. *Murphy v. State*, 15 Id., 385. The examination made it clear that the juror did not desire to sit in the case and would have been pleased if excused. Yet his answers were doubtless conscientiously given. During the examination by the court he was asked if, notwithstanding what he had heard and read, he could sit as a fair and impartial juror and render a verdict according to the law and evidence. His answer was, "I shall have to answer as I did Judge Mason. I don't know enough to swear I could not."

The Court. "I ask you if, sitting as a juror in this case, you could render a verdict according to the law and evidence as it shall be given you on the trial of the case?"

Answer. Well, sir, I guess that I could, I don't know. I am very sorry I have been brought into this case in some way. I am sorry I am troubled in this way. At the same time I would not like to have to reply—to swear. I don't know enough to say. I cannot tell. The newspapers—

The Court. How?

A. I don't know anything further except what I read, and I didn't form an opinion, as I know, as to whether they were right. We take the Omaha *Herald* and Lincoln papers, and local papers, and I don't know whether they were right or wrong; that's as far as I can tell you.

* * *

The Court. You have no impression as to whether he is guilty or not of the crime?

A. Yes, necessarily some impression, or it would not have been in the newspaper.

The Court. You have an impression a man was killed?

A. Yes, I have an impression a man was killed.

The Court. You have an impression a man killed him?

A. Yes.

The Court. Whether or not it was excusable, you have no impression?

A. No.

The Court. Then it would not take evidence to remove that?

A. No, it would not."

While the examination of the juror was, at times, not very clear, yet on the whole examination he shows himself to be competent, and the court did not err in retaining him.

The next and last error complained of is the alleged misconduct of counsel for the state while making the closing argument. This alleged misconduct consists in going outside the record, and referring to the Cincinnati riots

which had occurred a few days before the trial. The record discloses the fact that counsel for plaintiff in error had to some extent gone outside of the evidence in his very able argument to the jury, and that the allusion to the Cincinnati riots by the state's counsel was in reply to what had been previously said, and for the purpose, as stated, of illustration. While counsel for the state, especially, should at all times avoid going outside of the record, and while, in a case of this importance especially, we should be in favor of a strict enforcement of the proper rules governing arguments to juries, yet it is impossible for us, in the light of the almost uniform decisions of this court, to say the trial court erred in the matter referred to. We are informed by the record that during the argument of Mr. Watson, when he referred to the Cincinnati riots, the attorney for plaintiff in error said, "I desire to object to the discussion of the Cincinnati riots."

Watson: "I simply refer to it in illustration. I heard counsel state worse."

The Court. "It is not—."

Mason. "Note an exception."

There was no ruling of the district court adverse to plaintiff in error or otherwise. In *Bradshaw v. The State*, 17 Neb., 147, a similar question was before this court, and it was held that "before a case can be reversed and a new trial ordered, it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this state is now settled in this respect, and before this court can review questions of this kind the attention of the trial court must be challenged by a proper objection to the language, and a ruling had upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument an exception to the decision can be noted." There being no ruling of the court we can not say the court erred. The

question did not afterwards arise, as the line of argument objected to was abandoned.

We find no error in this record. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	80
19	677
23	604
24	809
18	80
37	390
18	80
58	17
18	80
159	175
18	80
662	390

L. D. HUNTER, PLAINTIFF IN ERROR, V. JAMES LEAHY & CO., DEFENDANT IN ERROR.

1. **Revivor: LIMITATION.** The limitation of one year within which an action may be revived on motion does not apply to the revival of a judgment.
2. ———: **JURISDICTION OF COUNTY COURT.** A county court upon proper application may revive a judgment which has become dormant.

ERROR to the district court for Cass county. Tried below before POUND, J.

J. H. Haldeman, for plaintiff in error, cited: Sections 466-472, and 473, Civil Code. *Seymour v. Street*, 5 Neb., 85. *Freeman Judgments*, § 442. *Scroggs v. Tutt*, 23 Kan., 181. *Angell v. Martin*, 24 Id., 334. *Baker v. Hammer*, 31 Id., 325. *Gillette v. Morrison*, 7 Neb., 263. *Carter v. Jennings*, 24 Ohio State, 188. Civil Code, § 1047. *Freeman Executions*, 29, 30.

R. B. Windham, for defendant in error, cited: *Wright v. Sweet*, 10 Neb., 190. 2 Nash Pl. & Pr., § 417. *Tyler v. Winslow*, 15 Ohio State, 364.

MAXWELL, J.

In September, 1874, the defendant in error recovered a judgment against the plaintiff, in the probate court of Cass

county, for the sum of \$171.35 and costs. In December, 1875, an execution was issued on said judgment, and delivered to the sheriff, but by the direction of the attorney for the defendant in error was returned without making a levy. In September, 1876, an execution was again issued and delivered to the sheriff, and again returned without making a levy. In March, 1884, the attorney for the defendant herein filed a motion in said court to revive said judgment, and in May thereafter an order of revivor was entered, and the action revived. The case was taken on error to the district court where the judgment of the county court was affirmed.

It is claimed by the plaintiff in error that the right to revive is barred by the statute of limitations.

Sec. 466 of the Code provides that "an order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor unless in one year from the time it could have been first made."

The mode of reviving actions by motion is not exclusive. A party may, after the expiration of a year, revive an action by bill or supplemental petition. *Carter v. Jennings*, 24 Ohio State, 188. *Fox v. Abbott*, 12 Neb., 328. *Pendleton v. Fay*, 3 Paige, 204. 2 Daniels Ch. Pr. (4 Ed.), 1509. Maxwell Pl. and Pr. (3 Ed.), 695.

Sec. 473 of the Code provides that if a judgment becomes dormant it may be revived in the same manner as is prescribed for reviving actions before judgment.

The statute does not provide that the judgment is to be revived in one year from the time it becomes dormant or the right to revive will be barred, and we have no authority to insert words to that effect therein. We do not think the restriction as to time applies to the revivor of judgments. The court no doubt might refuse to revive a judgment which had remained dormant for so long a time as to raise a presumption of payment, and where it would

be inequitable to enforce it. But that question is not before the court. The question here involved was before this court in *Wright v. Sweet*, 10 Neb., 190, and an order reversing a judgment sustained.

Objections were made to the right of a county court to make an order of revivor.

In *Miller v. Curry*, 17 Neb., 321, it was held that the provisions of the Code for the revival of actions and judgments apply to actions before justices of the peace. The same procedure applies to county courts. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	89
21	374
18	82
24	398
18	82
30	41
18	82
33	622
18	82
35	55
35	151
35	612
18	82
42	290
18	82
45	155
18	82
55	4

REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF
IN ERROR, V. LOUIS FINK, DEFENDANT IN ERROR.

- 1. Railroad: EXERCISE OF POWER OF EMINENT DOMAIN: DAMAGES.** While the statute authorizes a railroad corporation to go upon the land of an individual, if need be, and locate its line of road over such land, and permits either the corporation or the land-owner to institute proceedings to condemn the right of way, yet, before the corporation can appropriate such right of way by entering upon the land and constructing its road across the same, the damages must have been appraised and the amount thereof paid to the land-owner or deposited with the county judge. *O. & N. W. R. R. v. Menk*, 4 Neb., 21. *Ray v. A. & N. R. R.*, 439. If the damages are not awarded and deposited the corporation is liable in trespass.
- 2. ———: ———: HOW FAR STATUTE EXCLUSIVE.** The statutory mode of acquiring the right of way and ascertaining the damages therefor is exclusive as to the manner of assessing the value of the land taken with damages to the residue of the tract, but does not include damages to the possession caused by the wrongful entry upon the land before condemnation.
- 3. ———: ———: MEASURE OF DAMAGES.** The measure of damages in such case does not, before the award of the commissioners, include the value of the land taken.

ERROR to the district court for Gage county. Tried below before BROADY, J.

L. W. Colby, T. M. Marquett, and J. W. Deweese, for plaintiff in error, cited: *Stowell & Flagg*, 11 Mass., 363. *Calkin v. Baldwin*, 4 Wend., 667. 1 Redfield Railways, 334. *Mason v. R. R.*, 31 Me., 215. *Aldrich v. R. R.*, 1 Am. Ry. Cases, 206. Mills Eminent Domain, §§ 88, 89. *Hanlin v. R. R.*, 21 N. W. R., 623. *Sherman v. R. R.*, 40 Wis., 645. *R. R. v. Benitos*, 10 Am. & Eng. R. R. Cases, 122.

Phil. E. Winter and Babcock & Davidson, for defendant in error, cited: 2 Coke Inst., 200. *Aling v. Harris*, 5 Johns., 175. *Scidmore v. Smith*, 13 Id., 322. *Doe v. R. R.*, 1 Ga., 524. *Clark v. Brown*, 18 Wend., 220. *Keith v. Tilford*, 12 Neb., 271. Wade Notice, § 1127. *Horbeck v. Toledo*, 11 Ohio State, 219. *Lohmann v. R. R.*, 18 Minn., 174. *Graves v. Otis*, 2 Hill, 468, and note *A. Mohawk R. R. v. Archer*, 6 Paige, 84. *Oregon R. R. v. Oregon Nav. Co.*, 3 Oregon, 178. *Loop v. Chamberlain*, 20 Wis., 135. *Omaha R. R. v. Menk*, 4 Neb., 21.

MAXWELL, J.

This is an action brought by the defendant in error against the plaintiff to recover damages for injury to certain real estate of the defendant during the years 1880, 1881, and 1882. The cause of action is stated as follows: "That the defendant (plaintiff in error) during the years A. D. 1880, 1881, and 1882, did unlawfully and with force and arms, break, enter, occupy, and ever since has occupied a portion of the close of plaintiff heretofore described, and then and there dug, excavated, removed, and piled up the soil and earth of the plaintiff, and then and there built and laid their line of railroad which they have

ever since operated, thereby converting to their own use four and eleven-one-hundredths acres of land out of the south-east corner of the aforesaid described piece or parcel of land (the s. e. $\frac{1}{4}$ of Sec. 25, t. 2 n., r. 6 e.) whereby the plaintiff for and during all that time lost and was deprived of the use and benefit of said four and eleven-one-hundredths acres of land, all of which is to the damage of the plaintiff in the sum of one thousand dollars."

The defendant below (plaintiff in error), in its answer, alleges that, "2d, in the years 1880, 1881, the defendant located and constructed its line of railroad over and across a portion of the said described real estate, by building and constructing a road-bed and track for its line of road; that defendant took possession of the strip of ground necessary for the right of way and location of said road peaceably and quietly, and without any objection or protest on the part of the plaintiff; and the defendant has ever since occupied the same for right of way for its road track in the usual course of its business as a public carrier. * * *

3d. "That it (the defendant below) built and constructed its line of road into and through a portion of Gage county in the year 1880 and 1881, and that prior to the location and construction of the same the said defendant purchased and condemned the right of way for its line of road; that prior to its construction the defendant needed and desired a portion of the plaintiff's said land for right of way, and tried to agree with plaintiff upon the amount of damage to be paid for said right of way, but the plaintiff and defendant failing to agree upon the amount of damages to be paid, the defendant proceeded, as by statute provided, and prior to the construction of said track, to condemn the right of way over the said land," etc.

The reply is a general denial.

On the trial of the cause the jury returned a verdict in favor of the plaintiff below for the sum of \$500, upon which judgment was rendered.

It is claimed by the attorneys for the plaintiff in error that as the statute gives the right to either party to institute proceedings to condemn real estate for a railway, that, therefore, the statutory remedy is exclusive, and an action of trespass will not lie. Sec. 97 of Ch. 16, Comp. Stat., entitled "Corporations," provides that "if the owner of any real estate over which said railroad corporation may desire to locate their road shall refuse to grant the right of way through his or her premises, the probate judge of the county in which such real estate may be situated, as provided in this subdivision, shall, upon the application of either party, direct the sheriff of the county to summon six disinterested freeholders of said county, to be selected by said probate judge, and not interested in a like question, unless a smaller number shall be agreed upon by the parties, whose duty it shall be to inspect said real estate and assess the damages which said owner will sustain by the appropriation of his land to the use of said railroad corporation," etc.

Sec. 100 provides that, "If upon the location of said railroad it shall be found to run through the lands of any non-resident owner, the said corporation may give four weeks' notice to such proprietor, if known, and if not known, by a description of said real estate by publication four consecutive weeks in some newspaper published in the county where such lands lie," etc., * * * "and upon payment of the damages assessed to the probate judge of the proper county for such owner, the corporation shall acquire all rights and privileges mentioned in this subdivision."

By Sec. 97 it is provided, "that either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated, within sixty days after such assessment. And in case of such appeal the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified, to

the county clerk, to be filed and recorded as hereinbefore provided in his office. But such appeal shall not delay the prosecution of the work on said railroad, if such corporation shall first pay or deposit with said probate judge the amount so awarded by said freeholders."

Sec. 21 of Art. 1 of the constitution provides that, "the property of no person shall be taken or damaged for public use without just compensation therefor."

Our statute, in effect, provides that a railroad company may, if need be, go upon land not belonging to it and locate its line over it, but, before it appropriates the land to its own use, it must pay to the land-owner or deposit with the county judge for his use the amount of the award made by the commissioners. The proceedings to condemn may be instituted by either the land-owner or the corporation, but the award must be made and the money paid or deposited before the corporation has any legal right to appropriate the property. *Menk v. O. & N. W. R. R.*, 4 Neb., 21. *Ray v. A. & N. R. R.*, 4 Neb., 439. If this is not done, an action for injury to the possession will lie, because the corporation has no legal right to occupy the premises. Payment for the property appropriated must precede, or at least be concurrent with, the appropriation of the property. The statute, while it authorizes the corporation to condemn such property as it may require for the construction of its road, protects the citizen as well, by requiring just compensation to be made therefor. The law does not require the citizen to institute proceedings to protect his rights, but merely permits him to do so. Constitutional guarantees of the rights of property would be of very little value if a corporation could seize the property of an individual and say to the owner, if you want compensation for this property institute proceedings to condemn it, and after we think the proper amount is awarded we will pay you. Where the assent of the owner is not obtained the corporation must pay the condemnation money before it acquires the right to construct

its road across the land of another. In other words, the property of a citizen cannot be appropriated for public use until the condemnation money is deposited with the county judge, for the use of the owner. This money presumably represents the damages which the land-owner has sustained by the location of the road across his premises. If the sum awarded is insufficient or in excess of the actual injury sustained, either party may appeal to the district court, where the question of damages will be tried *de novo*. But the appeal does not excuse the failure to deposit the amount of the award. *Ray v. A. & N. R. R.*, 4 Neb., 439. Thus, in the case cited, the Burlington & Southwestern R. R. Co. condemned the right of way across the plaintiff's land, but made no payment or deposit of the award. The company then appealed from the award of the commissioners to the district court, where judgment was rendered against it. It afterwards assigned all its rights to the A. & N. R. R. Co., which seemed to claim as an innocent purchaser, but this court held that the assignee took no greater interest than was possessed by the assignors, and that the money not being paid or deposited, the owner of the land had his choice of three remedies, viz.: "He could bring an action for the award, sue for damages occasioned by the trespass, or enjoin the operating of the road across his premises until the award should be paid." That opinion was rendered nearly ten years ago, and has never, so far as the writer is advised, been questioned, certainly not in this court, and it is the law of this state. The corporation must see to it, therefore, before it enters upon the land of another to construct its road, that it has so far complied with the statute as to possess the authority. If it has not, it is like any other trespasser liable in damages. This principle is recognized by the corporation in its answer, in which it alleges "that the damages sustained by the plaintiff for the location and construction of said road over and across his said land were duly assessed and awarded by a commission duly

appointed by the county judge of said county, in all respects as provided by statute; and the amount of damages thus awarded was deposited with the county judge for the plaintiff by the defendant, and which remains on deposit for the plaintiff, if he has not withdrawn the same." As the proof fails to establish the truth of the answer in this regard, it need not further be considered. In an action for trespass, however, the corporation will only be liable for such damages as result from the wrongful appropriation. The value of the land must be ascertained in the mode pointed out in the statute. The court instructed the jury "that should you believe from the evidence that the plaintiff was the owner of the land described in his petition at the time of the several wrongs therein complained of, and should you further believe from the evidence that said land has been injured by reason of the building of defendant's line of road across the same, then the plaintiff is entitled to recover of the defendant the difference between what would have been the value of his land at the time of the injury complained of had the defendant not have constructed their line of road across the same, and what it was worth at that time with it constructed, in the manner as shown by the evidence."

This action is brought by the plaintiff below to recover damages sustained by him for injuries to *his* land. The corporation does not acquire an easement in the right of way by the verdict in this case; that can only be done by condemnation proceedings. The measure of damages, therefore, as stated in the above instructions, is incorrect, and must have been prejudicial. Until the land is condemned and the damages paid the corporation is a trespasser and is liable for the actual injury sustained, but that does not include the value of the land taken. The condemnation proceedings are shown to have been nugatory, by reason of the failure to serve the defendant in error, who was a non-resident of the state, with notice. They afford no justification, therefore, to the action.

R. V. R. R. Co. v. Fink.

There are other assignments of error to which it is unnecessary to refer. For the error in giving the instruction complained of, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF
IN ERROR, v. LOUIS FINK, DEFENDANT IN ERROR.

SAME v. MARY E. WYKOFF.

1. **Instructions to Jury.** Where objection is made that the instructions of the court to the jury are not sufficiently explicit, the remedy is to request instructions which are satisfactory. *B. & M. E. R. Co. v. Schlunda*, 14 Neb., 425. *S. C. R. R. Co. v. Brown*, 13 Id., 317.
2. **Negligence: DAMAGES.** An instruction that if the defendant's "negligence contributed in a large degree, along with the act of God, in causing the loss sustained by the plaintiff, it (the defendant) would be liable in damages for the additional damages sustained by the plaintiff by reason of such negligence of the defendant," is not erroneous.
3. ———: **ANSWER: EVIDENCE CONFLICTING AS TO DAMAGES MUST BE SUBMITTED TO JURY.** Where the answer is a general denial, and the witnesses disagree as to the amount of damages, an instruction that "the question of amount of damages scarcely requires much attention, since in the trial the defendant has made no contest thereon," is erroneous.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Marquett & Deweese, for plaintiff in error, cited: *B. & O. R. R. v. Sulphur Springs*, 2 Am. & Eng. R. R. Cases,

166. *Billinger v. N. Y. R. R. Co.*, 23 N. Y., 51. *R. R. Co. v. Steven*, 73 Ind., 278. *Drake v. R. R.*, 17 Am. & Eng. R. R. Cases, 59. *Chase v. N. Y. R. R. Co.*, 24 Barb., 273.

J. E. Bush and P. E. Winter, for defendant in error, cited: *Gordan v. Buchanan*, 5 Yerg., 72. *Friend v. Wood*, 6 Gratt., 184. *Michaels v. R. R.*, 30 N. Y., 571. *McArther v. Sears*, 21 Wend., 190. *Cooley Torts*, 640. *McMahon v. Davidson*, 12 Minn., 357. *C. R. I. & P. R. R. v. Moffit*, 75 Ill., 524. *Clark v. Lebanon*, 63 Me., 393. *Simpson v. Kimbertin*, 12 Kan., 355.

MAXWELL, J.

These actions were brought against the railroad company in the district court of Gage county by the defendants in error to recover damages sustained by them by reason of the overflow of water along Indian creek in said county, caused, it is alleged, by the improper construction of the railroad along and across said creek. As the cases are of the same nature, and substantially grow out of the same cause of action, the parties on the trial entered into a stipulation that both causes be submitted at the same time to the same jury, which, in case they found the railroad company liable, were to return separate verdicts in favor of the defendants in error (plaintiffs below).

In the Fink case the jury returned a verdict for the sum of \$586.74, and in the Wykoff case for \$491.00. A motion for a new trial having been overruled, judgment was entered on the verdicts. The railroad company bring the causes into this court on error.

Fink alleges in his petition that, during the years 1880 and 1881 he was the owner of certain real estate (describing it) in Gage county; that in the years 1880 and 1881 the railroad company "constructed and run its line of railroad aforesaid over, across, and through a certain

tract of land contiguous to the land of the plaintiff above described." "That in constructing said line of railroad over the said land last above described, the same being contiguous to the lands of the plaintiff, the defendant negligently built and constructed a bridge over a natural water-course, known as Indian creek, in such a manner as to obstruct the natural flow of water in the channel of said creek, wheretofore it had and of right ought to flow unobstructed, by catching hold and piling up great masses of driftwood and debris." "That eastward from said bridge across said Indian creek the defendant built and constructed an embankment of great height, extending eastward from said bridge to a great length, and across certain other water-courses, wholly neglecting and failing to put in, build, and erect or construct proper and sufficient bridges, culverts, or sluiceways for the water to pass through or under said embankment." That "by reason of said improperly constructed bridges, and the erection of said embankment across said water-courses without proper and adequate bridges, culverts, or sluiceways, the natural water-courses were dammed up and the water was held and backed up until it had gained such volume and force as to break through said embankment erected as aforesaid by the defendant. And on or about the 11th day of June said water broke through said embankment and flowed over the land of the plaintiff herein described, with great force and volume, destroying the grain of the plaintiff growing on said land, and washing away the soil from the land of the said plaintiff," to his damage in the sum of \$1,500, etc.

The railroad company in its answer denies all the allegations of the petition, except that it is a corporation, and pleads that it had condemned the right of way over the plaintiff's and adjoining lands, and deposited the money with the county judge of said county, "and that the defendant's line of road constructed thereon has since been maintained and operated on said right of way thus acquired in a legal and proper manner."

In the Wykoff case the plaintiff below claims damages by reason of an ice gorge formed at the bridge in question in March, 1881, by which her orchard was greatly injured and quantities of corn and hay destroyed; also for injuries sustained by the flood in June of that year. A very large amount of testimony was introduced on the trial in which the witnesses substantially agree that the storm was very severe, and some of them state that it was the most severe ever known since the settlement of the county. Others, however, deny this. There is no doubt whatever that the storm was one of the most severe that had ever visited that locality.

The principal defense against liability of the railroad company is, that the storm was unusual—no such flood of water had been seen before that time by the oldest inhabitant of the county, and that the evidence of experts and persons familiar with the construction of railroads shows that the railroad was constructed in the ordinary manner of constructing railroads in this country, and that the bridges and culverts were sufficient judging from the experience of the past. *O. & R. V. R. R. Co. v. Brown*, 14 Neb., 173. The questions involved were questions of fact, and proper for the jury to pass upon; and as the court permitted the jury to view the property which is the subject of litigation, it is pretty clear that there was very important evidence before the jury which is not before this court. It is impossible, therefore, for this court to review the facts.

Objection is made that the "instructions of the court to the jury are in general terms, and give no correct guide to the jury in determining what obstruction would be allowable in the proper construction of bridges and embankments."

In a number of cases this court has held that instructions must be based on the evidence. *Meredith v. Kennard*, 1 Neb., 319. *City of Crete v. Childs*, 11 Id., 257.

Neihardt v. Kilmer, 12 Id., 38. And they should be clear and explicit and cover all questions at issue. *Milton v. State*, 6 Neb., 144. *Parrish v. State*, 14 Id., 62. The complaint in this case, however, is not that the instructions were not based on the evidence, but that they are not sufficiently explicit. The remedy in such case is by request for instructions which are satisfactory. *B. & M. R. R. v. Schluntz*, 14 Neb., 425. *S. C. R. R. Co. v. Brown*, 13 Id., 317. As we find no request to the court for instructions of the character named, and refusal to give the same, the objection is unavailing.

Complaint is made of the fourth instruction given on behalf of the plaintiff below, which is as follows: "The court instructs the jury that it is not necessary to the plaintiff's recovery to show great negligence on the part of the defendant; and if you believe from the evidence that the defendant negligently constructed its line of road, bridges, and culverts, as complained of by the plaintiff in her petition, and such negligence contributed in a large degree, along with the act of God, in causing the loss sustained by the plaintiff, it would be liable in damages for the additional damages sustained by the plaintiff by reason of any such negligence of the defendant."

A loss occasioned by the act of God has reference to acts with which the agency of man has nothing to do. *McArthur v. Sears*, 21 Wend., 190. *Gordon v. Buchanan*, 5 Yerg., 72. *New Brunswick, etc., Co. v. Tiers*, 24 N. J. Law, 697. *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y., 564. This question was very ably discussed by Cowen, J., in *McArthur v. Sears*, 21 Wend., 195-200, and a large number of authorities cited. If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God. *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y., 564-571. *Proprietors, etc., v. Wood*, 4 Doug., 287-290. *Chicago, etc., R. R. Co. v. Sawyer*, 69 Ill., 285. The instruction, therefore, was favorable to the railroad com-

Dunbar v. Briggs.

pany, and it has no cause of complaint because it was given.

The court gave the following instruction, to which exceptions were taken: "The question of amount of damages scarcely requires much attention, since in the trial the defendant has made no contest thereon." If there was no conflict in the testimony as to the amount of damages, such an instruction perhaps would not be erroneous. But, where, as in this case, the witnesses do not agree, the instruction must have been prejudicial. The railroad company in its answer, among other things, denies the damages, and it devolves upon the plaintiff to prove the same, and the facts must be submitted to the jury to determine. As this was not done in this case the judgment must be reversed. Objections are made to some of the other instructions, but we see no error in them, and they need not be noticed. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

18	94
30	550
18	94
38	889

JOHN J. DUNBAR, PLAINTIFF IN ERROR, v. B. B. BRIGGS,
DEFENDANT IN ERROR.

1. Trial: THREE TRIALS: VERDICT SUSTAINED. When a case has been tried three times, the verdict of the jury each time being in favor of the plaintiff, the court will not set aside the third verdict as being against the weight of evidence, unless it is clearly wrong.
2. Instructions given set out in the opinion, Held, Not erroneous.

ERROR to the district court for Johnson county. Tried below before DAVIDSON, J.

A. H. Babcock and *A. Hardy*, for plaintiff in error,
cited: *City of Crete v. Childs*, 11 Neb., 256.

J. E. Bush and *Hurley & Crane*, for defendant in error,
cited: *Bryant v. R. R. Co.*, 63 Iowa, 465. *Chittenden*
v. Evans, 48 Ill., 52.

MAXWELL, J.

This cause was before this court in 1882, and is reported in 13 Neb., 332, the judgment of the court below being reversed and the cause remanded. After the cause was remanded application was made to the district court to change the place of trial, and the cause was thereupon transferred to Johnson county, and a trial had, which resulted in a verdict and judgment for the defendant in error.

The action is brought upon a promissory note, of which the following is a copy: "\$900.00. Beatrice, Neb., July 28, 1879. Sixty days after date I promise to pay to order of B. B. Briggs, nine hundred dollars, at the office of Smith Bros., Bankers. Value received. John J. Dunbar." The defendant below (plaintiff in error) in his answer admits the making of the note, but alleges that it was given for the purchase price of thirty-seven Texas horses and mares; that Briggs warranted them to be sound and free from disease, and that the defendant purchased the same on the faith of the warranty; that all of said horses were diseased at the time of said purchase with a disease known as Texas itch, which fact was wholly unknown to the defendant; that the defendant, relying upon the warranty, turned said Texas horses in with his herd containing more than one hundred horses, and the Texas horses being affected with said disease communicated the same to the entire herd; that all the horses purchased from the plaintiff died with said disease and about sixty-five head of the other horses in said herd. The defendant

therefore prays for judgment on his counter-claim for the sum of \$30,000.00. The reply is a general denial.

The first error relied on is, that the verdict is not sustained by sufficient evidence and is contrary to law, and the second, third, and fourth assignments are to the same effect, and will be considered with the first.

It may be conceded that the testimony shows that Briggs warranted the horses to be sound; and in our opinion the clear weight of the evidence shows that they were sound at the time of the sale to Dunbar. The sale was made the latter part of July, 1879, and it is pretty clear that none of the horses in question were affected with the disease until two or three months afterwards. The witnesses disagree as to the exact time, and it is not material in this case except as showing that the horses were not diseased when Dunbar purchased them.

The plaintiff below not only introduced evidence tending to prove that the horses were sound when sold to the defendant, but went further, and introduced testimony tending to prove that the horses in controversy caught the disease from another herd about three months after the purchase. This testimony was not introduced in the former trial and it tends to make clear an otherwise doubtful point in the case, and justified the jury, in connection with other evidence in finding, as they must have done, that the horses were sound when Dunbar bought them.

The fifth objection is overruling certain objections to interrogatories in depositions. Without noticing them at length, there was no such prejudice to the defendant as would justify the reversal of the case.

The defendant asked the court to give the following instruction :

“If it is true that Briggs himself, and also several witnesses for him, who had in various ways been connected with the herd for him, neither knew or had observed that the horses were diseased—this cannot prevail against

the positive testimony of several unimpeached and not otherwise contradicted witnesses, who swear positively that they saw the signs of this disease, known as the 'Texas itch' in Briggs' herd before the delivery of the ponies out of the herd to Dunbar, and among the ponies delivered to Dunbar out of this herd, within a time less than it takes to start and develop these signs."

The court modified it as follows: "If it is true that Briggs himself, and also several witnesses for him, who had in various ways been connected with the herd, neither knew nor had observed that the horses sold said Dunbar were diseased, yet if you are satisfied from the evidence that said horses were, at the time of said sale, in fact infected with said disease known as the 'Texas itch,' this will be sufficient to show a breach of the warranty of the soundness of said horses; if you believe from the evidence there was in fact any such warranty made by said Briggs as claimed by said defendant."

The instruction as given evidently is correct, and the modification was properly made.

In conclusion the court instructed the jury that "the burden is on the defendant to make out his defense or counter-claim by a preponderance of the proofs." This was repeated in another form. The court then added: "But if defendant has established by a fair preponderance of the testimony the defense and counter-claim set up in his answer, then you will find for the defendant and assess his damages at such sum as the testimony shows him entitled to over and above the amount of said note, in the light of the foregoing instruction."

While all that is required is a preponderance of the evidence to establish either a claim or a counter-claim, yet we do not think the use of the word "fair" in the connection in which it is used, particularly when the rule had been correctly stated in the same connection, was prejudicial.

Guthman v. Guthman.

This case has been submitted to three juries with the same result, a verdict in favor of the plaintiff below. Under such circumstances, to justify the court in reversing the judgment as being against the weight of evidence, it must be clearly wrong, or there must have been such error in giving or refusing instructions as was palpably prejudicial to the rights of the party complaining. As we find no substantial error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	98
26	361
18	98
45	789

FRANK R. GUTHMAN, PLAINTIFF IN ERROR, v. MARY J. GUTHMAN, DEFENDANT IN ERROR.

1. **DOWER: COURT MAY ASSIGN.** When a widow is entitled to dower in the lands of which her husband died seized, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever county the lands may lie, by the county court of the county in which the estate of the husband is settled, upon the application of the widow.
2. ———: ———: **PRACTICE.** In order to oust the county court of such jurisdiction the right of the applicant to such dower must be disputed by presenting an issue of fact, which, if established by proof, would defeat her claim of dower, and such issue must be one which the county court by its organization is unable to try.
3. **Homestead: COUNTY COURT MAY ASSIGN.** A county court has jurisdiction to set aside a homestead to a widow by virtue of its general jurisdiction in matters of probate and the settlement of estates.

NOTE.—County court has exclusive jurisdiction in probating wills. *Loosemore v. Smith*, 12 Neb., 343. *Pettit v. Black*, 13 Id., 152. Homestead rights of wife. *McMahon v. Spielman*, 15 Neb., 654. *Dickman v. Birkhauser*, 16 Id., 686. *Stout v. Rapp*, 17 Id., 462. *McHugh v. Smiley*, Id., 526.—REP.

ERROR to the district court for Lancaster county. Heard below before POUND, J.

M. A. Hartigan, for plaintiff in error.

L. C. Burr, for defendant in error.

COBB, CH. J.

Mary J. Guthman filed her petition in the county court of Lancaster county, alleging that she is the surviving widow of Charles Guthman, deceased; that said Charles Guthman departed this life on or about the 19th day of January, 1882, leaving him surviving as sole heir, his daughter Minnie Ellen, a minor of about the age of thirteen years, and that Joseph V. Weckback, Frank Guthman, and William Guthman, are her duly authorized guardians. That said Charles Guthman died seized in his own right of certain lands located in said county of Lancaster, describing the same, which said premises during the life-time of said Charles Guthman constituted his homestead and was occupied as such by himself and her, the said petitioner, his wife, for some time prior to and at the time of the decease of the said Charles Guthman; that said Charles Guthman left a will of which the said Frank Guthman and Joseph V. Weckback are the duly authorized executors. She further alleged that in his said last will and testament the said Charles Guthman made a certain provision for her, the said petitioner, to accept in lieu of dower, but that she refuses to accept the provision in said will mentioned in her behalf, and brings this her action for the admeasurement, adjustment, and assignment of her dower rights in said real estate as by the statutes of the state she is entitled to have. She further alleged that she desires and elects to have that portion of said lands on which the house, home, or manor house, and out-buildings

on said premises adjacent thereto are situated, and so much additional thereto of said lands as by the statutes of the state she is entitled to have, so that the same may be contiguous and convenient for farming purposes, and be set off separate and apart from the remaining lands, and petitioner can have exclusive possession and use thereof during her life-time, etc.

In response to said petition the said Minnie Ellen Guthman, by her guardians, and the said guardians by counsel, appeared in the said county court and filed an answer, of which the following is a copy:

1. "Now comes Minnie Ellen Guthman, by her guardians, F. R. Guthman, Joseph V. Weckback, and William Guthman, who appearing in that behalf, and for no other, and interpose this their answer and plea in abatement, and deny and challenge the jurisdiction of the court to apportion any homestead rights or dower rights of any person interested in the lands or estate of said deceased Chas. Guthman. 2d. Denying all other allegations in said petition contained."

Upon the hearing the county court made and entered the following findings and judgment in the said proceeding, to-wit: "I find that the prayer of said petitioner ought to be and is hereby granted. I further find that the said petitioner is the widow of said Charles Guthman, deceased, and is therefore entitled to the exclusive use, occupancy, rents, and profits of, in, and to the following described lands, to-wit: The north-west quarter of section nine, range 8 (*sic*) east of the sixth principal meridian in Lancaster county. That said land was the homestead of the deceased, and was occupied by said deceased and said petitioner as their homestead at the time of the death of said decedent, and that the petitioner is entitled to a life estate in the same, and is entitled to have the same appraised and set apart and assigned to her, or so much thereof as shall not exceed in value the sum of two thousand dollars, nor in

extent one hundred and sixty acres. I further find that she is entitled to and is hereby allowed her dower in all of the remaining lands of which her said husband died seized, to-wit: The north half of section nine, in township nine north, of range eight east of the sixth principal meridian in Lancaster county, containing about three hundred and twenty acres, less the homestead above described. Also the north-east quarter of the north-east quarter of section eight in township nine north, of range eight, containing about forty acres, all in Lancaster county. It is therefore by me considered, ordered, and adjudged that the prayer of said petition be and the same is hereby allowed, and it is further ordered that the said petitioner have her life estate in said homestead, to-wit: the north-west quarter of section nine in township nine, range eight, appraised, set apart, and assigned to her separate use for her life estate, or so much thereof as shall not exceed in value the sum of two thousand dollars, nor in extent one hundred and sixty acres, constituting such part of said lands upon which the house and other buildings are situated; and is further ordered that said petitioner have appraised and set off for her separate use and benefit her dower or life estate in the remainder of her deceased husband's lands as above described, set apart for her use and benefit during her natural life, and that said lands be set aside by metes and bounds, and that they be set apart in a body and contiguous to the residence part of said lands or the part where the buildings and other improvements now are," etc.

There was an appeal taken to the district court by the heir at law and executors of the will of the deceased. In said last mentioned court the petitioner filed substantially the same petition as that filed by her in the county court as above stated. To which the respondents made answer, in which they admitted the death of said deceased, the survivorship of his said heir and the appointment of said

executors; also that said deceased was seized of the real estate described in the petition. They deny each and every allegation of the petition not expressly admitted. They allege that the petitioner is not the head of a family, etc. That the said Minnie Ellen Guthman was the child of the deceased by his first wife, and that the custody of said child was removed and willed from petitioner, etc.

They further answering say, that "They have at all times been ready and willing that petitioner might have and receive her dower right in the estate of deceased, but charge the truth and fact to be that she sought to dismantle said estate by first claiming a homestead from said estate to the extent of one hundred and sixty acres, and to have then allotted a dower estate from the balance remaining, which was done in the county court of Lancaster county, and from which order and decree these respondents appeal and ask that the same, so far as homestead admeasurement or dower admeasurement is concerned, be vacated and held for naught, said court having no jurisdiction or power to make any such order and decree. They further allege that said petitioner has joined in a lease with these respondents for the leasing of said premises for the term of three years, and with an option of a longer period. That she has received a large amount of personal estate of the value of three thousand dollars and upwards, and has appropriated the same to her personal use in no way or manner placing any portion to the care, comfort, or education of said child," etc.

Upon the trial the district court made and rendered the following findings and judgment, to-wit:

"On due consideration of the premises the court doth find that the petitioner, Mary J. Guthman, widow of Chas. Guthman, deceased, is entitled to dower in the real estate described in the petition, and that the same should be assigned and set off to her in the manner provided by law And the court doth further find, that said Mary J. Guth-

man is not entitled to have a homestead assigned and set off to her in this proceeding, on the ground that this court has no jurisdiction; this proceeding being appealed from the county court of Lancaster county, and the right to such homestead being contested, the county court had no jurisdiction to assign and set off such homestead.

"It is therefore by the court considered, adjudged, and decreed that the proceedings and judgment and findings of the county court of Lancaster county, in so far as the same sets apart and assigns dower to the said Mary J. Guthman in the premises described in the petition, be and the same is hereby ratified and confirmed, and that said Mary J. Guthman, widow of said Charles Guthman, deceased, is entitled to such dower.

"It is futher considered and adjudged that the proceedings, finding, and judgment of the county court aforesaid, in so far as the same attempts to set apart and assign a homestead interest to the said Mary J. Guthman in and to the real estate in controversy, be and the same is hereby vacated, set aside, and held for naught, and that the said Mary J. Guthman is not entitled to such homestead for want of jurisdiction of this court, and said county court in this proceeding, the same being appealed from said county court as aforesaid, and the said homestead interest in the real estate in controversy being contested in said county court."

The respective parties having severally excepted to the said findings and judgment so far as the same was against each respectively, and each having severally moved for a new trial, and the same being denied, the cause is brought to this court on error by both sides, respectively.

There is but one question raised by the pleadings, and one in addition by the judgment of the district court.

First, as to the question of jurisdiction in the county court to assign dower in a case like this, Sec. 8, of Ch. 23, Comp. Stat., provides as follows: "When a widow is en-

titled to dower in the lands of which her husband died seized, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever county the lands may lie, by the judge of probate for the county in which the estate of the husband is settled, upon the application of the widow, or any other person interested in the lands," etc.

This provision of statute was enacted long before the adoption of the present constitution, and at most can only be construed to be a limitation upon the general power conferred upon county courts by that instrument to "have original jurisdiction in all matters of probate, settlements of estates of deceased persons," etc. Jurisdiction being thus conferred by the constitution, it is a question whether, even under the provisions of the above statute, it can be taken from it merely at the volition of a party respondent. But if it be granted that it can be done by pleading facts and the presentation of an issue or issues which the county court is incompetent to try—such, for instance, as the title to land, or the relationship of husband and wife—it will not be denied that such issue must be actually presented by proper pleading, and cannot arise by implication. Ordinarily a question of jurisdiction may, and in some cases must be made at the very threshold; but here the right of the petitioner to dower must be first disputed by an answer setting up facts which, when proved, will overthrow the claim of the petitioner. If the facts thus pleaded are of a nature which the county court by its organization is incompetent to try, whatever might or might not be its duty in the absence of further legislation, it is quite clear that to proceed to a final adjudication of the matter in that court would be erroneous, if not void. But the essential thing to do on the part of the respondent is to present the issue, to raise the dispute which will take the case out of the jurisdiction of the court. What fact was presented by the answer of the

respondents for the adjudication of the county court in the case at bar? None whatever, as I think. In saying this I do not overlook the last line of respondents' answer, "denying all other allegations in said petition contained." While this was probably meant as a mere formal, general denial, the court was, I think, justified in disregarding it, for the reason that it is not couched in positive language, but is a mere recital. But I will not impugn the good faith of the respondents by supposing that they ever intended to deny the relation of husband and wife which existed between the petitioner and the deceased at the time of his death. Such intention is clearly negatived by them in their answer filed in the district court and by the principal executor when on oath as a witness in the case. The paper itself was intended as a plea in abatement to the jurisdiction of the court, and was so claimed by counsel at the bar, and not an answer to the merits or to the petitioner's right to recover. I am therefore of the opinion that the petitioner's right to dower was not disputed in the manner contemplated by the statute so as to oust the county court of jurisdiction.

The district court reversed the judgment of the county court in so far as the same related to the homestead rights of Mary J. Guthman on the ground above stated. Upon the consideration of this case in the consultation room, we were all of the opinion that the reason was quite untenable, yet that the judgment would probably have to be affirmed for the want of sufficient allegations in the petition to entitle the petitioner to the assignment of her homestead. But upon a more careful examination of the petition I have come to the conclusion that it is sufficient. It has been often said in this court, with the approval of every member of it, present as well as past, that the homestead law, being of a highly remediable nature, would be liberally construed, and this liberal construction should follow it in every stage, and certainly will not be withdrawn from it when its benefits are invoked by the widow.

The central fact which could have been set up in the petition on which to base a judgment for the assignment of petitioner's homestead rights is, that the land described, or a designated portion of it, was and constituted the homestead of the petitioner and the deceased husband at the time of his death. The terms of the law supply all of the rest. The husband was the head of the family, while in life; as such he acquired the homestead estate. At his death it descended to his widow and family; to her not as the head of a family, but his widow *eo nomine*. Comp. Stat., Ch. 36, § 17.

It must be admitted that neither the constitution nor the statute gives to county court jurisdiction to assign a homestead to a widow or family in terms. But it is embraced in the general jurisdiction of all matters of probate, settlement of estates of deceased persons, etc. I conclude, therefore, that the county court had jurisdiction to render the judgment which it did render, and that accordingly the district court had jurisdiction on appeal.

It may not be out of place in this connection to say, for the guidance of the lower courts, that the homestead set apart and assigned to the petitioner in this proceeding must be held by her as well for the benefit of the respondent, Minnie Ellen Guthman, during her minority, as for herself, as a home, and while the same is rented out during said minority the said Minnie Ellen will be entitled to share equally with the petitioner in the net rental profits thereof.

The judgment of the district court in so far as it affirms the judgment of the county court is affirmed, and in so far as it reverses the judgment of the county court is reversed, and the judgment of the county court is in all things affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOSEPH CHRISMAN, PLAINTIFF IN ERROR, V. THE STATE,
DEFENDANT IN ERROR.

1. **Corrupting Witnesses: INDICTMENT.** In an indictment for attempting to corrupt a witness in a judicial proceeding, it need not be alleged that such witness had been sworn, recognized, or subpoenaed in such judicial proceeding.
2. ———: ———: **EVIDENCE.** When such judicial proceeding involved a trial upon an indictment for a crime or misdemeanor, it was not error to admit in evidence upon the trial of the case at bar the said indictment, with the name of such witness attempted to be corrupted endorsed thereon as a witness on the part of the state.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hazlett & Bates, for plaintiff in error.

William Leese, Attorney General, for the state.

COBB, CH. J.

The plaintiff in error was indicted, tried, and convicted in the district court of Gage county for the offense of attempting to corrupt and influence, and of corrupting and influencing one C. R. Woodard, by offering to and paying him the said C. R. Woodard a sum of money to leave the county and go beyond the jurisdiction and process of the state, and not appear against him, or testify against him as a witness in a certain criminal proceeding then pending against him.

The defendant demurred to the indictment on the ground that the same did not contain facts sufficient to constitute a crime under the laws of the state of Nebraska, which demurrer was overruled.

A trial was had to the court, a jury being waived. The

court found the defendant guilty, overruled his motion for a new trial, and sentenced him to pay a fine of five hundred dollars and be imprisoned in the county jail for a period of thirty days, etc.

The first point presented by plaintiff in error in his petition in error, and urged in the brief of counsel, arises upon the overruling of the demurrer to the indictment. In order to the consideration of this point I copy the substantial part of the indictment:

"That Joseph Chrisman * * * being then and there charged with a criminal offense and duly indicted under lawful authority by the grand jury of said county, of the December term of the district court of said county in the year eighteen hundred and eighty-three, for the crime of cutting one C. R. Woodard with intent to kill him, the said C. R. Woodard, in the county of Gage, and state of Nebraska aforesaid, and he, the said Joseph Chrisman, being then and there held to bail under said charge to appear at the February term of the said district court aforesaid, the said court having jurisdiction of the said offense, unlawfully did then and there attempt to corrupt and influence, and did corrupt and influence one C. R. Woodard then and there being, by offering to and paying to him, the said C. R. Woodard, the sum of fifty dollars with the further offer and promise to the said C. R. Woodard, of the further sum of money of five hundred and twenty-five dollars to corruptly and unlawfully influence and procure him, the said C. R. Woodard, to leave the said county of Gage and state aforesaid, and go beyond the jurisdiction and process of said district court and secrete himself so that the said C. R. Woodard could not be obtained as a witness on the part of the state of Nebraska in the said action aforesaid against the said Joseph Chrisman aforesaid, the said C. R. Woodard being then and there a very important in said action, and in fact the prosecuting witness in the said cause so pending as aforesaid against

the said Joseph Chrisman. And so the grand jurors aforesaid do say that the said Joseph Chrisman then and there in the manner and form aforesaid, unlawfully and willfully did attempt to influence and did influence and corrupt the said C. R. Woodard, a witness as aforesaid, by money and promises as aforesaid, well knowing that the said C. R. Woodard was a witness as aforesaid," etc.

The section of the statute under which this indictment was found is section 164 of the Criminal Code, and is in the following words:

"Sec. 164. If any person shall attempt to corrupt or influence any juror or witness, either by promises, threats, letters, money, or other undue means, either directly or indirectly, every person so offending shall be fined in any sum not exceeding five hundred dollars and imprisoned in the jail of the county not exceeding thirty days."

It is urged that the indictment fails to charge an offense under the provisions of the section quoted. There is an evident omission of the word witness where it should have first occurred in the form of indictment used. But I think it sufficiently appears on the face of the indictment that C. R. Woodard was a witness in the action then pending in said court and set out in the indictment. The indictment expressly alleges that the said C. R. Woodard was the prosecuting witness in said cause, and I am at a loss to perceive how he can be held to be any the less a witness, because he is the prosecuting witness.

I think the word witness is used in the section above quoted in a broad sense, and that it is not necessary that the witness should be alleged to have been either subpoenaed or recognized to appear and testify as a witness in the case. If I am right in this view, then it is sufficient in the indictment to describe the person corrupted, as a witness. Nor do I think that the use of the word prosecuting, as qualifying the word witness, vitiates or changes its meaning.

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If the person accused is guilty of the offense charged, he generally knows who are the witnesses who can testify against him, as well before as after they are recognized or subpoenaed, and an interpretation of the law that would leave him free to corrupt them until after they are sworn or even recognized on subpoena is certainly inadmissible.

There was evidence tending to prove that the money was paid and promise made by the plaintiff in error to Woodard for the purpose of inducing him not to appear and testify at the trial.

There was no error in the admission of the indictment with the name of Woodard endorsed thereon as a witness as evidence at the trial. As we have seen, evidence that Woodard was a witness on the trial of the case in which the indictment was the principal pleading was responsive to the principal point made in the case.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	110
44	96
18	110
62	760

II. H. SPELLMAN, HENRY SPELLMAN, AS H. H. SPELLMAN & Co., AND J. W. SCHMIDT, PLAINTIFFS IN ERROR, V. ABRAHAM FRANK, AUGUST FRANK, AND JOSEPH FRANK, AS A. FRANK & SONS, DEFENDANTS IN ERROR.

1. **Petition in Action on Note.** In an action upon a promissory note when a copy of the note sued upon is set out as a part of the petition, it must be alleged that there is due thereon from the adverse party to the plaintiff a specific sum, unless these facts may be inferred from others pleaded. *Gage v. Roberts*, 12 Neb., 276.
2. **Pleading not Amendable in Supreme Court on Original Motion.** When on a hearing on error in the district

Spellman v. Frank.

court leave is asked to amend a pleading to correspond with an order of the county court and such leave is refused, this court in the exercise of its appellate jurisdiction cannot grant leave for such amendment when asked by an original motion filed in this court.

ERROR to the district court for Lancaster county. Heard below before MITCHELL, J.

James E. Philpott, for plaintiffs in error.

A. C. Platt, for defendants in error.

REESE, J.

The only question presented in this case is, whether the petition filed in the county court states a cause of action. It is as follows:

“Abraham Frank,
August Frank, and
Joseph Frank, as
A. Frank & Sons,

Plaintiffs,

vs.

H. H. Spellman,
Henry Spellman, as
H. H. Spellman & Co., and
J. W. Schmidt,

Defendants.

“The plaintiffs herein complain of the defendants, and for cause of action in this behalf say that said defendants are indebted to them to the amount of \$480.00 and interest, for one promissory note as follows, to-wit:

\$480.00. July 30, 1884. To A. Frank & Sons. Ten per cent interest from date.

NOTE.—In *Humphries v. Spofford*, 14 Neb., 488, on appeal leave was given plaintiff to amend petition in the district court so as to correct a mistake, on payment of costs, the cause being remanded to the district court for that purpose.—REP.

"Protested Dec. 2, 1884, Firth, Neb., by C. M. Wittstruck. Fees, \$2.60." A true copy of note and protest is hereto attached, as exhibit 'A,' and made a part hereof, and that the same is now due and remaining unpaid; wherefore plaintiffs pray for judgment for the sum of \$480.00, with interest from the 30th day of July, 1884, at the rate of ten per cent per annum, and protest fees, \$2.60, with costs of this action, and such other and further relief as may be due in the premises.

"*Exhibit 'A.'*"

"\$480.00.

FIRTH, NEB. July 30, 1884.

Four months after date, for value received, we promise to pay to the order of A. N. Frank & Sons, four hundred and eighty dollars, with interest at the rate of ten per cent per annum from date until paid. Negotiable and payable at the Firth Bank, Firth, Neb.

"H. H. SPELLMAN & Co.,

"J. W. SCHMIDT."

The certificate of protest is also attached as part of exhibit "A," but as it cannot enter into the question in this case it is not necessary to set it out here.

As the amount claimed by the petition is not within the jurisdiction of the county judge when exercising the ordinary powers and jurisdiction of a justice of the peace, but is within the jurisdiction of the county court, and the case is what is known as a term case in that court, the rules of procedure and practice as applicable to the district court must be applied to the pleading under consideration. Compiled Statutes, §§ 10 and 11, Ch. 20. This being true, the decision in *Gage v. Roberts*, 12 Neb., 276, seems to be in point and decisive of the case. As in the case above cited, so in this case, there is no allegation that plaintiffs in error executed the note in question, nor that there is due defendants in error from plaintiffs in error the sum for which judgment is demanded. It may also be noted that

the note seems to be signed by a partnership or firm designated as "H. H. Spellman & Co.," yet there is no allegation in the petition that defendants in error were associated together as such firm, and that the note was their note.

It is clear that the petition does not state a cause of action.

Upon the cause being called for argument in this court, defendants in error asked leave to interline in the petition after the words, "that the same is now due and remaining unpaid," the words "on said promissory note from said makers, H. H. Spellman, Henry Spellman, and J. W. Schmidt, to these plaintiffs, the sum of \$480.00, with interest from July 30th, 1884, at ten per cent, no part of which has been paid," for the purpose of correcting the transcript to correspond with the amendment ordered by county court. It appears that at the trial in the county court, and upon the application of defendants in error, they were permitted so to amend the petition by interlineation, but the amendment was not in fact made. At the hearing in the district court, upon error, the amendment not having been made below, defendants in error moved the court for leave to make the amendment there, which was refused. We are not asked to review the action of the district court, but a new motion is made in this court.

As the jurisdiction of this court is appellate only, in such cases, there is no warrant for granting the motion, and it is therefore overruled.

The judgment of the district court is reversed, and the cause is remanded with directions to the district court to reverse the judgment of the county court, and for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

18	114
22	480
18	114
36	658
37	262

THE CITY OF LINCOLN, PLAINTIFF IN ERROR, V. JOHN
GILLILAN, DEFENDANT IN ERROR.

18	114
39	43
39	70
c39	618
18	114
40	32

18	114
44	859

18	114
48	400
18	114
50	236
50	338
53	741

1. **Trial:** CONCLUSION FROM UNDISPUTED FACTS A QUESTION FOR JURY. Where the existence of a state of facts is undisputed, and where upon such facts different minds may honestly draw different conclusions from them as whether or not such facts establish negligence or the absence thereof, the question as to the conclusion to be arrived at is a proper question for the trial jury, and not for the court.

2. **Instructions to Jury.** Where an instruction to a jury states a proposition clearly and distinctly, and without limitation or qualification, it is not error for the court to refuse to re-instruct the jury upon the same proposition, but with the addition of a clause limiting the force of the instruction when such limitation would be against the interest of the party asking the instruction. Or, if error, it would be error without prejudice.

3. ———. When an instruction is once given it is sufficient, and it is not error for the court to refuse to repeat it to the jury.

4. ———. It is not error for the trial court to refuse to instruct a jury upon questions not involved in the case on trial. Instructions should be confined to the issues in the case.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

A. C. Ricketts (H. H. Wilson with him), for plaintiff in error.

Court should have taken case from jury. *L. S. & M. S. R. R. v. Miller*, 25 Mich., 274. *Penn. Co. v. Rathgeb*, 32 Ohio State, 66. *McLoury v. McGregor*, 54 Iowa, 717. On instructions refused: *Reynolds v. R. R.*, 58 N. Y., 248. *Thompson Neg.*, 1236. *Rudolph v. French*, 44 How. Pr., 160. *Greenleaf v. R. R.*, 29 Iowa, 46. *Warner v. R. R.*, 64 N. Y., 465. *Benson & Titcomb*, 72 Maine, 31. *Hart v. R. R.*, 84 N. Y., 56. *Beatty v. Gilmore*, 16 Penn. State, 463. *Otis v. Janesville*, 47 Wis., 422. *Bassett v.*

St. Joseph, 53 Mo., 590. *Brown v. Glasgow*, 57 Id., 157. *Mount Vernon v. Dosonchett*, 2 Ind., 586. *Bruker v. Covington*, 63 Id., 33.

A. J. Sawyer and N. Z. Snell, for defendant in error, cited: *A. & N. R. R. v. Bailey*, 11 Neb., 332. *City of Lincoln v. Walker*, post. *Henry County v. Jackson*, 86 Ind., 111. *Wheeler v. Westport*, 30 Wis., 392. *Murphy v. Indianapolis*, 83 Ind., 76. *Looney v. McLean*, 129 Mass., 33. *McKenzie v. Northfield*, 16 N. W. R., 264. *Commissioners v. Burgers*, 16 Md., 29. *Bassett v. Fish*, 75 N. Y., 303. *Palmer v. Deering*, 93 Id., 7. *Mathews v. Baraboo*, 39 Wis., 674.

REESE, J.

The original action was instituted by defendant in error against plaintiff in error for the purpose of recovering damages alleged to have been sustained by him by reason of a defect in one of the public streets in the city of Lincoln. The allegation of the petition is, and the proof shows, that on the evening of the 11th day of November, 1882, while defendant in error was riding along the street, his horse stepped into a mud hole or wagon rut and fell, throwing defendant in error upon the ground and breaking his leg.

The first proposition contended for by plaintiff in error is, that the testimony "establishes, beyond any controversy, the existence of such facts as render defendant in error guilty of contributory negligence, as a matter of law, and therefore the trial court erred in submitting the case to the jury."

To this we are unable to agree. It appears that a week or ten days before the accident defendant in error saw the defect in the street, but there is no proof of his having seen it afterwards. It was his custom to ride from his home, east of the city, to his place of business, using for that purpose a horse, or colt, three years old the spring before.

The proof is that the horse was gentle and sure-footed. On the evening in question—some time after dark—he mounted the horse to go home. The night was quite dark and a storm was approaching from the north-west. He allowed his horse to go at a “lope,” selecting its own part of the street. The speed at which the horse traveled was not rapid, a witness testifying that he kept opposite to him while running along the sidewalk. Defendant in error was familiar with the street, having traveled it almost daily until a short time before the accident. Applying to these facts the rule of law adopted in *A. & N. R. R. Co. v. Baily*, 11 Neb., 332, we think it was clearly right for the trial court to submit the case to the jury. In that case Judge COBB, in writing the opinion, quoted with approval the following language from *Railroad Co. v. Stout*, 17 Wall., 657, viz.: “Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. * * *

It is assumed that twelve men know more of the common affairs of life than does one man; they can draw wiser and safer conclusions from admitted facts thus occurring than a single judge.

“In no class of cases can this practical experience be more wisely applied than in that we are considering.

“We find accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us that, although the facts are undisputed, it is for the jury and not for the judge to determine whether the proper care was given, or whether they established negligence.”

In the case at bar the trial judge submitted the question of contributory negligence to the jury with instructions for their guidance, and in this we think there was no error.

Plaintiff in error requested the court to instruct the jury as follows :

4. "The plaintiff was bound to exercise ordinary care for his personal safety while passing along the streets of the defendant, and if the jury believe from the evidence that plaintiff's slight negligence, if any, contributed directly to the alleged injury, then you will find for the defendant." This instruction was given as prayed.

It then requested the court to give the following instruction :

7. "If the jury believe from the evidence that there was a slight want of ordinary care on the part of the plaintiff, which slight want of ordinary care contributed to the injuries complained of, the plaintiff can not recover unless the jury further find the negligence on the part of the defendant was so gross as to justify the jury in finding that the alleged injury was caused by the willful and malicious act of the defendant or its agents or servants." The court refused to give this instruction, and this refusal is assigned as error.

Without stopping to inquire as to whether or not these instructions were applicable to the case, we will be content with a comparison of the two.

If there is any appreciable difference between "slight negligence," as used in the first of the above instructions, and a "slight want of ordinary care," as used in the second, we are wholly unable to see that difference, and will assume that they mean substantially the same thing. The first instruction informs the jury that if the slight negligence of defendant in error contributed directly to the injury they should find for the plaintiff in error. This virtually excluded all consideration of the negligence of plaintiff in error, whether slight or gross. The proposition

was short but clearly stated. If defendant in error contributed to the accident by slight negligence he could not recover, however negligent the plaintiff in error might have been. The second instruction is virtually a reiteration of the first, with the qualification or limitation that would destroy the force of the instruction if the jury should find that plaintiff in error had been guilty of the gross negligence mentioned. Had the court refused to give the first and had given the second there might have been a question, as the limitation did not exist in the first. But as the first contained all in favor of plaintiff in error that was in the second, we see no cause for complaint. If there was error it was without prejudice. If an instruction is once given it is sufficient, and it is not error for the trial court to refuse to repeat it to the jury. *Kopplekom v. Hoffman*, 12 Neb., 100.

Plaintiff requested the trial court to give the following instruction to the jury:

"The jury is instructed that a city is not liable to respond in damages because of every depression or inequality in the surface of its streets even though injury result therefrom. It is only liable when it fails to keep its streets in a reasonably safe condition for public travel, and it is not necessary that it should keep the entire width of its streets in good condition for travel, unless the public convenience and travel demands it; and if you find from the evidence that a sufficient width of the street, at the point of the alleged injury, was in a reasonably safe condition for public travel, and that the plaintiff could have passed over and along the same without injury by the exercise of ordinary care and prudence, then you will find for the defendant."

The court refused to give this instruction and the refusal as assigned as error. Before examining this instruction it may be observed that instructions one and ten, which were asked for by plaintiff in error and given, to some degree cover the same ground as the instruction above quoted. They are as follows:

1. "The jury is instructed that the defendant city is not an insurer against accidents upon its streets, nor is it liable for every defect therein, though it might cause the injury sued for. And if you find from the evidence that the street at the place of the alleged injury was in a reasonably safe condition for travel in the ordinary modes, then you will find for the defendant."

10. "The jury are instructed that defendant city is only required to exercise ordinary care and prudence in keeping its streets in repair, and unless you find from the evidence that the defendant failed to exercise ordinary care and prudence in the repair of its streets, at the place of the alleged injury, then you will find for the defendant."

By a comparison of the foregoing instructions it will be seen that the instruction refused was substantially given by numbers one and ten, except that part which would exonerate plaintiff in error from keeping the entire width of its streets in good condition for travel, unless the public convenience and travel demanded it. This branch of the instruction refused was not applicable to the case and was therefore properly refused. It is quite probable that a city is not required to keep the entire width of its streets in good condition under some circumstances, while under others it would be necessary, and that, too, without regard to whether the public convenience and travel demanded it or not. If part of the space included in a street, owing to the conformation of the surface, could not be made suitable and safe for travel and no effort thereto was made, then it might be allowed so to remain, perhaps, without the city incurring any liability; or, if in the case at bar it had been shown that the city had not undertaken to improve the whole street, or that the street at the point of the accident had been at an unfrequented part of the city, in that event it would have presented a question to submit to the jury as affecting the primary liability of the city, or of the care or negligence of the parties. But as the record and testi-

mony shows that the place where the accident occurred was within the business and frequented part of the city, and that it had undertaken and assumed to improve the street from one sidewalk to the other, thus acknowledging a duty and responsibility in that behalf, we can not see that the trial court erred in refusing to submit to the jury the question thus presented by the instruction. It is provided by the law governing cities of the second class that: "The mayor and council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances." * * Sec. 31, Chap. 14, Compiled Statutes.

Other instructions were requested by plaintiff in error, and refused, and of which refusal complaint is now made, but upon examination of the record we find they were all substantially given by being embodied in other instructions and it would subserve no good purpose to quote them here.

It is also insisted that the court should have instructed the jury that it was incumbent on defendant in error to show that no negligence of his contributed to the injury, and that upon him rested the burden of proof as to the absence of such contributory negligence; but as the question was fully presented to the jury by repeated instructions that he could not recover if his own negligence contributed in any way to the injury we will notice it no further. It is sufficient to say that, under the instructions given, the jury must have found that defendant in error was guilty of no negligence whatever. The judgment cannot therefore be reversed, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JANE BUCHANAN, CHARLES F. BUCHANAN, OSCAR H. BUCHANAN, JOSEPH B. BUCHANAN, EMMA V. BUCHANAN, WALLACE W. BUCHANAN, AND ELMER BUCHANAN, APPELLANTS, V. NATHAN K. GRIGGS, WILLIAM H. ASHBY, AND NATHANIEL HERRON, APPELLEES.

18	121
20	168
18	121
55	573
18	121
62	250

1. **Conveyance of Real Estate by Minor to Father:** MORTGAGE AFTERWARDS GIVEN WILL NOT DISAFFIRM DEED. When a minor conveys real estate to his father in possession, and the father soon afterwards executes a mortgage thereon, and in a short time thereafter dies, the son being one of the heirs of his estate, the execution of a mortgage on the real estate by the son four years after he attains his majority will not of itself amount to a disaffirmance of the deed made to the father, the mortgage not being inconsistent with the deed as it conveys no title and can have full force upon the interest of the mortgagor which he has in the estate by inheritance.
2. —: **FORECLOSURE OF MORTGAGE GIVEN BY FATHER.** In such case, where the mortgage executed by the father is foreclosed after the son has attained his majority and he is made a party defendant, the foreclosure of the mortgage and conveyance of the real estate by the sheriff upon an order of sale will be an entire bar against the son and all persons claiming under him.
3. —: **THIRD PARTIES BARRED.** And where, during the pendency of the suit to foreclose the mortgage executed by the father, the son executes a mortgage to a third party, such third party will also be barred by the foreclosure proceedings.
4. **Equity Jurisdiction:** DECREE SET ASIDE FOR MISTAKE, ETC. Where by mistake or misunderstanding of parties a party having a perfect defense to an action which he has plead and is prosecuting is induced to abandon his defense, believing in good faith that such a decree will be entered and proceedings had as will perfect and quiet his title to real estate which he has purchased, and to which he has a perfect title, and, while relying upon what he believes the promise of the opposite party, such proceedings are had as will virtually destroy his title, he may, in equity, have the decree and proceeding set aside in order that he may make his defense.

APPEAL from the district court of Gage county. Tried below before BROADY, J.

L. M. Pemberton, for appellants. Decree should be set aside. Freeman on Judgments, § 492. 3 Pomeroy Eq. Jur., §§ 1365, 1371, note 2. *Erie R. R. v. Ramsey*, 45 N. Y., 637. *Holland v. Fratter*, 22 Gratt., 136. *Pearce v. Olney*, 20 Conn., 544. *Moore v. Barclay*, 16 Ala., 158. *Adams v. Adams*, 51 New Hamp., 388, and cases cited. Plaintiffs should have decree ordering sheriff to execute deed to Armstrong or his assignee, Buchanan. 2 Jones Mort., § 1652. Rorer Jud. Sales, §§ 438, 950-954. *Huxley v. Rice*, 40 Mich., 73. Deed was not disaffirmed. *Bool v. Mix*, 17 Wend., 119. *Irvine v. Irvine*, 9 Wall., 617. *Goodnow v. Lumber County*, 31 Minn., 168. *Keil v. Healey*, 84 Ill., 104. *Bingham v. Basley*, 55 Tex., 281. *Jones v. Jones*, 46 Iowa, 475. 2 Kent Com., 237. *Bigelow v. Kinney*, 3 Vt., 353. *Terry v. McClintock*, 41 Mich., 492.

N. K. Griggs, for appellees, cited: *Colby v. Brown*, 10 Neb., 414. 2 Kent Com., 238, note a. Tyler on Infancy, § 31. *Baylis v. Dinely*, 3 Maule & Selw., 482. *Curton v. Patton*, 11 Sergt. & Rawle, 311. *Tucker v. Moreland*, 10 Peters, 58. *Jackson v. Carpenter*, 11 Johns., 539. *Chapin v. Shafer*, 49 N. Y., 407. *Vaughan v. Parr*, 20 Ark., 600. *Prout v. Wiley*, 28 Mich., 164. Jones Mortgages, 1371-3. *Phillips v. Reeder*, 18 N. J. Eq., 95. *Hogendobler v. Lyon*, 12 Kan., 276. *Halstead v. Shepard*, 23 Ala., 558. *Bigelow v. Topliff*, 25 Vt., 273. *Lansing v. Montgomery*, 2 Johns., 382. Bigelow Estoppel, 593-4, 541, 601. 2 Smith's Leading Cases, 662.

REESE, J.

Plaintiffs, as the widow, heirs at law, and administrators of Job Buchanan, filed their petition in the district court,

in which they allege, substantially, that Job Buchanan died on the 18th day of Sept., 1880; that on the 4th day of July, 1871, Samuel Jones was the owner in fee-simple of the north-west quarter of the south-west quarter of section number eleven, in township number four north, of range number six east of the sixth principal meridian; and that on that day he executed and delivered a mortgage on said property, together with other real estate owned by him, to one John Armstrong, to secure the payment of the sum of \$4,200.00, due in one year after date, and which mortgage was also signed by the wife of said Samuel Jones; that Jones died on the 8th day of February, 1872; that John Armstrong assigned the note and mortgage to one William Null, who, on the 8d day of October, 1872, commenced an action to foreclose the mortgage. On the 8th day of November, 1877, Null obtained a decree of foreclosure, the amount of the decree being \$4,300.00. During the year 1878 Null sold and transferred the decree to one James M. Armstrong, who afterwards sold and transferred it to said John Armstrong, the original mortgagee. On the 26th day of July, 1880, John Armstrong sold and transferred it to said Job Buchanan, now deceased. On the 31st day of July, 1880, an order of sale was issued, and on the 7th of September, of the same year, the land was sold by the sheriff, under the order of sale, to the said Job Buchanan, which sale was confirmed by the district court and a deed ordered, which was executed by the sheriff on the 22d day of March, 1881, and the deed duly placed on record in the deed records of Gage county; that by these proceedings the plaintiffs became the owners of the fee-simple titles to the real estate in dispute.

It is further alleged that on or about the 13th day of April, 1874, and while the foreclosure suit was pending, one John Jones, who was the son and heir of Samuel Jones, and who was one of the defendants in the foreclosure proceeding, with a fraudulent intent, executed and delivered to

the defendants, Nathan K. Griggs and Wm. H. Ashby, a mortgage for \$500.00 upon said land, and that the mortgage was placed upon the mortgage records of Gage county, and that the only consideration therefor was an agreement on the part of said defendants that they should defeat the foreclosure proceedings; that if they failed to do so the mortgage should be null and void; and that they did fail to defeat the foreclosure; that at the time of the execution of said mortgage the said John Jones had no right, title, or interest in or to the land, except as one of the heirs of said Samuel Jones, then deceased, all of which said Griggs and Ashby well knew, and that all of said interest of said John Jones was forever barred and foreclosed by this final decree and sale under the foreclosure of the mortgage executed by Samuel Jones; that on the 3d of December, 1878, Griggs and Ashby commenced an action in the same court for the purpose of foreclosing the mortgage executed to them by John Jones, and made the heirs and administrators of Samuel Jones, as well as John Armstrong, who was then the owner of the decree above referred to, parties defendant; and that John Armstrong appeared and filed his answer, setting up the foregoing facts, and which were a full defense to the action, when a contract was entered into between John Armstrong and Ashby and L. W. Colby, who was the attorney for Griggs and Ashby, whereby Armstrong, for a valuable consideration, purchased the note and mortgage from Griggs and Ashby, and it was agreed that he was to have all their interest therein and in the foreclosure thereof, the same to be prosecuted to a final termination in their name but for his benefit, and that he was to be the owner of the decree when finally obtained, and that upon the sale of the property it was to be bid in for him; that Armstrong made no further defense to the foreclosure suit and allowed them to take their final decree, relying upon their agreement that it was to be done for his benefit, the decree being rendered on the 1st day of October, 1879;

Buchanan v. Griggs.

that the consideration paid for said note and mortgage was the full amount they would have been entitled to had their note been based upon a valid consideration; that after the decree was rendered the land was to be bid in by them in his name; that the land was sold by the sheriff under the decree and order of sale, and on the 10th day of April, 1880, and in pursuance of said agreement, the real estate was sold, nominally, to Griggs and Ashby, who bid it in in their own names, but for the use and benefit of said Armstrong, and that he being the real party for whom the land was purchased, he became entitled to a deed upon confirmation of the sale, which took place on the 13th day of April, 1881. On the 26th day of July, 1880, Armstrong sold and assigned to Job Buchanan all his interest in the decree, and by a quit-claim deed conveyed to him all his interest in the real estate, and Buchanan took the property subject to taxes and costs, which he assumed and agreed to pay; that from the time of the making of the agreement between Armstrong and defendants, Griggs and Ashby, until the sale of the property by the sheriff, Ashby acted as the attorney for Armstrong and Buchanan, and advised the purchase by Buchanan of Armstrong's interest, and that relying thereon Buchanan made the purchase; that the sale to defendants was confirmed, but that they now claim that they are the owners of the decree, and that they purchased the property for themselves, and not for Armstrong, and that they are entitled to a deed, and unless restrained from doing so the sheriff would make to them instead of to Armstrong a deed of conveyance; that they claim that said John Jones was the absolute owner of the mortgaged premises at the time of the execution of the mortgage by him to them, and that the mortgage created a valid lien upon the land; that the basis of their claim is, that in the year 1869 John Jones, being then a minor, owned the land, and while yet a minor conveyed it to his father, Samuel Jones, who mortgaged it to Armstrong in 1871, and that

after attaining his majority disaffirmed the conveyance and mortgaged to them. But that John Jones not only did not disaffirm the conveyance after attaining his majority, but that he fully affirmed and ratified the same, and that he and all persons claiming under him are estopped to set up any claim thereto by reason of his minority at the time of his conveyance to his father; and that, at all events, Griggs and Ashby are estopped from setting up any claim by reason of the proceedings had in connection with the contract with Armstrong and the entering of the decree of foreclosure.

An injunction was prayed for restraining the execution of the deed by the sheriff, and that he be decreed to execute the deed to Armstrong or Buchanan; that their title be quieted as against defendants and all persons claiming under them, or that the mortgage from John Jones be declared null and void, and to create no lien upon the premises adverse to plaintiffs, and that the decree of foreclosure and sale by the sheriff be annulled and set aside, and for general relief.

To this petition the defendants answered, admitting the death of Samuel Jones, and the representative capacity of plaintiffs, the execution of the note and mortgage by him, their assignment to William Null, the rendition of the decree of foreclosure in his favor, the assignment to James Armstrong and his assignment to John Armstrong, and the assignment by him to Job Buchanan, and the execution of the sheriff's deed, but deny that Samuel Jones was the owner of the land in question at the time of the execution of the mortgage. They also admit the execution of the mortgage to them by John Jones, and that, at that time they were in partnership, the subsequent foreclosure proceedings by them, the execution of the contract with Armstrong, but allege that it was afterwards rescinded. They admit that they claim to be the owners of the decree, and that they demand a deed from the sheriff, and allege

that they are entitled to it. They allege that John Jones, in 1869, and when a minor, conveyed the premises to his father, Samuel Jones, deny that upon attaining his majority he ratified the conveyance, but allege that he expressly disaffirmed it, and mortgaged the land to them, and that at the time of making the mortgage he was the legal and equitable owner thereof.

The answer then reviews the allegations of the petition, and plead various estoppels which we do not deem it necessary here to notice.

After trial the plaintiffs filed an "amendment to their petition to make it correspond with the facts proven," by which they allege that after the rescission of the contract between Armstrong and Ashby and Colby, on the 12th of February, 1880, another agreement was made between Armstrong and Ashby in which it was agreed between them that in consideration of what Armstrong had paid Ashby, amounting to over \$700, Ashby was to put Armstrong in possession of the property in controversy, and was to carry out the original contract made between Armstrong and Ashby and Colby, and that Ashby was to proceed to have the property sold and purchased in the name of Armstrong, and the deed made to him, and that, relying upon the agreement with Ashby, he paid no further attention to the matter, but paid to Ashby the said sum of \$700. That defendants did bid in the land, but in their own name instead of his.

A trial was had which resulted in a finding and decree by the court, setting aside the sale made by the sheriff, but holding that the lien created by the mortgage and decree of foreclosure was a valid and subsisting lien in favor of defendants, dissolving the injunction, and ordering the resale of the property. From this decree plaintiffs appeal.

According to our view of the case the decree of the district court cannot stand. By the pleadings and proofs it is established beyond any question that John Jones, while

a minor, received a conveyance of the land in question from his father, and reconveyed it to him. The deed made by the father was on the 20th day of February, 1869. The reconveyance was on the 21st day of September, 1870. The mortgage to Armstrong was executed July 4th, 1871. On the 22d day of January, 1872, John attained his majority. On the 8th day of February, 1872, Samuel Jones died. From the time of the acquisition of the title by Samuel Jones—long prior to the conveyance to John—until his death he was in the possession of the land, John never at any time being in possession. On the 13th day of April, 1874, John Jones executed the mortgage to defendants, that being the first act of his with reference to the land. The proceeding to foreclose the mortgage executed by Samuel Jones was commenced on the third day of October, 1872, to which John, then having attained his majority, was made a party defendant, which action was pending at the time of the execution of defendants' mortgage.

It cannot be said that the bare execution of this mortgage was a disaffirmance of the conveyance to Samuel Jones, for two reasons:

First. Before the simple execution of a deed made by a person after coming of age will amount to a disaffirmance of a conveyance made during minority, the second deed must be of as high a character as the first. That is, it must appear on its face to undo that which has been done by the former deed. If the first is an absolute conveyance, so must the second be in order to work a disaffirmance of the first within itself. *Jackson v. Burchin*, 14 Johns., 124. *Jackson v. Carpenter*, 11 Id., 539. *Bool v. Mix*, 17 Wend., 182. *Eagle Ins. Co. v. Lent*, 1 Edw., 301. *Tucker v. Moreland*, 10 Peters, 58.

Again, we think it is well established, both upon principle and authority, that the second deed must be so inconsistent with the first that both deeds cannot stand, in

order of itself to work a disaffirmance of the first. *McGan v. Marshall*, 7 Humph., 121. *Eagle Ins. Co. v. Lent*, 6 Paige, 635. Schouler's Domestic Relations, 588 (2d Ed.)

"In this state a mortgage of real estate is a mere pledge or collateral security creating a lien upon the mortgaged property, but conveying no title nor vesting any estate, either before or after condition broken." *Davidson v. Cox*, 11 Neb., 250.

Second, At the time of the execution of the mortgage to defendants, John Jones was one of the joint owners of the land with the other heirs of Samuel Jones (he being then deceased), subject only to the mortgage made by Samuel to Armstrong, the life estate of his mother, and the claims of the creditors of his father, if any existed, assuming that he did not desire to disaffirm the conveyance to Samuel. This interest was a mortgageable one and was subject to the decree in the foreclosure suit. *Jones on Mort.*, § 1411, 1314.

There is nothing shown by way of declaration or recital in the mortgage which would indicate any intention of the mortgagor to disaffirm any prior act of his. It may also be noted as a circumstance tending to throw some light on his intention at the time of the execution of the mortgage, that on the 16th day of May, 1876, he conveyed the real estate in question to one M. W. Thompson, and in the deed he expressly excepts from the covenant of warranty the mortgage executed by his father to John Armstrong, the exception being as follows: "Subject, however, to a mortgage executed by Samuel Jones to John Armstrong, dated January 5, 1871, and recorded in the records of Gage county, book B, page 161." The deed also excepts the mortgage executed to defendants. It is true that the date is referred to as "January 5th, 1871," while the mortgage to Armstrong was dated July 4th, 1871, but it is proven that Samuel Jones never executed but the one mortgage to John Armstrong, and there can be no doubt but that it was the

one referred to in the deed. It was clearly impossible for the mortgage to Armstrong to stand unsupported by any title in Samuel Jones. His title was derived from John Jones. By the reservation in the deed to Thompson, John Jones clearly recognized the validity of the Armstrong mortgage. Schouler Dom. Rel., 438. By that he recognized the validity of his deed to his father. The deed to Thompson was executed more than four years after John's majority. Had it been the intention of John Jones to disaffirm the deed executed by him to his father it would be quite reasonable and in accord with ordinary human action for him to have done some act which would have unequivocally demonstrated that intent. No such demonstration has been made. The foreclosure of the Armstrong mortgage was persistently fought in the courts, being finally decided in *Jones v. Null*, 9 Neb., 57, but not upon the ground that Samuel Jones had no title to the land at the time of the execution of the mortgage or that John had disaffirmed his deed to him. If he had such a defense and desired to avail himself of it, he was called upon to do it in that action. It is very evident such was not his intention. Such being the case, it is clear that Griggs and Ashby, having received the mortgage during the pendency of that action, could stand in no better or more advantageous position than did their grantor. Jones on Mortgages, § 1411. *Metcalfe v. Pulvertoft*, 2 Ves. & B., 208. *McPherson v. Housel*, 13 N. J. Eq., 301. *Jackson v. Losee*, 4 Sand. Ch. 407. *Zeiter v. Bowman*, 6 Barb., 133. *Griswold v. Miller*, 15 Id., 520. *Cleveland v. Boerum*, 3 Abb. Prac., 294. *Ostrom v. McCann*, 21 Howard's Pr. Rep., 431. The foreclosure of the Armstrong mortgage forever barred the rights of John Jones in the land, and with his, the rights of Griggs and Ashby and of Thompson. The execution of the sheriff's deed conveyed to the purchaser all the title of all the parties to the action. Jones on Mortgages, § 1654. *Young v. Brand*, 15 Neb., 601. See also § 853 of the Civil Code.

 Bayha v. Webster County.

Prior to the time the contract between Ashby and Armstrong was made, Griggs and Ashby virtually had no standing in court in their foreclosure proceeding, and the defense plead by Armstrong was a complete bar to their recovery. The testimony is contradictory as to what the real agreement between them was. Griggs insists he gave no person any authority to make it for him. As all contracts must be mutual to be binding, if he was not bound Armstrong was not, and has therefore been deprived of his defense unjustly. Taking the testimony for our guide, it is evident there has been a mutual misunderstanding between the parties, and by that misunderstanding Armstrong has been deprived of his defense in the suit of Griggs and Ashby against Jones and others.

It follows that the decree of the district court must be reversed, and the decree in the case of Griggs & Ashby against Jones and others, together with all proceedings thereunder, set aside and vacated, and Armstrong or his grantee be permitted to make his defense.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN P. BAYHA, PLAINTIFF IN ERROR, V. THE COUNTY
OF WEBSTER, DEFENDANT IN ERROR.

Officers: MUST PERFORM WORK FOR COMPENSATION ALLOWED BY STATUTE. A public officer must discharge all the duties pertaining to his office for the compensation allowed by law, and will not be allowed compensation for extra work unless it is authorized by statute.

ERROR to the district court for Webster county. Tried below before GASLIN, J.

18	131
34	283
18	131
36	363
18	131
46	30
18	131
48	287
18	131
51	722
18	131
58	453

W. H. Stroh, for plaintiff in error.

Gilham & Rickards, for defendant in error.

REESE, J.

The only question presented for decision in this case is, whether there is a legal liability against defendant in error for services rendered by plaintiff in error in the year 1883, in making out the tax list. Plaintiff in error presented his claim for the sum of \$440 to the commissioners of defendant in error, which was rejected. An appeal was taken to the district court, where plaintiff in error filed his petition alleging the facts of the performance of the labor, etc. A demurrer to his petition was filed, the ground of demurrer being that the petition did not state a cause of action. This demurrer was sustained, and plaintiff brings the cause into this court for review by proceedings in error.

The contention on the part of plaintiff in error is, that the duty of making out the tax list was an extra one, and not one of the ordinary official duties of the county clerk as such officer. That it is for the benefit of the county, and that there is an implied obligation to pay for it, and that he is at least entitled to there asonable value of his services.

While it is possible that there may be a moral obligation resting upon defendant to render a compensation for the services rendered, yet it is quite clear there is no legal obligation.

The act of February 19th, 1877, page 46, Laws of 1877, provided that the county clerk should receive the sum of four cents for each description of lots and lands and the extension thereof on the tax list and duplicate, including footings and recapitulation. This act was an amendment of certain sections contained in the act entitled "An act to provide a system of revenue," which took effect February 15th, 1869, and repealed the act of February 26th, 1873.

The act of March 1st, 1879, Comp. Stat., Ch. 77, expressly repealed the act of 1869, together with "all acts and parts of acts supplemental to and amendatory thereof." As the act of 1877, above referred to, was amendatory of the act of 1869, it is clear that it was repealed by the act of 1879. That being the case no provision remained providing for services rendered in preparing the tax lists.

In *The State v. Silver*, 9 Neb., 88, it was held that, "A public officer must discharge the duties pertaining to his office for the compensation allowed by law, and no compensation for extra services can be recovered or allowed unless authorized by statute." Our attention has been called to no legislative act providing for the payment of such claims as the one presented by plaintiff.

It follows that the decision of the district court was correct, and its judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PHOEBE J. MORRISON, PLAINTIFF IN ERROR, V. JONATHAN NEFF, DEFENDANT IN ERROR.

Public Lands of United States: ORIGINAL LOCATION OF A SECTION CORNER, HOW DETERMINED. Where a stone purporting to be the north-east corner of a section was 52 rods east of the true section line, as shown by the surveys both north and south of it, and there was no evidence tending to show that it had been placed there by the government surveyors, nor had it been seen until about four years after the original surveys; *Held*, That the quantity of land contained in the subdivisions of the section in question, and the one east of it, and the field notes and plats of the original survey were properly received in evidence for the purpose of determining the original location of the section corner.

ERROR to the district court for Gage county. Tried below before DAVIDSON, J.

Hazlett & Bates, for plaintiff in error.

J. E. Bush and *W. H. Ashby*, for defendant in error.

MAXWELL, J.

This is an action of ejectment brought by the plaintiff against the defendant to recover the possession of "about fifty rods in width off of the east side across the north-east quarter of section 30, township 2 north, range 6 east, in Gage county." The defendant is the owner of the north-west quarter of the north-west quarter of section 29, township 2 north, range 6 east (lot 2). The question involved is the location of the section line between sections 29 and 30. An opinion was filed in this case in 1884, the judgment being reversed, and is reported in 20 N. W. R., 254.*

A rehearing was granted, and the cause is again submitted.

The land in controversy is situated on what was formerly the Otoe reservation, and was surveyed in the year 1873. A stone purporting to be the corner stone at the north-east corner of section 30, is 52 rods east of the true line between sections 29 and 30, as shown by the section corner on the south line of said section 30, and by the section line on the north, so that the section line from the corner contended for by the plaintiff runs nearly south-west to the south line of the section. No witness swears to the location of the corner by the government surveyors at the point indicated, nor did any witness testify to seeing the stone there prior to 1876 or 1877. The court below found the issues in favor of the defendant, and rendered a decree

* NOTE.—This opinion was withheld from publication in the regular series of Reports by direction of its writer.—REP.

quieting his title. We approve of the points stated in the syllabus in this case in the opinion heretofore filed, and also in *Johnson v. Preston*, 9 Neb., 474, and adhere to those decisions. And when it is shown that a corner was established by the government surveyors, its location cannot be changed by evidence showing that it is incorrect. But the question here is, where was the government corner located? That is the only question in the case. To determine this the court may examine all the facts tending to show the original location. Thus, the quantity of land returned as being contained in the several subdivisions of sections 29 and 30 is evidence tending to show the correctness of the survey and location of the lines. It is true this evidence would not prevail against proof of the location of a corner, but in the absence of such proof it may be considered. Thus, in this case we find that the plaintiff purchased and has title to one hundred and twenty acres of land; that the defendant purchased lot 2 in the N. W. $\frac{1}{4}$ of section 29, which contains 41 $\frac{1}{100}$ acres. If the plaintiff should obtain the land she is seeking to recover, she would obtain nearly 140 acres, while the defendant would obtain but little more than one-half of the amount purchased and paid for by him.

The field notes also may be considered where a government corner is destroyed or its existence is in dispute; so with plats of the government survey. All these are fingerboards, as it were, which point in the direction of the original corner as located by the surveyors. The court will then weigh carefully all the evidence presented, and determine the fact. In this case we think that the court below was fully justified from the evidence in finding, as it must have done, that the stone 52 rods east of the true line was not placed there by the government surveyors, and in proceeding thereupon to determine from the evidence the true location.

There are strong equities in favor of the defendant, and

justice as well as law approves the judgment of the court below, which is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**WILLIAM DOOLITTLE, PLAINTIFF IN ERROR, V. ERASTUS
M. WHEELER, DEFENDANT IN ERROR.**

Where the evidence on each side is of nearly equal weight, and the only objection to the finding and judgment is that they are against the weight of evidence, they will not be set aside.

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

A. C. Platt and Harwood, Ames & Kelley, for plaintiff in error.

D. A. Snyder, for defendant in error.

MAXWELL, J.

On the 19th of October, 1878, the defendant executed and delivered to the plaintiff his promissory note for the sum of \$250, due January 22d, 1879, payable at the Commercial Bank of Brooklyn. There is an indorsement thereon made by the plaintiff of the sum of \$113, October 19th, 1879. The plaintiff brought an action on this note to recover the balance claimed to be due thereon. The defendant in his answer admits the execution of the note, but alleges that he paid the same by executing, on the 22d day of January, 1879, a note in lieu of the one sued on, which second note he has since paid. On the trial of the cause in the court below a jury was waived and the cause

submitted to the court, which found the issues in favor of the defendant, and dismissed the action.

The principal question in issue is, whether the note alleged to have been made January 22d, 1879, in lieu of that of October 19th, 1878, was in fact executed. Upon this point there is direct conflict in the testimony, some of the defendants swearing positively that such a note was executed, and has since been paid, while the plaintiff denies that it was ever executed, the evidence being nearly evenly balanced. In such cases the finding of the court below will be upheld. A number of technical objections are made to certain evidence introduced on the trial, which do not affect the real merits of the controversy. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ROBERT P. LAWSON, APPELLANT, V. JENNETTE F. GIBSON ET AL., APPELLEES.

1. **Judicial Sale: NOTICE OF SALE.** The provisions of the code which require public notice of the time and place of the sale of real estate upon execution to be given "for at least thirty days before the day of sale, by advertisement in some newspaper," etc., are not satisfied by one publication of the notice at least thirty days before the day of sale.
2. ———: ———. The word "for," as used in the section above quoted, means "during," and the notice must be published for or during thirty days before the day of sale. *Whitaker v. Baker*, 12 Kas., 493, approved.
3. **Statutes: REPEAL BY IMPLICATION.** A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.

18	137
18	820
21	602
18	137
24	686
35	672
18	137
38	669
38	760
18	137
42	633
18	137
46	907
18	137
49	432
51	619
54	656
55	66
18	137
158	736
58	763

APPEAL from order confirming sale of real estate in the district court of Lancaster county. POUND, J., presiding.

J. H. Foxworthy, for appellant.

Ricketts & Wilson, for appellees.

MAXWELL, J.

This action was commenced in the district court of Lancaster county in 1882, and a decree of foreclosure and sale rendered in favor of the defendant and against certain real estate held by the plaintiff on a B. & M. land contract. The amount of the decree was \$777.35. In October, 1884, an order of sale was duly issued on said decree and the premises appraised at the sum of \$1,400, the total liens and incumbrances being \$470, which, deducted from the gross amount, made the net value as found by the appraisers to be the sum of \$950. The mortgaged premises were thereupon advertised for sale on the 24th of October, 1884, in the *State Journal*, of Lincoln, that the sale would take place on the 26th day of November of that year. But one publication was made. Objections were made to the confirmation of the sale upon this ground, which were overruled and the sale confirmed. This is now assigned for error.

Sec. 497 of the code provides that, "Lands and tenements taken in execution shall not be sold until the officer causes public notice of the time and place of sale to be given for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or, in case no newspaper be printed in the county, in some newspaper in general circulation therein, and by putting up an advertisement on the court-house door, and in five other public places in the county, two of which shall be in the precinct where such lands lie. All sales made without

such advertisement shall be set aside, on motion, by the court to which the execution is returnable."

It is claimed by the appellee that one notice, published at least thirty days before the day of sale, is a full compliance with the statute, and *Craig v. Fox*, 16 Ohio, 563, is cited in support of that position. In that case the notice was published in the Cincinnati *Daily Enquirer* of April 15, and in the weekly of the 19th and 26th of April, and the 3d and 10th of May. The sale took place May 16 of the same year (1843). The *Daily Enquirer* circulated almost entirely in the city, and the weekly in the county adjacent, and were read by different sets of subscribers. Burchard, Ch. J., in delivering the opinion of the court, states that the notice was insufficient, because it failed to state the time and place of sale. After quoting the statute, he says (page 566): "It is urged that these words require consecutive insertions of the notice during the period of thirty days. This construction of the statute has been practiced upon very generally in many parts of the state. * * * I look, then, to the statute in order to gather the meaning and intention of the legislature. Its words will be answered, 'by one publication inserted in a newspaper thirty days before the day of sale,' etc. This view, he states, was concurred in by another member of the court, which at that time consisted of four judges. Thus it will be seen that the question was not before the court, and the alleged decision but an expression of two of the judges. The doctrine, that in adopting the statute of another state we adopted the construction placed upon it by its highest court, therefore, need not be considered.

The question here involved was before the supreme court of Kansas in *Whitaker v. Beach*, 12 Kas., 493, and it was held that the notice must be first published at least thirty days before the day of sale, and continued in each successive issue of the paper up to the day of sale. The construction given by that court to the word "for" as equiv-

alent to "during," in connection with the words, "At least thirty days before the day of sale," we think is correct, and we adopt that construction. The meaning of the statute, therefore, is that the notice shall be published during at least thirty days before the day of sale. Not necessarily in a daily paper; a weekly, no doubt, will answer the requirements of the statute, but the publication must be continued for at least thirty days. The object of the notice is to give publicity to the sale, and thereby invite competition and secure the best price possible for the property. This can only be done by a full compliance with the statute, and the court should see to it that its terms and provisions have been substantially complied with. As this was not done in this case the judgment of the court below, confirming the sale, is reversed.

2. It is claimed by the appellant that the statute (Sec. 498 of the Code) authorizing the confirmation of sales in vacation was repealed by implication by Sec. 39 of the "Act to amend Chapter 18, of the Revised Statutes of 1866, entitled Courts," which took effect March 1, 1879, at least so far as relates to the procedure. Comp. Stat., Chap. 19. It is evident, however, that there is no repugnancy between the several provisions. A statute will not be repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. *Foster's Case*, 6 Coke, 59. 1 Roll., 91. 10 Mod., 118. In *Stone v. Green*, 3 Hill, 472, Cowen, J., says: "A construction which repeals former statutes or laws by implication is not to be favored in any case." The law in that regard was very clearly stated by Chief Justice Gantt, in *Johnson v. Hahn*, 4 Neb., 140. See also *White v. City of Lincoln*, 5 Id., 514. *People v. Weston*, 3 Id., 323. *State v. Maccuaig*, 8 Id., 217. *Ex parte Wolf*, 14 Id., 31. In this case there is no repugnancy between the statutes, and the earlier one is not repealed by the later. The judge, therefore, had authority to confirm the

State v. Babcock.

sale at chambers. *State Bank v. Green*, 8 Neb., 298. There are other assignments of error, to which it is unnecessary to refer.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE, EX REL. D. M. WIAINT ET AL., V. H. A. BABCOCK, AUDITOR, AND E. P. ROGGEN, SECRETARY OF STATE.

County Bonds: LIMITATION ON ISSUE. Under the provisions of the act of 1873, as amended in 1883, authorizing counties to issue bonds "to pay the outstanding unpaid bonds, warrants, and indebtedness of a county," such bonds, with those previously issued and unpaid, cannot exceed ten per cent of the assessed valuation of the county.

ORIGINAL application for mandamus.

Harwood, Ames & Kelly, for relator.

William Leese, Attorney General, for respondents.

MAXWELL, J.

This is an application for a mandamus to compel the defendants to register certain bonds of Franklin county. It appears from the petition that the assessed valuation of Franklin county for the year 1884 was the sum of \$824,389.34; that previous to that year, said county had issued its bonds for internal improvements to the amount of \$37,000. At the election in November, 1884, the question of

issuing \$49,000 of funding bonds was submitted to the electors of that county, and carried by the requisite majority. Funding bonds to the amount of \$49,000 were thereupon issued and presented to the defendants for registration and certification. The defendants refused to certify that the bonds were "issued pursuant to law," upon the ground the bonded debt of the county would thereby exceed ten per cent of the assessed valuation for the year 1884. The question involved is the authority of the defendants to certify bonds issued in excess of ten per cent of the assessed valuation.

In 1877 an act was passed by the legislature "to provide for the funding of the warrants and outstanding indebtedness of counties." Sec. 1 provides, "That the county commissioners of any county in the state of Nebraska be and are hereby authorized and empowered to issue coupon bonds of such denominations as they may deem best, sufficient to pay the outstanding and unpaid warrants and indebtedness of such county. *Provided*, That the county commissioners of any such county may limit the provisions of this act to any fund or funds of said county. *Provided further*, That on no event shall bonds be issued to a greater amount than ten per cent of the assessed valuation of such county. *And provided further*, That the county commissioners of any such county shall first submit the question of issuing bonds to a vote of the qualified electors of such county." Laws 1877, 219. This law was substantially re-enacted in 1879. Comp. Stat., Ch 18, § 132. In 1883 this section was amended by inserting the words "unpaid bonds," so that as amended it reads * * "sufficient to pay the outstanding and *unpaid bonds*, warrants, and indebtedness of said county," etc. * * * "*Provided further*, That in no event shall bonds be issued to a greater amount than ten per cent of the assessed valuation of said county."

The question is, does this provision restrict the entire

issue of bonds by the county to ten per cent? We think it does. There is no inherent power in a county to issue bonds, but the authority must be expressly conferred by statute. *Hollenbeck v. Hahn*, 2 Neb., 397-8. *Stewart v. Otoe County*, Id., 183. *Hamlin v. Meadville*, 6 Id., 227. In the case last cited it is said (page 233): "Whatever may be the rule as to municipal corporations, counties have no authority at common law to issue bonds. * * The power to issue commercial paper must be conferred by statute, and such power must be exercised in the manner prescribed." This, in our view, is a correct statement of the law. The power to issue bonds must be expressly given or result from other powers conferred. In this case the issue of bonds is limited to ten per cent. We cannot restrict this to funding bonds without injecting words into the statute which are not necessarily implied. The language applies to all bonds and we must so construe it. We therefore hold that the issue of funding bonds, with bonds previously issued and unpaid, cannot exceed ten per cent of the assessed valuation of the county. As the bonds issued in this case, with those previously issued, exceeded that sum, the defendants are not in default in refusing to certify the same. The writ must therefore be denied.

WRIT DENIED.

THE other judges concur.

18	144
18	189
18	144
32	39
18	144
39	850
18	144
46	589
18	144
60	578
18	144
61	341

**CHARLES H. TRUMBLE, PLAINTIFF IN ERROR, V. MARY
OPHELIA WILLIAMS AND OTHERS, DEFENDANTS IN
ERROR.**

1. **Administration of Estate: REMOVAL OF ADMINISTRATOR: RESIGNATION OF TRUST.** Where an administrator is about to remove from the state he may resign his trust, and an order of the proper tribunal discharging him cannot be attacked in a collateral proceeding. COBB, CH. J. dissents.
2. ———: **POWER OF ADMINISTRATOR DE BONIS NON.** An administrator *de bonis non* has the same powers in administering the estate as the first administrator, and will take up the business of settling the estate at the point where his predecessor ceased to act; therefore where the first administrator had filed a petition in the proper court for the sale of real property of the decedent for the payment of debts due from the estate, a license to sell may be issued to the administrator *de bonis non* upon the petition previously filed. In such case the administration is continued by the same official—the administrator, although a different person.
3. ———: **JURISDICTION: PETITION TO SELL REAL ESTATE NOT SUBJECT TO ATTACK IN COLLATERAL PROCEEDING.** A petition for license to sell real property for the payment of debts of an estate, filed in the court having exclusive original jurisdiction, and which was acted upon by that tribunal and treated as sufficient, is not, in the absence of fraud or collusion, subject to attack in a collateral proceeding. The want of verification of a petition is not an element of jurisdiction.
4. ———: ———: The authority to grant a license to sell real estate carries with it the implied power to determine the necessity for such sale and the sufficiency of the pleadings presented to the court for that purpose.
5. ———: **EVIDENCE.** Where the record of an administrator's sale of real estate, or any paper or instrument pertaining to the same is lost, destroyed, or cannot be found, the statute authorizes the party affected to prove the contents as in case of other lost instruments. Evidence, *Held*, To have been improperly excluded.
6. **Jurisdiction.** Titles to real property acquired under proceedings of courts having jurisdiction cannot be attacked in collateral proceedings.

ERROR to the district court for Cass county. Tried below before MORRIS, J., sitting for POUND, J.

Chapman & Polk, for plaintiff in error, cited: *Steel v. Street*, 89 Ill., 51. *State v. Carroll*, 25 Conn., 449. *Clark v. Commonwealth*, 29 Penn. St., 129. *Cocke v. Halsey*, 16 Pet., 71. *Hobson v. Swan*, 63 Ill., 146. *Hobson v. Ewing*, 62 Ill., 146. *Wilson v. South Park*, 70 Ill., 46. *Seward v. Dullier*, 16 Neb., 58. *Howard v. Moore*, 2 Mich., 227. *Thompson v. Tomlie*, 2 Pet., 168. *Grignon's Lessee v. Astor*, 2 How., 319. *Good v. Norley*, 28 Iowa, 188. *Holmes v. Beal*, 9 Cush., 223. *Moore v. Porter*, 51 Wis., 487.

Marquett, Deweese & Hall, for defendants in error, cited: 1 Williams Ex., §§ 330, 463, 479, 484, and cases cited. Wade on Notice, 483. *Shipman v. Butterfield*, 11 N. W. R., 283. *Gregory v. McPherson*, 13 Cal., 562. *Townsend v. Tallent*, 33 Cal., 45. *Snydor v. Palmer*, 32 Wis., 406. *Hartwig v. The People*, 22 N. Y., 95. *Dunning v. Corwin*, 11 Wend., 661. *Sharp v. Johnson*, 4 Hill, 99.

MAXWELL, J.

This is an action of ejectment brought by the defendants in error against the plaintiff, in the district court of Cass county, to recover the possession of the west half of the south-west quarter of section 27, T. 10 N., R. 12 E., in Cass county.

The defendant below (plaintiff in error), in his answer, alleges that one William H. Taylor died in June, 1865, seized of said premises; that after the death of said Taylor, "to-wit, on or about the 12th day of August, 1865, one Isaac N. Shambaugh was duly and legally appointed and qualified as administrator of the estate of the said William H. Taylor, deceased, by the probate court of Otoe county, territory of Nebraska, and gave bond in the sum of \$2,000,

which was duly approved;" that "on the 12th day of February, 1866, the said court, on the petition of the said Isaac N. Shambaugh duly and legally presented to said court, issued a license as provided by law authorizing and empowering the said administrator to sell the real estate of the said William H. Taylor, situated in Otoe and Cass counties, Nebraska, of which the above described lands were a part, said sale to be subject to the approval of said court." The land in question was thereupon offered for sale, but not sold for want of bidders; that on the 14th of May, 1866, Shambaugh tendered his resignation as administrator to the probate court, which was duly accepted, and a petition was thereupon filed in said court for the appointment of C. W. Seymour as administrator of the estate of said Taylor, deceased, and due notice thereof given, and afterwards said Seymour was duly appointed and gave a bond in the sum of \$5,000 for the faithful performance of his duty; that thereafter said court issued a license to said Seymour to sell said real estate, and in pursuance thereof "said administrator, after duly and legally advertising and appraising said lands as required by law, sold the same to Mary E. Taylor; that said sale was afterwards duly and legally ratified, approved, and confirmed by said court and the said administrator ordered to execute and deliver in due form of law a deed to Mary E. Taylor for said lands."

It is also alleged that the sale was confirmed by the district court in 1870. The conveyance of the land in question to Mary E. Taylor, in 1866, is then alleged, and the conveyance by her to one McMahon is then averred, together with an allegation of various conveyances to several parties till they reach the defendant below. The plaintiffs below, in their reply, deny that "Shambaugh was ever discharged as administrator or that he surrendered the administration of said estate, or was in any manner legally relieved from the duties of administration originally imposed upon him." * * * "Deny that there was any sale of

said real estate by the said administrator as provided by law, and deny that there was any approval or confirmation of said sale or pretended sale either by Isaac N. Shambaugh or the said C. W. Seymour." They also deny that "Seymour was ever duly or legally appointed as administrator of said estate, and deny that he ever procured an order for the sale of said real estate."

On the trial of the cause the court excluded evidence of the appointment of Seymour as administrator and all subsequent proceedings relating to the sale of the land, and found the issues in favor of the defendants in error. The testimony of the plaintiffs below was taken by deposition and read in their behalf on the trial, from which it appears that the plaintiffs are the children of William H. Taylor, deceased; that Mary O. Williams was born in 1850; that Rufus A. Taylor was born in 1854, and Lillie B. Wheeler in 1859; that their father, William H. Taylor, came to Nebraska City to reside about the year 1857 or 1858, and continued to reside there until the spring of 1865, when, being in very poor health, he attempted to remove to Harrodsburg, Kentucky, but died at Louisville, on his way thither; that Mary E. Taylor was the widow of William H. Taylor, and the mother of the plaintiffs.

The defendant below also offered in evidence the petition for the appointment of Shambaugh, the notice of the application, the order of appointment, the bond, letters of administration, order fixing the time for creditors of the estate to file their claims, inventory of real and personal property, petition to sell real estate, the order to sell the same, and the return of Shambaugh of not sold for want of bidders. Shambaugh thereupon resigned, and Seymour, upon petition, after due notice, was appointed in his stead. The reason for Mr. Shambaugh's resignation is stated in Mrs. Taylor's testimony. She testifies that, "when my husband left Nebraska, he left his business in the hands of Mr. I. N. Shambaugh as his attorney, and some time after my

husband's death Mr. Shambaugh wrote to me that he was going to move to Missouri, and that Mr. Seymour would make application for appointment as administrator of my husband's estate."

The first question presented is the authority of the probate court to accept the resignation of Shambaugh and appoint Seymour.

Section 187 of the law in relation to decedents (Comp. Stat., Ch. 23) provides that, "if any administrator shall reside out of this state, or shall neglect, after due notice by the judge of probate, to render his account and to settle the estate according to law, or to perform any decree of such court, or shall abscond or become insane, or otherwise unsuitable to discharge the trust, the probate court may, by an order therefor, remove such administrator."

Section 189 provides that, "when an administrator shall be removed, or his authority *shall be extinguished*, the remaining administrator may execute the trust; if there be no other the court of probate may commit administration of the estate not already administered to some suitable person, as in case of the death of a sole administrator."

These sections certainly confer authority on the probate court to accept the resignation of an administrator. Here the administrator was about to become a non-resident of the state, consequently the process and judgment of the court would be ineffectual to reach him and compel an accounting. In other words, the administrator who was about to go beyond the jurisdiction of the court surrendered his trust to the court with a statement of his administration to that date. The court thereupon accepted his resignation, in effect removed him for what appeared to be sufficient cause, and afterwards appointed another administrator; this it had authority to do. *Marsh v. People*, 15 Ill., 284. 1 Am. Probate R., 27.

It is clear from the evidence introduced and offered that the probate court of Otoe county had acquired jurisdiction

in the premises; that debts against the estate of W. H. Taylor to the extent of several hundred dollars had been proved, and that it was necessary to sell real property belonging to said estate to pay the same. That tribunal therefore had the authority to remove an administrator whenever sufficient cause for removal was presented to it, and its action in that regard, even if it erred, cannot be questioned in a collateral proceeding. The action of the probate court in appointing or removing an administrator is subject to review, but until set aside is voidable only, and in a collateral proceeding must be treated as valid. The first objection, therefore, is untenable.

2. That no petition was ever presented by Seymour for license to sell real estate. The testimony shows that a petition had been filed by Shambaugh for the sale of the real estate in question, and a license had been issued thereon, under which the land in question had been offered for sale, but not sold for want of bidders.

Section 190 of the decedent's act provides that, "an administrator appointed in the place of any former executor or administrator, for the purpose of administering the estate not already administered, shall have the same powers and shall proceed in settling the estate in the same manner as the former executor or administrator should have had or done, and may prosecute or defend any action commenced by or against the former executor or administrator, and may have execution on any judgment recovered in the name of such former executor or administrator."

This section makes the two administrators the same as one, and the second may complete any business commenced by the first. By the second appointment a new trustee is appointed, who took up the trust at precisely the same point the powers of the former trustee ceased. In other words, the new administrator was clothed by the statute with the same powers as the former, and began the business at the point where the former ceased to act. Administration was

continued by the same official—the administrator, but by a different person.

The former license to sell had been of no avail by reason of the want of bidders. The necessity for a sale, however, still existed to pay debts due from the estate; and this fact was made to appear to the probate court of Otoe county by the petition for the sale of such real estate then on its files, and the report of Mr. Shambaugh of his inability to make the sale. There was no necessity, therefore, for a second petition, and that filed by Mr. Shambaugh was sufficient to authorize the probate court to issue license to sell to Mr. Seymour. The second objection, therefore, is unfounded.

3. It is claimed that the petition for license “is defective, and not in accordance with the statute, giving the court no jurisdiction to grant license to sell, and is therefore void.” The first defect alleged is, that the petition is “not sworn to.” In answer to this objection it is sufficient to say that the defect, if such it is, does not affect the jurisdiction of the court; and cannot be attacked in a collateral proceeding. *Johnson v. Jones*, 2 Neb., 126.

In the case cited it is said (page 138): “The affidavit to the petition was not an element of jurisdiction without which the court could not act. It was at most merely a formal part of the petition, a preliminary form in commencing suit; and its omission amounts to one of those irregularities which cannot be collaterally called in question, even if the proceedings had taken place before an inferior tribunal. See *Wright v. Marsh, Lee & Delevan*, 2 Greene (Ia.), 108. *Cropsey v. Wiggenghorn*, 3 Neb., 116. *Wilson v. Macklin*, 7 Id., 52. *Hull v. Miller*, 4 Id., 503. *Dorrington v. Meyer*, 8 Id., 214.

Upon the filing of the petition for the sale of the real estate in question by Shambaugh, the probate court made an order fixing the 12th day of February, 1866, as the time for a hearing on the petition, and ordered a notice of

the time to be published six consecutive weeks in the Nebraska City News. On February 12th, 1866, the court, after finding that the notice had been duly published, adds, "and there appearing no objection to the granting of said license, and the necessity for the same having been made to appear to the satisfaction of the court, and the court being fully advised, doth order that license be and is hereby granted to Isaac N. Shambaugh, administrator of the estate of W. H. Taylor, deceased, which said real estate is described as follows:

"E. S. REED,

"*Probate Judge.*"

Then follows the license giving a description of the real estate to be sold. The petition, in our view, states sufficient to authorize the court to issue the license; but even if it did not, and the court would so hold in a direct proceeding to set it aside, yet, where it has been acted upon as sufficient by the court having exclusive original jurisdiction of the subject matter, it will be sustained in this court when collaterally attacked where there was no collusion and fraud. The authority to grant a license to sell real estate carries with it the implied power to determine the necessity for such sale, and the sufficiency of the pleadings presented to the court for that purpose, and where it has jurisdiction its orders and judgments are valid until set aside. There is nothing, therefore, in this objection.

4. The attorney for the defendant below offered to prove by Seymour that, as administrator of Taylor's estate, and under the license offered in evidence, he advertised and sold the land in controversy in the manner provided by law; that he reported the sale to the probate court of Otoe county, and that said court, about the month of October, 1866, confirmed said sale, and the administrator was ordered to make a deed for said premises to the purchaser. This testimony was excluded, and the rejection of the same is now assigned for error.

In view of the loose condition in which the probate court records were kept in some of the counties of the state, the legislature of 1873 passed an act which provides, "That in all cases where lands have been sold by order of the probate court in any county in the territory or state of Nebraska, on application of the guardian of any minor child, or children, or executor, or administrator, and it shall appear in any action in any court held within this state relating to the title to such land, that the record or any part of the record of such sale is imperfect or deficient, or that such record or any part thereof, or any paper or papers, notice, affidavit, document, instrument, or any proceeding whatsoever, from the filing of the petition for license to sell until the execution of the deed to the purchaser, has been lost or destroyed by fire or otherwise, or cannot be found, the contents of such record, paper, notice, affidavit, document, instrument, or other proceeding may be proved in the same manner as in case of other lost instruments or papers, by secondary evidence, and when so proved they shall have the same effect as if proven by the production of the original record, paper, notice, affidavit, document, instrument, or other proceeding, or by a duly certified copy thereof." Comp. Stat., Ch. 20., § 39.

This statute applies in all cases where the records in the probate courts or any part thereof are lost or destroyed. As it was made to appear that there was no record of the confirmation of the sale in the probate court, etc., the statute authorizes proof of such facts by secondary evidence. The court, therefore, erred in excluding the evidence offered. The court also erred in excluding the deeds from Seymour to Mary E. Taylor for the land in question. One of these was made soon after the sale in 1866, and the other after a confirmation of the sale by the district court of Otoe county, August 25th, 1873. The first of these deeds, in connection with the proof of confirmation of sale offered, was admissible in evidence; while the second con-

tains within itself sufficient recitals to entitle a party claiming under it to its protection.

5. The land in question was sold soon after the close of the war, when there was but little immigration to this then territory, and consequently the value of real estate was depressed. The land seems to have sold for its full value at that time, and the fact that it had been once offered and remained unsold for want of bidders shows that competition for it was not active. A creditor of the estate, however, was entitled to be paid, and to have the property sold for that purpose. Carrying out this purpose the court granted a license for the sale of the land, and the sale was made to the mother of the plaintiffs. The consideration, so far as appears, was applied to the payment of the debts of the estate, while the plaintiffs' mother was enabled a few years afterwards to sell the land at a considerable advance. This money, no doubt, in whole or in part was used in the nurture and education of the plaintiffs. But, however this may be, the original purchase price was used in paying their father's debts, and the purchaser should be protected. If this was not so it would be impossible for an executor or administrator to sell real property belonging to the estate of the decedent for the payment of debts due from the estate for any sum near its true value. No one but a speculator in disputed titles would care to invest in property the title of which might be overturned many years afterwards, and the effect would be to prevent competition, depress the value of the property, and in many cases deprive creditors of their just dues. But such is not the law. Titles acquired under the proceedings of courts having jurisdiction must be deemed inviolable in collateral proceedings. And there are no judicial sales around which greater sanctity should be placed than those made of the estates of deceased persons by order of a court upon which the statute has conferred exclusive jurisdiction of the subject. *Seward v. Di-*

McLain v. State.

dier, 16 Neb., 58. *Gregon's Lessee v. Astor*, 2 Howard, 339. *Thompson v. Tolmie*, 2 Peters, 162. *Ballou v. Hudson*, 13 Gratt., 672. *Mohr v. Porter*, 8 N. W. R., 536. *Hall v. Low*, 102 U. S., 461. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur, COBB, CH. J., dissenting from the first point stated in the syllabus.

18	154
20	178
18	154
42	538
18	154
46	836
18	154
49	407
51	155
54	133
54	198

JOHN McLAIN, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

- 1. Instructions Upheld.** The instruction of the court to the jury examined, and *Held*, Free of objection in point of law, and as favorable to the accused as the evidence would justify.
- 2. Confession.** When no confession or admission of guilt has been made by a party on trial for a criminal offense, it is immaterial what inducements may have been held out to him for the purpose of obtaining a confession or admission of guilt.
- 3. Argument of Attorney.** Where the language used by the district attorney or assistant counsel, in opening a case or summing up to a jury, is deemed prejudicial to the accused, "the attention of the court should be called to it, by proper objection, and a ruling had thereon. If the objection is overruled and an exception taken, the question may be reviewed in the supreme court upon the language, objection, ruling, and exception being made a part of the record by a proper bill of exceptions, but not otherwise." *Bradshaw v. State*, 17 Neb., 147.
- 4. ———.** *Held*, Not error on the part of the court to allow counsel for the state, in summing up to the jury, to comment upon the presumption of guilt arising from the possession, by the accused, of recently stolen goods, without explanation of such possession, even where counsel fail to state the law with technical accuracy.
- 5. Evidence Sufficient.** The evidence in the case, *Held*, Sufficient to sustain the verdict.

ERROR to the district court for Otoe county. Tried below before POUND, J.

J. L. Mitchell and *John C. Watson*, for plaintiff in error, on instruction No. 6, cited: *Mullins v. People*, 110 Ill., 42. *Maltese v. State*, 59 Ohio State, 215. On instruction No. 9, cited: *Watson v. Commonwealth*, 95 Penn. State, 413. *State v. Sidney*, 74 Mo., 390. *People v. Hurley*, 60 Cal., 74. On instruction No. 10, cited: *State v. Harden*, 46 Iowa, 623. *State v. Jaynes*, 73 N. C., 504. *Howard v. State*, 50 Ind., 190. On confession of prisoner, cited: *People v. Wentz*, 37 N. Y., 308. *Boyd v. State*, 2 Humph., 39. Wharton Cr. Ev., 651. Argument of attorney. *State v. Williams*, 18 N. W. R., 682. Crim. Code, § 473. *Festner v. O. & S. W. R. R.*, 17 Neb., 280.

William Leese, Attorney General, for the state, cited: *Jaynes v. Commonwealth*, 2 Met., 32. *Straight v. State*, 48 Tex., 486. 1 Whart. Crim. Law, § 695. *State v. Mortimer*, 20 Kan., 97. *State v. Johnson*, 21 N. W. R., 843. *Fitzgerald v. Fitzgerald*, 16 Neb., 415. *Donovan v. Yard*, Id., 33.

COBB, CH. J.

The plaintiff in error was indicted, tried, and convicted, in the district court of Otoe county, of the crime of grand larceny, in the stealing of a quantity of gold and silver watches, watch cases, and jewelry, the property of Alexander Calmelet. The cause having been brought to this court on error, the questions presented arise upon the sufficiency of the evidence, the admission of the testimony of the witness Dennis Kay, misconduct of the prosecuting attorneys, the refusal to charge, and the charge as given by the court. These questions will be discussed in the order in which they are presented in the brief of counsel.

It appears from the bill of exceptions that the store of Mr. Calmelet is situated on Main, between Fifth and Sixth streets, Nebraska City, on the south side of the street. The store had two doors, one front and one in the rear. On the afternoon of Saturday, the 5th day of April, 1884, at five minutes to six o'clock, Mr. Calmelet locked up his store and went to supper, at the Morton House, a few blocks distant. He was absent from the store thirty-five minutes. When he returned he found that an entrance had been effected by removing a glass from the back window, reaching in, and turning the key which had been left in the back door, and drawing the bolt, and the watches, watch cases, and jewelry above mentioned taken.

The matter was placed in the hands of the sheriff of the county, who, the next day, had printed a circular containing a description of the property stolen, and an offer of a reward for its return and the apprehension of the thief. Copies of this circular were mailed to sheriffs and police officers throughout the country, including the chief of police of Chicago. On the morning of the 14th day of the same month the defendant was arrested in the shop of a pawnbroker, in the city of Chicago, by Dennis Kay, a police officer. At the time of his arrest he had in his possession and on his person a part of the watches, watch cases, and jewelry, stolen as aforesaid, about half in value of the same. It further appears from the bill of exceptions that at the time of the breaking into the said store and larceny of said goods, the defendant was in Nebraska City, and had been there for about two weeks. That during said time he took his meals at the restaurant of William Ince, and roomed in the Barnum House. That he was without any known occupation, but claimed to be about to open a shooting gallery. There was also evidence tending to prove that he was without money.

He continued to take his meals at Ince's restaurant until Friday, April 10, when he disappeared, and was not seen

there again, nor elsewhere in Nebraska City, until he was brought back after his arrest in Chicago.

The only evidence offered on the part of the defense (except of one witness) was that which tended to prove an *alibi*, and it can not be denied that such evidence was very strong. Captain Murfin, Mrs. Wm. Ince, Nettie Knight, and Richard Filbon all testified to facts in relation to the presence of defendant in the dining room of Ince's restaurant between the hours of five and seven o'clock on the evening of the larceny, which, if true, and no doubt is cast upon the honesty or candor of either of the witnesses, and the clock in the dining room indicated the correct time, was sufficient to establish the impossibility of the defendant's being at the scene of the larceny at any time between five minutes before and thirty minutes after six, the whole period of Mr. Calmelet's absence from the store, according to his testimony. But W. W. Brown, a witness on the part of the state, testified that he was on Main street, diagonally opposite to and across the street from Calmelet's store, on the evening in question, twenty minutes or a half an hour before he went to his supper at the Morton House. Saw Calmelet come out of the store, and pass up the street, and that shortly afterwards, and when witness had time to walk about three-fourths of a block, he met defendant and passed him on the sidewalk, diagonally and on the opposite side of the street from Calmelet's store. That defendant was alone, and looking in the direction of Calmelet's store. Witness testified that within twenty-five minutes or half an hour from the time of his meeting defendant on the sidewalk, as above stated, he heard, at Reed's drug store, of the robbery of Calmelet's jewelry store. Witness testified that the time when he saw Mr. Calmelet come out of the jewelry store and pass up street was not earlier than five minutes before, nor later than five minutes after six o'clock, and though he was subjected to a searching cross-examination, none of his statements were in the least shaken.

I have stated the substance of the testimony for and against the *alibi* for the purpose of introducing the instructions prayed by the defendant and refused by the court, which refusal is urged as error. The instructions prayed were as follows :

"No. 6. The jury are instructed that the burden lies on the state to prove the falsity of the defendant's *alibi* beyond a reasonable doubt."

"No. 9. The jury are instructed that the presumption arising from the possession of stolen property is completely removed by the proof of an *alibi* for defendant."

"No. 10. The court instructs the jury that while possession of stolen property recently after the theft, if unexplained, is a circumstance tending to show the guilt of the possession, still, in this case, if the jury believe from the evidence that the defendant at the time of the commission of the larceny was at the restaurant of William Ince, and not at the place of said larceny, this is a satisfactory account of his possession of the property, and removes every presumption of guilt growing out of such possession."

The following instructions bearing on the point of defendant's evidence tending to prove an *alibi* were given:

"4. It is a rule of evidence in trials for the larceny of goods that the finding of the stolen goods in the exclusive possession of the accused very recently after the larceny was committed, is presumptive evidence that he stole them, and in this case if the goods mentioned in the indictment were stolen, and shortly after the larceny they or a portion of them were found in the exclusive possession of the accused, the presumption arising from such possession is that the defendant stole them. But the defendant having introduced evidence to show that he at the time of the larceny was at another place and could not have perpetrated the crime, the burden still rests upon the prosecution to prove the defendant did commit said larceny and is guilty beyond a reasonable doubt."

No. 1 of instructions given as prayed by defendant: "Where a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an alibi."

"No. 2. One of the defenses interposed by the defendant in this case is what is known as an alibi, that is, the defendant was at another place at the time of the commission of the crime, and the court instructs the jury that such defense is as proper and as legitimate if proved as any other, and all evidence bearing upon that point should be carefully considered by the jury, and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed they should give the defendant the benefit of the doubt and find him not guilty."

"3. As regards the defense of an alibi the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged."

"4. The court further instructs the jury that if they believe from the evidence that at the time of the alleged larceny and at the hour that the crime was committed the defendant, McLain, was at the restaurant of William Ince, as testified to by some of defendant's witnesses, and was not present at the scene of such larceny at the time of its commission, then you must acquit the defendant."

"5. The jury are instructed that if you entertain any reasonable doubt as to whether or not the defendant, McLain, was at Ince's restaurant or at the scene of the larceny, Calmelet's store, at the time the larceny was committed, then it is your sworn duty under the law to give the benefit of the doubt to the defendant and acquit him."

"7. The jury are instructed that if you should entertain a reasonable doubt as to the defendant's guilt he should be

acquitted, although the jury might not be able to find that the alibi was fully proved.

"8. The jury are instructed that the fact that the defendant may not be able to show how or where he acquired possession of the property alleged to have been stolen is by no means conclusive of his guilt, but merely raises a presumption of guilt, which he may rebut by proof that at the time of the commission of the offense he was some distance from the place of taking."

These instructions presented to the consideration of the jury the defendant's evidence of his *alibi* in a light as favorable to him as the law would justify the court in doing, and indeed I think the court went rather too far in that direction. The most that could be required was, that the jury be told that the burden of proof did not shift to defendant upon the question of *alibi*, and that if upon all the evidence, including that for and against the *alibi*, there was a reasonable doubt of his guilt, they must acquit him. This they were told in effect so often as to almost infringe upon the rule which forbids a court in instructing a jury to give undue prominence to particular facts or a particular branch of the case. See *Campbell v. The People*, 109 Ill. R., 565.

Plaintiff in error, in the brief of counsel, also makes a point upon the giving of No. 5 of instructions given on behalf of the state, which is as follows:

"No. 5. If the evidence satisfies you that said goods were stolen, then, in passing upon the question of the defendant's guilt or innocence, you should consider the evidence as to the goods having been found in the possession of the defendant as well as the evidence as to defendant's opportunity or want of opportunity to commit the larceny, his conduct at or about the time of the larceny and prior and subsequent thereto, and what, if anything, he may have said respecting the larceny, as well as all the attending circumstances as shown by the evidence admitted in the

case." Counsel do not point out in what respect the giving of this instruction was prejudicial to the plaintiff in error, nor do I perceive in what light it can be held to be error, much less prejudicial error.

A considerable part of the brief of counsel is devoted to a discussion of the question of the admissibility of confessions made by the accused while under arrest, and induced by those having him in arrest by threats of punishment or promises of favor. While I am inclined to agree with counsel in the main in what they say as to the law on that subject, I am unable to see its applicability to the case at bar. Certainly no witness has testified to any confession made by the accused. The giving of information by him by means of which one of the stolen articles was found cannot be regarded as a confession of guilt, and it is very clear from the whole case that it was not so intended. Neither does it appear that the police officers sought to elicit a confession of guilt from him that would secure his conviction. They did seek to induce him to divulge facts which might lead to their securing the balance of the stolen property, and probably of his associates in the crime, yet with but little success. The watch and chain which he had pawned in Chicago he knew they would find anyhow, so he gave the name of the shop where it might be found; but as to what had become of the balance of the plunder, or who had assisted him in the commission of the robbery and shared its fruits with him, or, indeed, that he had any part in its commission or received the goods from some other party knowing that they had been stolen, or otherwise, he made no sign.

It appears from the bill of exceptions that in opening the case to the jury, on the part of the state, Mr. Strode, district attorney, as a part of his remarks, referring to the apprehension of the defendant, used the following language: "The policeman knew his reputation to be that of a common thief." Upon the attention of the court being

called to these remarks by the counsel for defendant, the court admonished the district attorney that he "should not say that." And upon counsel for defendant demanding the court to instruct the district attorney "that it is improper to state what this man's reputation was," and said, "We object to anything as to this man's character or reputation being said," the court said, "You cannot prove that in the first instance, I suppose; till they show good character you cannot prove bad character." Whereupon the district attorney said, "I will desist from commenting." Again, in his closing remarks in summing up to the jury, the district attorney used the following language: "I trust the jury will do what is right, and I will be satisfied, and the people will be satisfied. But if you acquit there is no appeal for the state; that ends it as far as the state is concerned; while if you convict, and an injustice is done, the defendant has a right to appeal to the supreme court, who, if it is wrong, will reverse the case and give him a new trial." Whereupon counsel for defendant said, "I ask that that be taken down, and we except to it."

Also, it appears that Hon. F. J. Ransom, who assisted the district attorney, and who also summed up on the part of the state, in the course of his speech said, while commenting on the testimony of the witness Dennis Kay, who arrested the defendant in Chicago: "He suspected there was some crooked work, because he knew him to be an old thief." Upon the attention of the court being called to these remarks, and objection made to them by counsel for defendant, Mr. Ransom claimed that he was commenting on the testimony. Counsel for defendant asked that the notes of the reporter be read, which was done, and it was found that the testimony of the witness Kay as to the defendant being an old thief had been stricken out. Whereupon counsel for defendant asked the court to instruct the jury that what counsel had said should have no weight with them, and asked the court to instruct counsel not to

refer to that any more, for it is not in evidence, and it is improper to do so, which, according to the bill of exceptions, "is accordingly done."

Again, in the course of his remarks, Mr. Ransom said: "He has not called any witness here, nor accounted for the property." Watson: "I object to counsel stating anything of that kind, not accounting for the property." Ransom: "I say that a person found with stolen property in his possession is bound to account for it so as to change the burden of proof." Watson: "We object."

Objection overruled, and defendant excepted.

The above is claimed to be misconduct on the part of the district attorney and assistant counsel, and a reversal of the judgment is claimed for that reason.

Similar questions have often come before this court, and its rulings have been almost, if not quite, uniform upon them. The case of *Bradshaw v. The State*, 17 Neb., 147, is quite in point as to all objections of this character in the case at bar, except the last objection raised to the remarks of assistant counsel Ransom. In that case, in the opinion by Judge Reese, the court say: "The supreme court in the exercise of its appellate jurisdiction in cases of this kind is limited to the correction of the errors of the district court. Before a case can be reversed and a new trial ordered it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this state is now settled in this respect, and before this court can review questions of this kind the attention of the trial court must be challenged by a proper objection to the language and a ruling upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument, an exception to the decision can be noted by a bill of exceptions showing the language used, the objection, ruling of the court, and exceptions to the ruling can be presented to this court for decision. If

the court sustains the objection, and thus condemns the language and requires the attorney to desist and confine himself to the evidence in the case, no injury is suffered by the accused." In the matters which we are now considering there was but one ruling of the court adverse to the defendant. In that the court sustained assistant counsel Ransom in stating to the jury, "He has not called any witness here nor accounted for the property," and "I say that a person found with stolen property in his possession is bound to account for it so as to change the burden of proof."

The first proposition was one of fact. If counsel should be understood as meaning that the accused had called no witness to testify for him at the trial, the statement was not true in point of fact, for he had called several. But such could not have been the intent of the language, but rather that the defendant had called no witness to testify as to how he came into the possession of the goods. In this sense it was true, and I think legitimate matter to call the attention of the jury to. The other words used by him, while not stating the proposition as fully and clearly as would be required in an instruction by a court to a jury, yet did state the law substantially correct; and as nearly technically so as should be required in a forensic address. There can be no doubt, as a general proposition of law, that the exclusive possession of goods recently stolen is sufficient to put an accused person upon his defense. The remarks of counsel in summing up must be construed in reference to the evidence in the case in hand, and in that view I think they were unobjectionable.

The only remaining point to be examined is that numbered six in the petition in error. "That the verdict is not sustained by sufficient evidence and is contrary to law."

It is not questioned that the goods described in the indictment were stolen at the time and place therein stated. Nor that at that time the accused was boarding at one place and rooming at another, all within a block or two of the

scene of the larceny. It is in proof on both sides that as early as the next morning after the larceny the plaintiff in error knew that he was suspected as having committed it. One of his own witnesses testified that on the next Friday, six days after the larceny, he disappeared from his boarding house without notice of his intended departure, and three days from that time the plaintiff in error was arrested in a pawnshop in Chicago, four hundred miles away, with about half of the stolen property on his person, having already pawned a valuable gold watch and chain, part of said stolen property, for some ten or fifteen dollars.

There was also evidence tending to prove that at the time of the larceny the defendant had been in Nebraska City for about two weeks, without occupation or visible means of support. That he was talking of building and operating a shooting gallery, but was unable to raise the sum of five dollars required by the carpenter as advance payment before commencing the work.

The only defense sought to be made by the accused was that of alibi. That at the time, to-wit, between five minutes before six o'clock and thirty minutes after six of the afternoon of Saturday, the 5th day of April, 1884, he was, all of the time, in the dining-room of William Ince's restaurant. This is sworn to by four witnesses; and it seems to me that while this defense rested entirely upon the accuracy of the restaurant clock, and the fact that it had not been tampered with on the evening in question, yet, those two propositions granted, the alibi was as fully proven as well as could be. Yet there was conflicting evidence. One witness, who carried a watch and had occasion to consult it with reference to taking his wife to supper at the hotel, and did consult his watch at the very time in question, swears positively to having seen the accused on the street near the scene of the larceny about the time when the larceny must have been committed, at the time when the other four witnesses swear to his having been on the

sofa playing with Mrs. Ince's children in the restaurant. In such cases it is the province of the jury, and always a disagreeable and unwelcome duty, to decide which statement is the truth. And in arriving at this decision many other things beside the relative number of witnesses on either side may be considered by them, and when their finding follows the consistent evidence of one intelligent and unimpeached witness it cannot be said to be unsustained by the evidence.

In passing upon the prisoner's defense of alibi I think the jury had the right to consider all the evidence in the case; that of the finding of a part of the stolen property on the person of the accused in a shop where stolen property of that description is usually disposed of, in a distant city, nine days after the robbery, as well as that confined to his actual presence at the restaurant on the one hand, or on the street near the scene of the larceny on the other near the precise point of time when the larceny must have been committed. And looking at the whole of the evidence, I think that the verdict is not only sustained by the evidence, but for the jury to have found otherwise would have been to ignore both reason and the teachings of experience.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**LEWIS TESSIER, PLAINTIFF IN ERROR, V. LOCKWOOD
ENGLEHART & CO., DEFENDANTS IN ERROR.**

1. **Attachment: AFFIDAVIT IN LANGUAGE OF STATUTE.** The grounds or causes for the issuance of an order of attachment, being divided and separated into nine groups or subdivisions in the section of the statute providing therefor, each group or subdivision constitutes but one ground or cause, and the whole of either one of such groups or subdivisions may be stated in the language of the statute in an affidavit for an order of attachment, although it contains more than one distinct allegation separated from each other by the disjunctive conjunction *or*. When more than one of such groups or subdivisions are used in an affidavit they should be united by the conjunction *and*.
2. ———: ———: **SUFFICIENCY.** Where from the record before the court it appears that the person who made the affidavit for an order of attachment is the plaintiff or one of several plaintiffs, the attachment will not be quashed, although the affidavit contains no direct allegation that the affiant is the plaintiff or one of the plaintiffs.
3. ———: **PART OF DEBT NOT DUE.** It is not a fatal objection to an attachment that it may be deducible from an examination of the petition or bill of particulars that some part of the amount stated in the affidavit for attachment is not yet due.
4. ———: **FAILURE OF ORDER TO STATE CLAIM OF PLAINTIFF NOT FATAL.** In an action for goods, wares, and merchandise, it is not a fatal objection to an order of attachment issued therein that the same fails to state the plaintiff's claim, so as to show whether or not the defendant is entitled to the maximum of exemption against the same.
5. **Set-off.** A claim on the part of a defendant which he will be entitled to set off against the claim of a plaintiff must be one upon which he could at the date of the commencement of the suit have maintained an action on his part against the plaintiff. *Simpson v. Jennings*, 15 Neb., 671.
6. **Foreign Judgment.** The judgment of a foreign court against a person domiciled in this state, where it appears by the record that no personal service of process was had upon such defendant, and that he made no appearance to the action, will not have full force and effect in this state.

18	167
23	103
24	188
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18	167
38	523
18	167
44	76
18	167
50	370
18	167
58	49

ERROR to the district court for Gage county. Tried below before BROADY, J.

T. D. Cobbey, J. E. Cobbey, and W. H. Ashby, for plaintiff in error, on insufficiency of affidavit for attachment, cited: *Wray v. Gilman*, 1 Miles, 75. *Culbertson v. Cabeen*, 29 Tex., 247. Maxwell's Justice, 1883 Ed., 185. Maxwell's Pl. & Pr., 3d Ed., 499-500. *Stacy v. Stichton*, 9 Iowa, 399. *Kigel v. Schrenklenin*, 37 Mich., 174. Drake Attachment, § 104. *Wray v. Gilmore*, 1 Miles, Pa., 75. *Barnard v. Sibre*, A. K. Mar., 580. *Willis v. Lyman*, 22 Tex., 268. On debt not due, cited: *Cross v. McMackin*, 17 Mich., 511. Drake, § 107. On foreign judgment, cited: *Davenport v. Barnett*, 51 Ind., 329. Story Conf. Laws, 8th Ed., 821. *Mason v. Butchell*, 101 U. S., 638. *U. S. v. Denny*, 6 Biss., 501. *Child v. Powder Works*, 45 N. H., 547. *McGilloray v. Avery*, 30 Vt., 538. *Barnes v. Gibbs*, 31 N. J. Law, 320.

Burke & Prout and Hazlett & Bates, for defendants in error, cited: *Ellison v. Tallon*, 2 Neb., 15. *Tallon v. Ellison*, 3 Neb., 73. *Hilton v. Ross*, 9 Id., 409. Drake, §§ 102, 418. *Tessier v. Crowley*, 16 Neb., 369. *King v. Vance*, 46 Ind., 246. *Maxwell v. Stewart*, 22 Wall., 77. Waples Attachment, § 3, and cases cited in note 1.

COBB, CH. J.

This action was commenced by the defendants in error against the plaintiff in error in the district court of Gage county, to recover the sum of \$1,963.19, claimed to be due from plaintiff in error to defendants in error. At the time of commencing the action plaintiffs therein also filed an affidavit and undertaking for an order of attachment against the property of the defendant therein, which was issued, and property attached thereon. The defendant in said

action filed his motion in the district court to dissolve the attachment and discharge the attached property, for reasons therein stated, which motion was overruled. Defendant then filed his answer; a trial was had to a jury, with a verdict and judgment for the plaintiffs. A motion for a new trial being overruled, the defendant brings the cause to this court on error. The first error assigned is, "that the court erred in overruling the motion to dissolve the attachment and discharge the attached property."

The affidavit for the order of attachment is set out in the record as follows:

"STATE OF NEBRASKA, }
" GAGE COUNTY. }

"John A. Johnson, one of the plaintiffs, being first duly sworn, deposes and says that he has commenced an action in the district court of Gage county against Louis Tessier, to recover the sum of \$1,963.19 now due and payable to the plaintiffs from the defendant on account for goods, wares, and merchandise sold and delivered by the plaintiffs to the defendant, at his special instance and request.

"Affiant says that the said claim is just, and he ought as he verily believes to recover thereon the sum of \$1963.19, and that the defendant, Louis Tessier, has assigned, removed, or disposed of his property, or is about to dispose of his property, or a part thereof, with the intent to defraud his creditors, and has rights of action which he conceals." Subscribed and sworn to.

The provision of statute under which the said order of attachment was issued is as follows:

"Sec. 198. The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated: *First*. When the defendant, or one of several defendants, is a foreign corporation or a non-resident of this state; or *Second*. Has absconded with the intent to defraud his creditors; or *Third*.

Has left the county of his residence to avoid the service of a summons; or *Fourth*. So conceals himself that a summons cannot be served upon him; or *Fifth*. Is about to remove his property or a part thereof out of the jurisdiction of the court with the intent to defraud his creditors; or *Sixth*. Is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors; or *Seventh*. Has property or rights in action which he conceals; or *Eighth*. Has assigned, removed, or disposed of, or is about to dispose of his property or a part thereof with the intent to defraud his creditors; or *Ninth*. Fraudulently contracted the debt or incurred the obligation for which suit is about to be brought." * *

Here are nine distinct grounds or causes, upon either of which an order of attachment may issue. Some of them embrace but one allegation, while others, and most of them, are compound in their character; but whether single or compound, each one contains but a single cause of action, and it cannot be urged as an objection to an affidavit or pleading under this section that it contains disjunctive language, as long as it contains but one of said grounds or causes of action, and substantially follows the language of the statute. The *eighth* subdivision or group of grounds or causes of action contains five allegations, separated by the disjunctive conjunction *or*, but in the meaning of the statute it embraces but one ground or cause for attachment. No doubt if the affidavit contained two of the statutory groupings of grounds or causes separated by a disjunctive conjunction, the objection, reasoning, and authorities of counsel for plaintiff in error would be applicable and unanswerable, but such is not the case.

Counsel also object to the affidavit for attachment, because the affiant does not state that he is one of the plaintiffs therein in direct language, but only by way of recital. The statute requires the affidavit to be made by the "plaintiff, his agent, or attorney." Of course where there

is more than one plaintiff it can be made by either one of them, and simultaneously with the filing of the affidavit was also filed the petition in the case, whereby it appears that John A. Johnson was one of the plaintiffs. But it is sufficient for the purposes of this case to say that this objection was never brought to the attention of the district court. Had it been the petition as well as the balance of the record being before the court, it would, doubtless, have been overruled.

The second point is not relied upon in the brief, and will not be considered.

The third objection to the affidavit for attachment is, that it states plaintiffs "ought to recover the sum of \$1,963.19 now due and payable," while the petition shows that there was only \$1,637.88 due at the time of the commencement of the action. This constitutes no objection to the proceedings, but if the plaintiffs in the court below knowingly and willfully attached a greater amount of goods than was necessary to pay their debt then due, with costs and expenses, they would probably be liable in damages.

The fourth objection is, that the plaintiff's claim is not stated in the order of attachment as it is in the affidavit. The contention of counsel is, that the statute requires the order of attachment to contain a statement of the nature as well as the amount of the plaintiff's claim, to the end that the sheriff may know whether the defendant is entitled to the maximum exemption against the same or not. This view of the statute is certainly ingenious and worthy of consideration. But I do not think that the defendant in the case at bar can take advantage of any failure of the order to state the nature of plaintiff's claim even if counsel's view of the statute be adopted. The most that could be said of it is, that by failing to state the nature of the plaintiff's claim they admit that defendant is entitled to the maximum exemption.

The fifth point of error is, that the court below refused to allow defendant to prove his counter-claim, which consisted wholly of a claim for damages caused by the taking of the defendant's goods on the order of attachment issued in the case on trial, and the breaking up of defendant's business, which resulted therefrom. In the pleading itself the defendant does not designate it as a counter-claim, but rather as a defense to plaintiff's cause of action; but upon the trial, as appears by the bill of exceptions and in the brief, it is claimed to be a counter-claim.

The statute defines a counter-claim as follows: "The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Sec. 101, Code of Civil Procedure.

Now "the contract or transaction set forth in the petition as the foundation of the plaintiff's claim," and "the subject of the action" in the case at bar is the purchase and sale of goods at sundry times between July 19th and December 20th, 1882, both inclusive. The counter-claim is based upon matters and transactions claimed to have occurred subsequently to the commencement of the suit in March, 1883.

In the case of *Simpson v. Jennings*, 15 Neb., 67, we had occasion to examine the subject of counter-claim, and upon due consideration, and upon authorities there cited, the law was stated as follows: "A claim on the part of a defendant, which he will be entitled to set-off against the claim of a plaintiff, must be one upon which he could at the date of the commencement of the suit have maintained an action, on his part, against the plaintiff."

The sixth point urged by plaintiff in error in the brief of counsel arises upon the refusal of the court below to

admit in evidence upon the trial the transcript of a judgment rendered by the superior court of Cook county in the state of Illinois.

The third plea or paragraph of the defendant's answer is in the following words: "The defendant for a third defense to this action further alleges that the plaintiffs herein did, on the 9th day of May, 1883, in the superior court of Cook county, Illinois, recover a judgment against the defendant herein for the sum of nineteen hundred and sixty-three and $\frac{10}{100}$ dollars, upon the same cause of action set forth in plaintiff's petition, and upon which plaintiff's cause of action is founded, and said judgment remains a valid judgment unsatisfied and unappealed from," etc.

This defense was demurrable in not alleging either that the superior court of Cook county, Illinois, is a court of general jurisdiction, or that it had jurisdiction of the subject matter of said judgment, or of the person of said defendant. Said court being a foreign tribunal, in the sense of the law and authorities, such allegation was necessary, and its absence could be taken advantage of either by demurrer or by objection to the introduction of testimony under that paragraph of the answer, and perhaps in other ways.

Upon examination of the record offered, it appears that while the judgment is in due form of a personal judgment, yet there was no personal service on the defendant, nor indeed any proof of constructive service, which either this or the district court could recognize. Yet, if it be conceded that the court rendering the judgment offered in evidence was a court of general jurisdiction, there having been no personal service on the defendant, he being domiciled in another state than that of the court, and having made no appearance in the action, the judgment in whatever form could have no extra territorial effect either as evidence or otherwise. See Story on Conf. of Laws, 8 Ed., note 6, pp. 809 and 810, and authorities there cited.

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The admission of the record offered in evidence was therefore properly refused.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JAMES F. LANSING, PLAINTIFF IN ERROR, v. P. P. JOHNSON, DEFENDANT IN ERROR.

Verdict Sustained. The verdict of the jury being consistent with the instructions of the court and the evidence, the judgment thereon will be affirmed, there being no error in the instructions.

ERROR to the district court of Lancaster county. Tried below before POUND, J.

Sawyer & Snell, for plaintiff in error.

Marquett, Deweese & Hall, for defendant in error.

REESE, J.

This action was for the recovery of \$575 alleged to be due plaintiff in error from defendant in error as commission due for services as a real estate agent, in negotiating the exchange of certain real property. The jury returned a verdict for the sum of two hundred dollars, for which judgment was rendered. Plaintiff in error not being satisfied with the amount of his recovery moved for a new trial, and upon his motion being overruled by the district court he alleges error and brings the case into this court for review.

The principal question in the case is, whether plaintiff in error was entitled to recover the usual commission fee charged by real estate agents, or whether his recovery

should be limited to what his services were worth. An instruction was asked by plaintiff in error that if the jury found for him they should allow the full customary and usual commissions charged for making such sales, where there was no agreement as to the amount to be paid. The instruction asked was refused, but an instruction was given as follows:

"If you find for the plaintiff then he is entitled to recover such sum as you believe, from the evidence, his services were reasonably worth according to the usual and customary mode of charging for such services among real estate agents at the time and place such services were rendered, together with interest on such sum at the rate of seven per cent per annum from the time the same was done."

As applied to the case at bar we can not see but that this instruction was correct. And, indeed, it seems to be in accord with the views of plaintiff in error. The jury are told to allow the reasonable worth, according to usual and customary charges for such services among real estate agents. In other words the jury were directed to consider such custom in arriving at the worth of the services. This was correct. 2 Sutherland on Damages, 451. *Ham v. Goodrich*, 37 N. H., 185.

But it is insisted that, conceding the instruction to be correct, the verdict is contrary to the weight of evidence as well as contrary to the instruction of the court.

Were defendant in error the complaining party it might with some show of reason be contended that the verdict was against the weight of evidence, yet as the testimony was conflicting there was sufficient perhaps to sustain it, but we can see no just ground for complaint on the part of plaintiff in error. The services rendered, even if under employment, were comparatively light, and sustained a small proportion to the whole of the labor in perfecting the trade. The jury might, and perhaps did, conclude that,

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upon the basis of commissions usually charged, plaintiff had not rendered a service which would entitle him to more than the amount given. Substantially all that plaintiff could do in the matter of making the exchange of the property traded was to bring the parties together, or rather inform them of the existence of each other. But it is clearly shown that this was done by another agent before the alleged employment of plaintiff.

Upon the whole case we think plaintiff has no just ground for complaint, and that the verdict and judgment are fully as liberal as he could be entitled to in any view of the case.

The judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ANTON DEIRKS AND DEITRICK DEIRKS, PLAINTIFFS IN
ERROR, v. H. H. WIELAGE, DEFENDANT IN ERROR.

1. **Herd Law.** A person taking up stock for trespass upon cultivated lands, under the provisions of the herd law of 1871, acquires no lien upon such stock unless he complies substantially with the provisions of the act. *Bucher v. Wagner*, 13 Neb., 424.
2. —: **REPLEVIN OF STOCK.** Where the taker-up of trespassing stock, upon the application of the owner so to do, refuses to appoint an arbitrator for the purpose of ascertaining the damage done, after an arbitrator has been selected upon the part of the owner, but demands the payment of a specific sum of money, he thereby loses his right to the possession of the stock, and the owner may maintain replevin therefor.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Charles E. Magoon, for plaintiffs in error.

J. E. Philpott, for defendant in error.

REESE, J.

This cause was an action of replevin for the possession of a bull belonging to defendant in error, plaintiff below. The trial resulted in a verdict and judgment in favor of the plaintiff in the action, and the defendant, as plaintiff in error, brings the case into this court for review by petition in error.

The facts in the case may be briefly stated as follows: The animal in question escaped from the premises of defendant in error and broke into and trespassed upon the pasture land of plaintiff in error, where his cattle were, and being found there by plaintiff in error was detained, by being herded away from the other cattle and within the enclosure. Notice was verbally given to defendant in error of the fact, and he at once went to the premises of plaintiff in error for the purpose of removing the animal to his home, but plaintiff in error demanded more compensation than he was willing to pay. He then procured an arbitrator and returned, and requested plaintiff in error to select his arbitrator, which plaintiff in error declined doing, saying he wanted five dollars for trouble and labor in keeping the animal away from his herd, and that the question of damages could be settled only after it was ascertained how much damage had been done by reason of the bull—which is denominated a “scrub”—getting with his cows. Defendant in error then instituted the action.

The third instruction given by the court to the jury at the request of defendant in error was as follows:

“You are further instructed that if you shall find from the evidence that the plaintiff went to the defendants and requested them to name an arbitrator to settle the amount

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they should receive for any injury or damages done by said bull, and then on his part offered and named such an arbitrator, then, it was the duty of the defendants in a reasonable time to name such an arbitrator and to submit their said differences to such arbitrators; and that in case you shall further find from the evidence that the defendants failed and neglected to appoint and name an arbitrator on their part to act with an arbitrator named by the plaintiff, or if you shall find from the evidence that the defendants, upon a request to them by plaintiff to name and appoint an arbitrator to act with such an arbitrator named by him, wholly refused so to name or appoint such an arbitrator, and demanded that plaintiff should pay them a certain sum fixed by them as such damages and compensation, then the plaintiff was at once entitled to the possession of said bull. The defendants were not thereafter entitled to hold possession thereof, and you should find thereupon for the plaintiff." The giving of this instruction is alleged as error.

We cannot hold the giving of the instruction to be erroneous. Assuming, as we may, perhaps, that plaintiff in error was entitled to a lien upon the trespassing animal for the amount necessary to compensate him for the detention and care necessarily required, yet that lien was a statutory one, and depended upon a substantial compliance with the requirements of the law for its continuance and enforcement. He was required to give the written notice of the capture, amount of damage, and the name of his arbitrator. Comp. Stat., Ch. 2, Art. III. This was waived by defendant in error by the selection of his arbitrator and requesting plaintiff in error to select his, which plaintiff in error refused to do. It was clearly his duty to do so if he wished to perpetuate his lien.

In *Bucher v. Wagoner*, 13 Neb., 424, which we think is decisive of this case, it was held that a substantial compliance with the statute was necessary, otherwise no lien was acquired. In that case Judge MAXWELL, in writing the

opinion of the court, says: "But in this case the person taking up the stock refused to submit the matter to arbitration to ascertain the amount of damages, in fact refused to select an arbitrator or submit the matter to adjudication. He made an arbitrary demand for damages, and refused to take the necessary steps to ascertain the actual amount." And again it is said: "But the person taking up stock acquires no lien thereon unless he complies substantially with the terms of the statute, and this the defendant wholly failed to do."

But it is claimed that defendant in error cannot complain that plaintiffs in error refused to appoint an arbitrator to ascertain the damage done, for the reason that a reasonable length of time was not given them in which to make the selection of an arbitrator. However that might have been, had plaintiff in error required further time, it is quite clear that the rule contended for can have no application to this case, for plaintiff in error refused to make such appointment. It would have accomplished nothing to wait longer when plaintiff in error had already decided he would make no selection. It is true his reason for declining was that it was impossible to ascertain the damages done to his cows at that time. But this does not aid the matter. He could not legally keep the animal there until that fact could be ascertained, and therefore it would seem that he would have to resort to another remedy for damages of that character. It is evidently the purpose of the law that the taker-up of stock shall have a lien for only such damages as could be ascertained by arbitrators to be immediately appointed.

We think the ruling of the district court was correct, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	180
20	638
18	180
32	301

ANDREW NELSON, PLAINTIFF IN ERROR, v. ANNA K. JOHANSEN, DEFENDANT IN ERROR.

1. **Instructions to Jury.** When upon a jury trial an instruction is asked by which it is sought to cover the whole case made by the party asking it, all the essential elements of the case should be embodied in the instruction, otherwise it is not error to refuse it.
2. **Guardian and Ward: LIABILITY OF GUARDIAN FOR NEGLIGENCE IN CARE OF WARD.** Where an infant plaintiff of the age of eleven years resided with the defendant, and where it was his duty to keep such infant properly clothed, if she left his house on a very cold day to return to her own house a mile and a half distant, and defendant had, in violation of his duty and through negligence, failed to provide sufficient clothing, and she was by reason thereof badly frozen, the defendant would be liable for such damages as were chargeable to his want of care.
3. **Verdict Sustained.** When the testimony is conflicting a verdict will not be set aside as against the weight of evidence, unless such verdict is clearly and manifestly wrong.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

C. A. Baldwin, for plaintiff in error.

John C. Cowin, for defendant in error.

REESE, J.

Plaintiff in error having failed to appear in this cause, and having filed no brief, the cause was submitted by defendant in error without brief or argument, according to the provisions of rule four of this court, in force at the time the same was filed.

While it could not be expected that, without the aid of briefs and arguments of counsel calling the attention of the court to the errors complained of, we can be able to give

the case that critical examination which it would otherwise receive, yet we devote to it sufficient attention to examine the questions presented by the record, and ascertain whether such errors appear of record as to require the reversal of the case.

The action in the district court was brought by defendant in error by her next friend, she being a minor. The petition alleges that in the year 1880, when she was of the age of ten years, her father, by agreement with defendant in error, sent her to the home of defendant in error to reside with and work for his family until the 5th day of December, 1880, and that at that time and upon that day—the weather being very cold—plaintiff in error sent her home across the prairie, a distance of about one mile and a half, so poorly and thinly clad, and so exposed to the inclement weather, that on her way she was badly frozen, so that she was for a long time sick, confined to her bed and suffered great pain, etc., and whereby she was greatly damaged, to-wit, in the sum of \$5,000, for which she asked judgment.

The answer of plaintiff in error, after admitting the fact of defendant in error residing with him, and leaving him at the time alleged, denies all improper treatment of defendant in error on his part; alleges that she came to live with him for the term of three years, but, at the instigation and by command of her parents, left him on the day named without any knowledge on his part as to what clothing she wore, and while he was from home; that she was provided with suitable clothing, some of which she had left at her own home; and pleading such other facts as if established by proof would exonerate him from any charge of cruel or improper treatment of defendant in error. The trial resulted in a verdict and judgment in favor of defendant in error for the sum of two hundred and fifty dollars.

The errors assigned in the petition in error are, that the court erred in giving certain instructions referred to by numbers, and in refusing others which are designated in-

the same way. Also that the verdict is contrary to law, and is contrary to and against the weight of the evidence in the case. Other general assignments are made in the usual statutory form.

As to the first assignment of error, that the court erred in giving the instructions, six in number, referred to, it is sufficient to say that we have examined them, and do not detect any misstatements of the law or improper directions to the jury.

The instructions refused, and of which refusal complaint is made, are as follows :

"3. If the jury are satisfied from the evidence that at the time the plaintiff, Anna K. Johansen, left the home of the defendant to go home, on December 5th, the defendant was not at home, and did not know when he left his home that she was going to leave his place that day, and the defendant did not send her away, the plaintiff can not recover, and your verdict must be for the defendant."

"4. The parents of Anna being her natural guardians had the right to direct and control her actions; and if the jury shall find from the evidence that on the day preceding the day she left the defendant's her parents told her to come home, and she communicated that to the defendant, and that he thereupon told her that he would rather she would not go, but that he had no power to stop her going, that he did not want her to go, and that she afterwards did leave without defendant's knowledge, and by reason of doing so took cold, and was sick, the defendant would not be liable therefor."

"5. The jury are instructed that if the plaintiff, at the time referred to, left the defendant's by the direction of her parents and against the advice of the defendant, and that by reason of her so going she took cold, and was made sick, the defendant would not be liable for negligence in permitting her to go home under these circumstances under the issues made by the pleadings in this case."

The petition alleged, and the testimony on the part of plaintiff tended to show, that the suffering of plaintiff was caused by the want of proper clothing for the purpose of protecting her from the rigor of the weather; that it was cold and she was very thinly clad. Her age at that time was about eleven years. So far as the duty of plaintiff in error toward her was concerned he stood in the relation of her parent, and in view of her want of experience and knowledge it was his duty to see that she was properly clothed. If he failed in this, through negligence, he would be liable for the consequences. By an examination of the foregoing instructions it will be seen that they fail to embody this important element in this case. Even if she had gone home without his knowledge, and by the express command of her parents, yet it would not relieve him from his duty to exercise proper care over her, and to see that she was properly and as near as might be comfortably clad. For this reason we think the instructions were properly refused.

It is next alleged that the verdict was against the weight of evidence, and was not supported by sufficient evidence.

Upon this branch of the case it is sufficient to say that we have carefully read over and examined all the testimony introduced upon the trial, and find it conflicting and quite difficult to harmonize. In fact there was a sharp conflict between the testimony introduced on the part of defendant in error and that presented by plaintiff in error. If the jury believed the testimony of the witnesses produced by the defendant in error, there was sufficient to sustain the verdict. As to the weight of the testimony they were the judges, and the verdict would not be set aside unless clearly and manifestly wrong.

We are unable to discover any error in the record, and the judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PHOENIX INSURANCE CO., PLAINTIFF IN ERROR, v. JOHN
LEMKE, DEFENDANT IN ERROR.

1. **Justice of Peace: ACTION ON NOTE.** Where an action is brought on a promissory note before a justice of the peace, and the note is copied by him into his docket and a summons issued thereon, it is a sufficient bill of particulars.
2. ———: **JUDGMENT.** Where the justice has in his possession the instrument on which the action is brought, and there is no affidavit of the defendant made and filed with him denying its execution, nor any defense made to the action, the justice may render judgment on such instrument, although the plaintiff fail to appear.

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

Marquett, Deweese & Hall, for plaintiff in error, cited: *Wells v. Turner*, 14 Neb., 445.

J. E. Philpott, for defendant in error, cited: Civil Code, §§ 951, 952. *McCormick v. Thompson*, 10 Neb., 491.

MAXWELL, J.

This action was brought before a justice of the peace upon a promissory note, of which the following is a copy:
“\$20.00.

“On the first day of April, 1884, for value received, I promise to pay to the Phoenix Insurance Company of Brooklyn, N. Y. (at their office in Chicago, Ill.), or order, twenty dollars, in payment of premium on policy No. 095,-866 of said company. If this note is not paid at maturity said policy shall then cease and determine, and be null and void, and so remain until the same shall be fully paid and received by said company. In case of loss under said policy this note shall immediately become due and payable,

and shall be deducted from the amount of said loss. It is understood and agreed that this note is not negotiable.

"Dated at my farm this 3d day of April, 1883.

"JOHN LEMKE.

"Witness, J. A. CARPENTER."

The note was filed with the justice as a bill of particulars. A summons was issued, which was returnable on the 6th day of October, 1883. On the return day the defendant below appeared by attorney and obtained a continuance until the 11th of October, 1883, at 2 o'clock P.M. At 2 o'clock P.M., October 11th, 1883, the attorney for Lemke appeared and moved to dismiss the action, for the following reasons :

1st. Because the plaintiffs had filed no bill of particulars of their demand.

2d. Because the said plaintiffs had not filed a bill of particulars against the defendant.

3d. Because the said plaintiffs did not appear at 2 o'clock P.M.

The motion was overruled, and the defendant refusing to appear further, judgment was rendered in favor of the plaintiff for the sum of \$20 and interest and costs. The defendant took the case on error to the district court, where the judgment of the justice was reversed and the cause retained for trial.

The question here involved was before this court in *Wells v. Turner*, 14 Neb., 445, in which it was held that where a promissory note was left with a justice of the peace, who copied the same into his docket and issued summons thereon, it was a sufficient bill of particulars. It was also held that a justice having in his possession the evidence of indebtedness upon which the action is brought may render judgment on such evidence in the absence of any of the parties. This, we think, is a correct statement of the law. The statute requires a defendant when sued on an instrument purporting to have been made by him, but who controverts

Watson v. Ulbrich.

the making of the same, to "make and file an affidavit with the justice of the peace before whom the suit is pending, * * * that such instrument was not made, given, subscribed, accepted, or indorsed by him." Code, § 1100a. If no affidavit is filed in cases where there was personal service, the presumption is that the instrument is genuine, and proof of its execution is unnecessary. In this case no affidavit denying the execution of the note was filed, nor was any defense made to the same. Technical objections are not favored, and will not be sustained unless the matter complained of was prejudicial. But in this case there was no error in the judgment of the justice. The judgment of the district court is reversed and that of the justice re-instated and affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	186
37	357

JOHN C. WATSON, APPELLANT, v. PETER ULBRICH, APPELLEE.

1. **Purchaser at Judicial Sale not Affected by Subsequent Opening of Judgment.** A purchaser in good faith of lands the title of which was acquired through judicial proceedings upon constructive service, will not be affected by the subsequent opening of the decree under section 82 of the Code.
2. ———. Where a decree is vacated under section 82 of the Code, and an answer filed by the defendant denying the facts stated in the petition and praying for a dismissal of the action, the subsequent dismissal of the suit by the plaintiff will not affect the title of a purchaser in good faith while the decree was in full force.

APPEAL from the district court of Otoe county. Heard below before POUND, J.

John C. Watson, for appellant.

Groff & Montgomery, for appellee.

MAXWELL, J.

On the 4th day of June, 1874, one H. H. Gray obtained a tax deed from the treasurer of Otoe county for the north-west quarter of section 34, township 7 north, range 13 east, in Otoe county. On the 8th day of June, 1876, Gray obtained from the treasurer of said county a second tax deed for said land. On the 3d day of February, 1878, a third tax deed for the above described lands was issued to Gray by the treasurer of said county. All of these deeds were duly recorded. The three deeds were made in pursuance of a sale of the land for taxes for the years 1868, 1869, 1870, 1871, and 1872.

In February, 1878, Gray brought an action in equity against Leonard A. Crandall, in the district court of Otoe county, to quiet his title to said land. Crandall being a non-resident of the state an affidavit for publication was duly made and filed, and notice given by publication.

In April, 1878, a decree was rendered wherein the court finds "that he, Gray, has the legal estate in fee simple in and is entitled to the possession of the same; that neither the defendant nor any person since the commencement of this action has any estate in or is entitled to the possession of said real estate or any part thereof; and that the plaintiff ought to have his title and possession quieted as against the defendant as prayed for in his petition herein," and a decree was rendered in favor of Gray, and excluding Crandall from any right, title, or interest in the property.

On the 25th of October, 1878, Gray sold and conveyed the land in question to Holland, and Holland, in December, 1881, in consideration of the sum of \$1,700, sold and conveyed said land to the defendant.

In March, 1883, and within a few days of five years from the date of the decree, and more than a year after Ulbrich's purchase, Crandall served a notice upon Gray, who at that time lived in Wisconsin, of his application to open the decree. On the hearing of the application Crandall was permitted to answer upon payment of costs. He thereupon filed an answer as follows: "Now comes the said defendant, Leonard H. Crandall, and for answer to plaintiff's petition denies that plaintiff is the owner of the northwest quarter of section thirty-four, in town seven, range thirteen east, in Otoe county * * * Denies that he has any valid tax deed to or for said land. Denies that plaintiff ever made any valid purchase of said land for taxes of any year in 1869 or any other years. Denies that there was any valid sale of said land for taxes made in the year 1869, in 1874, or any other years, for the taxes of 1872 or any other year. Denies that any valid deed was ever executed by the treasurer of Otoe county for the tax of any year whatever, or at any time whatever."

Defendant says, "that he is the owner of said land, and asks that plaintiff's bill be dismissed, and that this defendant may have judgment for costs." Gray thereupon dismissed the action without prejudice.

On the 12th day of March, 1883, Crandall conveyed all his interest in the land in question to one James C. Young, who, in December, 1883, conveyed to the plaintiff, who thereupon brought this action, wherein he "prays that each of said deeds as aforesaid made be declared of no effect, and that they be set aside and held for naught, and that plaintiff have his title quieted to said premises, and for such other relief as he may be justly and equitably entitled to." Issues were joined, and on the trial the court found in favor of the defendant, and dismissed the action. The plaintiff appeals.

The principal question to be determined is, whether or not the decree in favor of Gray rendered upon construc-

tive service is valid until set aside. No objection is made to the service or any of the proceedings connected with it. The real estate in controversy was within the jurisdiction of the district court, and that court had authority in a proper case to render the decree confirming the title of Gray.

In *Castrique v. Imrie*, L. R., 4 H. of L., 414-429, Mr. Justice Blackburn says, "We think the inquiry is, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and secondly, whether the sovereign authority of the state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these considerations are fulfilled the adjudication is conclusive against all the world." *Grignon's Lessee v. Astor*, 2 How., 389. *Thompson v. Tolmie*, 2 Peters, 162. *Ballow v. Hudson*, 13 Gratt., 672. *McPherson v. Cunliff*, 11 Serg. and R., 422. *Seward v. Didier*, 16 Neb., 58. *Trumble v. Williams et al.*, ante p. 144. The court, therefore, in this case having authority to render the decree and jurisdiction of the subject matter, its decree is conclusive upon the property until vacated under the statute or set aside.

Section 82 of the Code provides that "a party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear and make his defense; but the title to any property the subject of the judg-

ment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title of any property sold before judgment under an attachment," etc.

It will be seen that the title of a *bona fide* purchaser acquired while the decree is in full force is protected. This question was before this court in *Scudder v. Sargent*, 15 Neb., 102, and it was held that a *bona fide* purchaser was entitled to protection. A statute of this kind is liable to abuse; and courts should exercise great care to see that the claims which are the subject of the action are well founded; but the decree when rendered, if the court had jurisdiction, is valid until set aside, at least so far as *bona fide* purchasers of the property are concerned. And the order of the court permitting the defendant to answer and make his defense is merely for the purpose of determining the respective rights of the plaintiff and defendant, and does not affect innocent third parties; and the dismissal of the action will not affect their rights. Where the plaintiff, upon an answer being filed, dismisses the action without a trial, and the suit was not founded on a valid claim, but was a mere pretext for obtaining the defendant's property, there is no doubt the plaintiff would be liable for the value of the property so converted. It is unnecessary, however, to consider that question. As the defendant is a *bona fide* purchaser under the decree confirming Gray's title to the property in controversy he is not affected by the subsequent opening of the decree and dismissal of the action. The judgment of the court below is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CLAUS PETERS, PLAINTIFF IN ERROR, V. ALBERT F.
PARSONS, DEFENDANT IN ERROR.

1. **Chattel Mortgage: DESCRIPTION OF PROPERTY.** Where the property was described in a chattel mortgage as "one bay horse eight years old, weight about 1,200," and it was stated in the mortgage that the mortgagor, who was a resident of the county, was "lawfully possessed of said goods and chattels," *Held*, Sufficient to put a purchaser on inquiry.
2. —: **EXECUTION OF MORTGAGE BEFORE PAYMENT FOR CHATTELS.** Where a party purchased horses upon condition that he should pay for them by a certain date, and paid for them at the time agreed upon, but before doing so he executed a chattel mortgage on them, *Held*, That so far as the mortgagee was concerned the title of the mortgagor related back to the date of purchase.
3. **Replevin: DEMAND: COSTS.** Where a defendant is rightly in possession of property the plaintiff must demand possession thereof before bringing an action of replevin, otherwise the defendant will not be liable for costs.
4. —: **ANSWER: GENERAL DENIAL INSUFFICIENT.** A mere denial by the defendant in his answer of the facts stated in the petition is not an assertion of ownership of the property; and does not waive a demand where such demand is necessary before bringing suit.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Charles O. Whedon, for plaintiff in error.

A. W. Field, for defendant in error.

MAXWELL, J.

This is an action of replevin brought by the defendant in error against the plaintiff to recover the possession of "one bay horse, one sorrel horse," in which he claims a special ownership by virtue of a chattel mortgage executed

18	191
26	186
18	191
34	447
18	191
36	734
18	191
41	90
18	191
43	463
18	191
158	330

by one B. E. Glazier. It is alleged in the petition that the defendant (plaintiff in error) "wrongfully detains said property from the possession of this plaintiff," etc. It is also alleged that "prior to the commencement of this action the said plaintiff demanded possession of said property of defendant which said defendant refused and still refuses." The answer is a general denial. On the trial of the cause the jury found that the plaintiff below had a special ownership in the bay horse described in the petition, and that the value of the possession was the sum of \$67.50. A motion for a new trial having been overruled, judgment was rendered on the verdict.

It appears from the evidence that in September, 1882, one Silas M. Clark, of Lancaster county, was the owner of the horses in question, and entered into a contract to sell the same to one B. E. Glazier for the sum of \$160.

To obtain money to pay for them, and for other purposes, Glazier, on the 26th of September of that year, executed a chattel mortgage upon the horses in question and other property to the defendant in error. In this mortgage the horses are described as follows: "One bay horse 8 years old, weight about 1,200; one sorrel horse 10 years old, weight about 1,000." The mortgage contains this allegation: "And I, the said mortgagor, do solemnly declare and represent unto the said mortgagee that I am lawfully possessed of said goods and chattels as of my own property, that the same are free and clear of all incumbrances for obtaining the above money."

The testimony shows that Glazier was at that time residing in Lancaster county, and that the property was within that county. Soon afterwards Glazier traded the horses in question to the plaintiff in error for a span of mules. This action was brought against him to recover the possession of the property; but as he had disposed of the sorrel horse before the action was brought the bay horse alone was taken under the order of replevin.

The first error relied upon by the plaintiff is, that the description of the horses in the mortgage is not sufficient to charge third persons with notice.

In *Jordan v. Hamilton County Bank*, 11 Neb., 503, the description of the property was as follows: "Two mules, one bay and one brown, aged eight years; one bay horse, age five years, one black mare, aged eight years. * * * Nine acres of growing wheat situated on sec. 35, town 12, range 6." This was held to be sufficient. In this case the description of the property in dispute is "one bay horse eight years old, weight about 1,200," of which the mortgagor was possessed. This certainly is sufficient to put a purchaser on inquiry, particularly where the mortgagor appears to have possessed but one horse of that color, and it is shown that Glazier was actually using the horse in question for some time before and at the time he traded the same to the plaintiff in error.

Objection is made that the age of the horse is shown to have been much greater than was stated in the mortgage, consequently calculated to mislead. The testimony tends to show that the horse in question was about twenty years of age. There is no proof that Glazier had been informed by Clark as to the age of the horse when he purchased him, nor that it was a material part of the description. The bay horse is shown to have weighed about 1,200 pounds at the time of the execution of the mortgage, and to have had a star in his forehead and "some white on his feet." As Glazier possessed no other bay horse, the description seems to be sufficient.

2. The testimony tends to show that Glazier made a contract for the purchase of the horses about the 25th of September. Glazier had taken the horses on trial, under an agreement that if he did not pay for them he would pay \$1.50 per day for their use. While in possession of them under this contract the mortgage was executed, the horses not being paid for until the 4th or 5th of the following

October. The plaintiff claims, therefore, that Glazier possessed no interest that was susceptible of being mortgaged, therefore the mortgagee acquires no interest by the mortgage. This position, however, is untenable. While Glazier seems to have executed the mortgage before he was the full owner of the horses, yet he was in possession under a contract which resulted in his acquiring the full title from Clark; in other words, under a contract that if he paid for them by a day named the title was to be complete in him. This payment he made, and it related back to the time the contract was entered into. The mortgage, therefore, is valid.

3. That the defendant below came rightfully into the possession of the property, and as no demand was made upon him for the possession, he should not be taxed with costs. It will be observed that it is alleged in the petition that a demand was made on the defendant below for the delivery of the property before the commencement of the suit. This is denied in the answer, and there is no proof on that point, hence the plaintiff below has failed to that extent to make out his case. In justification of the failure to prove a demand it is said in the brief of the plaintiff that, "in this case the defendant claimed the property as his, denied plaintiff's claim of title and right of possession, and contested every effort made by plaintiff to assert his rights and recover said property," citing *Homan v. Laboo*, 1 Neb., 209. *Homan v. Laboo*, 2 Id., 291. In the case cited in 1 Neb. it is said (pages 209, 210), "Laboo, answering, does not disclaim ownership nor put in the plea of *non detinet*, under which, with the right of Homan established as pledgee, he might have claimed protection from costs as an innocent party upon whom no demand had been made; but beside denying Homan's claim and charging conspiracy between Homan and Ward, he avers that he is the owner of said mules and entitled to the possession of the same."

In *Homan v. Laboo* the defendant claimed the property as his own. Being his own he would not deliver it to the plaintiff, hence the court held the demand would be of no avail, and was waived. *Johnson v. Howe*, 2 Gilm., 344. *Cranz v. Kroger*, 22 Ill., 74. *La Place v. Aupoix*, 1 Johns. Cases, 407. *Appleton v. Barrett*, 29 Wis., 221. Wells on Replevin, § 373. A mere denial of the plaintiff's right to the possession, however, is not a plea of property in the defendant, and does not waive a demand where one is necessary to entitle the plaintiff to recover. Where a party is in the rightful possession of goods the law presumes that he will deliver the same to the owner upon request, and it will not charge him with the costs of litigating the right to the possession of the same until his holding becomes wrongful, by reason of his refusal to deliver the goods. As there was no demand made in this case before bringing the action, the defendant below is not chargeable with costs. The judgment as to costs is therefore reversed, and judgment for costs is rendered against the plaintiff below. In all other respects the judgment is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WESLEY J. TRAPHAGEN, APPELLANT, V. LIZZIE W. IRWIN AND SARAH J. POUND, APPELLEES.

1. **Conveyance: RECORD: NOTICE.** The record of a conveyance or mortgage is constructive notice to those only who must trace their title through the grantor or mortgagor.
2. ———: ———: ———. A deed or mortgage of real estate executed by a party out of possession and having no record title or apparent interest in the premises is not alone, when recorded, constructive notice of the title or interest of such grantee or mortgagee against one who traces his title from the apparent owner.

 Traphagen v. Irwin.

3. **Judgment:** PRACTICE. Leave given the plaintiff to require the defendant to marshal securities and exhaust those upon which the plaintiff has no lien, before resorting to the latter.

APPEAL from Lancaster county. Tried below before MITCHELL, J.

J. R. Webster and W. E. Stewart, for appellant, cited: *Wing v. McDowell*, Walk. Ch., 183. *Growning v. Behn*, 10 B. Mon., 385. *Uhl v. Rau*, 13 Neb., 360. *Morse v. Godfrey*, 3 Story, 389. *Gafford v. Stearns*, 51 Ala., 443. *Powell v. Jeffries*, 4 Scam., 391. *Zorn v. R. Co.*, 5 S. C. (Richardson), 97-98. *Manhattan Co. v. Everston*, 6 Paige, 457. *Cary v. White*, 52 N. Y., 141. *Holbrook v. Tirrell*, 9 Pick., 108. *Gilbert v. Bulkly*, 5 Conn., 264. *Fawcetts v. Kimmey*, 33 Ala., 264. *Kearsing v. Kilian*, 18 Cal., 494. *Holmes v. Trout*, 7 Peters, 213. *Howard v. Huffman*, 8 Head., 563. *Hall v. McDuff*, 24 Me., 312. *Parker v. Kane*, 4 Wis., 12.

Harwood, Ames & Kelly, for appellees, cited: *Edminster v. Higgins*, 6 Neb., 265. *Rhea v. Reynolds*, 12 Neb., 128. *Galway v. Malchow*, 7 Id., 285. *Chicago v. Witt*, 75 Ill., 211. *Fenno v. Sayre*, 3 Ala., 478. *Calder v. Chapman*, 52 Pa. St., 359. *Lightner v. Mooney*, 10 Watts, 407. *Losey v. Simpson*, 3 Stockt. Ch., 246. *Cook v. Travis*, 20 N. Y., 402. *St. John v. Conger*, 40 Ill., 535.

MAXWELL, J.

This is an action to foreclose a mortgage upon lot 7, in block 242, of Lincoln, alleged in the petition to have been executed by William Royce and wife to the plaintiff. The court below found the issues in favor of the defendants and that the mortgage was void as to them. The plaintiff appeals.

It appears from the record that in January, 1882, one B. F. Cobb was the owner of the lot in question, and it is

alleged that on the 20th day of that month he executed a warranty deed for said lot to one William Royce; that thereupon Royce executed a mortgage upon said lot to the plaintiff to secure the sum of \$400, payable three years from date, with interest at 10 per cent. Royce's wife claims she did not sign the mortgage or give her assent to it. Royce, so far as appears, never had possession of the property, and failed to record his deed.

The mortgage to Traphagen was delivered to Cobb, and with the note of Royce accompanying the same was sold to the plaintiff, who was a resident of Illinois. To induce the plaintiff to purchase the same, Cobb, who seems to have kept an abstract of titles, sent an abstract of title of lot 7 wherein the deed from him to Royce is marked as having been recorded January 20th, 1882. Cobb, at this time and for more than two years thereafter, seems to have been in good repute, and entrusted by the plaintiff and others with their business, and there is no doubt that so far as the plaintiff is concerned he acted in the utmost good faith. On or about the 7th day of April, 1884, Cobb, being the apparent owner of said premises, entered into a written agreement for the sale of the same to Sarah J. Pound, who immediately took possession thereof and has retained possession ever since. On or about the 24th of September, 1884, Cobb being still the apparent owner of record of said lot, and being indebted to the defendant Irwin in the sum of \$2,450 conveyed said premises to her with other property by warranty deed. This deed was recorded the next day. This deed, though in form absolute, was intended as a mortgage. Up to this time neither the defendant Irwin or Pound had actual notice of the mortgage to the plaintiff; nor did they have such notice until about the 1st of October, 1884.

On the 4th of October, 1884, Cobb and wife made a quit-claim deed of the lot to the defendant Irwin, and about the same time he made a formal assignment of his interest

in the contract above referred to with Mrs. Pound, and on the 8th of that month Mrs. Pound took a new contract from the defendant Irwin. On the 9th of that month Royce and wife made a quit-claim deed of the lot to the plaintiff. That the defendants Irwin and Pound, as well as the plaintiff, have acted in good faith in this transaction there is not a shadow of doubt. The only question that need be determined is, whether or not the recording of the mortgage to the plaintiff was constructive notice to the defendants Irwin and Pound.

A deed duly acknowledged and recorded is constructive notice to all persons claiming through or under the grantor. *Johnson v. Stagg*, 2 Johns., 510. *Rogers v. Burchard*, 34 Texas, 453. *Doe v. Beardsley*, 2 McLean, 412. *Bates v. Norcross*, 14 Pick., 231. *Schutt v. Large*, 6 Barb., 373. *Flynt v. Arnold*, 2 Met., 619. But where the party executing the deed or mortgage is not in possession and has no record title or apparent interest in the premises, a mortgage executed by him upon such premises is not constructive notice to creditors of or subsequent purchasers from the apparent owner. *Chicago v. Witt*, 75 Ill., 211. *Fenno v. Sayre*, 3 Ala., 458. *Calder v. Chapman*, 52 Penn. St., 359. *Lightner v. Mooney*, 10 Watts, 407. *Losey v. Simpson*, 3 Stockt. Ch., 246. *Cook v. Travis*, 20 N. Y., 402. *St. John v. Conger*, 40 Ill., 535.

The reason is, the record of a conveyance or mortgage is constructive notice to those alone who must trace their title through the grantor or mortgagor by whom the deed or mortgage was made. 2 Pomeroy's Eq., § 761, and cases cited. The plaintiff's mortgage, therefore, was not constructive notice to the defendants.

It is apparent, however, that the plaintiff has rights in the premises which will be protected as far as possible. The defendant Irwin received a deed for a large amount of real estate, as heretofore stated, in September, 1884. This deed, though absolute in form, was in fact merely a mort-

Price v. Lancaster County.

gage. The quit-claim deed delivered a few days afterwards was executed after the defendants had actual notice of the plaintiff's rights. The value of the property thus mortgaged does not appear from the evidence; but if in excess of the defendant Irwin's claims against Cobb, the plaintiff has leave to require her to marshal such securities and exhaust all the property described in the mortgage except the amount due from Mrs. Pound for lot 7, in block 242, in Lincoln, before resorting to the latter fund; and that she receive only so much out of that fund as will satisfy her claim, and assign the remainder to the plaintiff. In all other respects the judgment of the court below is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THOMAS PRICE, PLAINTIFF IN ERROR, V. LANCASTER
COUNTY, DEFENDANT IN ERROR.

18	199
39	884

1. **County not Liable for Taxes Paid by Treasurer to State, School Districts, etc.** Where a county treasurer collects and pays over taxes for the state and for school districts and other municipalities less than and within the county, such county is not liable to the tax payer for such taxes, even if illegally levied, and this would be true whether he sought to recover back such taxes under the provisions of the revenue law or as a general creditor of the county.
2. **Limitation: STATUTE NOT APPLICABLE TO DELINQUENT TAXES.** The statute of limitations prescribing the time within which a civil action may be brought under the code of civil procedure, has no reference to the time within which delinquent taxes may be collected by distress, and is not applicable thereto.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

N. C. Abbott, for plaintiff in error.

Walter J. Lamb, for defendant in error.

REESE, J.

The plaintiff in error filed his petition in the district court, in which he seeks to recover certain taxes paid to the county treasurer for the years 1873 to 1881, inclusive. It is alleged that the county treasurer, on the 12th day of December, 1882, wrongfully levied upon the personal property of plaintiff, and was proceeding to collect the taxes by distraint, when he paid the amount demanded, under protest, for the purpose of preventing a sale of the property. He soon afterwards filed his claim with the county commissioners, asking that the money be refunded. The amount paid was \$412.53. The county board refunded \$25, and disallowed his claim as to the remainder. He then appealed to the district court, where defendant demurred to his petition. The demurrer being sustained, he prosecuted error to this court.

The first count, or cause of action, in the petition—after setting out the taxes levied against him for the various years—alleges, that of the taxes so paid by him the amount for the years 1873, 1874, 1875, and 1877, was \$182.53, and that “there was no assessment of said property by any assessor of said precinct; that there was no certificate or oath of any assessor attached to or returned with any pretended assessment roll of said precinct for any of said years to the county clerk or commissioners of said county, and that the commissioners had no authority or jurisdiction to levy any tax whatever upon any of the property of the plaintiff.” It is also alleged that “all of said property so pretended to have been assessed was, during all the years herein mentioned, situated in Nemaha precinct in said county of Lancaster, and the plaintiff was during said time a resident of said precinct.”

If a cause of action is stated in this count of the petition it must depend upon the clause which seeks to avoid the assessment, for it is not claimed the property was not taxable. It seems to us that the clause referred to is entirely too indefinite. It is alleged there was no assessment by any assessor of the precinct, but in the same sentence it is alleged that there was no oath attached to the assessment roll. If there was no "assessment of the property by any assessor of the precinct" that fact might avoid an assessment; or if there was an assessment, but the oath was not taken by the assessor and returned with the assessment, that fact should be stated.

But, however that may be, the county could not be held for the repayment of the taxes collected for the state or any of the municipalities less than the county. *B. & M. R. R. Co. v. Buffalo Co.*, 14 Neb, 51. If plaintiff seeks to recover by a compliance with section 144 of the revenue law of 1879, he must be limited to the provisions of section 145, Ch. 77, Compiled Statutes, which prohibits the refunding of taxes unless it appears that they were levied for an illegal or unauthorized purpose, or that the property had been twice assessed in the same year, or was not liable to taxation. The petition contains no allegation covering any of these conditions, except as to certain bond taxes, and it is shown that a greater amount was allowed by the board than this tax amounted to, presumably with reference to it. If the provisions of section 144 are limited by the words "hereafter levied" to taxes levied after the act took effect, then plaintiff would derive no benefit from it, as the taxes referred to were all levied prior to the taking effect of the act—September 1st, 1879—so that either with or without these provisions we cannot see that the action could be maintained, as our attention has been called to no prior law permitting the refunding of taxes.

The principal contention of plaintiff is based upon another count or paragraph of his petition, which alleges, in

substance, that more than four years had elapsed after the taxes became due and before the levy was made by the officer, and that during all of said time the plaintiff had personal property in the county, from which the same might have been collected, and that therefore the claim was barred by the statute of limitations.

We are unable to see that this statute applies to the case. No distinction appears to have been made between real and personal property taxes by the law in force at the time these taxes were levied. Taxes were declared to be a perpetual lien upon the real estate upon which they were levied, and no provision is found where the right to collect is affected by the lapse of time. No demand was necessary, and it was the duty of the owner of the property to attend at the treasurer's office and pay his taxes. The statute of limitations is by its terms limited to civil actions under the code of civil procedure, and we cannot see that the right to collect delinquent taxes could be in any manner affected thereby.

But plaintiff insists that he is not seeking to recover under any of the provisions of the revenue law, but upon the ground that "defendant has money in its possession belonging to plaintiff that he has wrongfully and illegally been forced to pay, and that he has a general right of recovery for the amount thereof." We are unable to agree to this proposition. The county was made by law the agent of the state as well as of the lesser municipalities within the county, for the collection of the taxes due them. If we abandon all the provisions of the revenue law for the refunding of taxes, and all statutes giving the commissioners the right to refund it, we leave the commissioners without authority to act, and the appellate court could gain no jurisdiction by the appeal. Furthermore, the taxes other than county taxes could in no sense be said to be a claim against the county.

It follows that the decision of the district court in sus-

taining the demurrer was correct, and the judgment of dismissal must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	208
29	196
18	208
35	905

JOHN CASEBEER AND MARY DRAHOBLE, PLAINTIFFS IN
ERROR, V. CHARLES P. RICE ET AL., DEFENDANTS IN
ERROR.

1. **Malicious Prosecution.** In a case of malicious prosecution the right of action accrues whenever the criminal prosecution is disposed of in such a manner that it can not be revived, and the prosecutor, if he proceeds further, will be put to a new one. *Casebeer v. Drahole*, 13 Neb., 465.
2. **Jury Judge of Fact.** Questions of fact, and upon conflicting testimony, are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it unless the want is so great as to show that the verdict is manifestly wrong. *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb., 529.
3. **Malicious Prosecution: PROBABLE CAUSE: PROOF OF MALICE.** A person in the lawful possession of property, either real or personal, may by force defend against an unlawful invasion of his rights, if such invasion is by force and violence, *providing* such resistance is necessary to the protection of such rights, and *provided* such resistance is within proper bounds, and does not become aggressive. And where in such case the person making the unlawful attack causes the person attacked to be arrested for a crime in making such defense, such arrest will be without probable cause, and if caused with the intent and purpose of wrongfully injuring the person arrested, it will be held sufficient proof of malice.
4. **False Imprisonment: EVIDENCE: MALICE.** In an action of false imprisonment it is incumbent upon the plaintiff to prove by a preponderance of testimony that the criminal prosecution was without probable cause and was malicious. But where the

want of probable cause, is clearly shown, and all the facts and circumstances of the case are before the jury, they may find from the facts showing a want of probable cause, that the prosecution was malicious.

5. —: PROBABLE CAUSE: MALICE. While ordinarily the question of what constitutes probable cause for a criminal prosecution does not depend necessarily upon whether the offense has, in fact, been committed, nor whether the accused is innocent or guilty, yet where before the commencement of a criminal prosecution the promoters of such prosecution were possessed of full knowledge of all the real facts in the case, and knew that the party charged was not guilty of the alleged offense, proof of the real facts in the case may be made for the purpose of showing a want of probable cause and malice.

ERROR to the district court for Gage county. Tried below before DAVIDSON, J.

G. M. O'Brien and *J. E. Bush*, for plaintiffs in error, on first point, cited: 2 Addison on Torts, 759. *Bacon v. Town*, 43 Cushing, 217. *Parker v. Farley*, 107 Cushing, 482. *Cardinal v. Smith*, 100 Mass., 159. *Dreggs v. Burton*, 44 Vermont, 124. On fourth instruction, cited: 2 Hilliard on Torts, 469, Chap. 16, § 246b. *Harpham v. Whitney*, 77 Ill., 32. *Ewing v. Sandford*, 19 Ala., 605.

L. M. Pemberton, and *A. H. Babcock*, for defendants in error, on fourth instruction, cited: 1 Hill. on Torts, 191. Cooley on Torts, 167. 2 Add. on Torts, 693. Desty Am. Cr. Law, § 130m. *Scribner v. Beach*, 4 Denio, 448. *Parsons v. Brown*, 15 Barb., 590. *Cerey v. The People*, 45 Id., 262. *Merriam v. Mitchell*, 18 Me., 439. *Shaul v. Brown*, 28 Iowa, 37.

REESE, J.

From the record and pleadings in the cause it appears that on or about the 29th of October, 1880, the defendants in error were arrested upon a criminal charge made against them before the county judge of Gage county. The crime

Casebeer v. Rice.

charged by the complaint was that of an unlawful assembly or, perhaps, what is denominated "rout." The complaint was signed and sworn to by Mathias Drahoble, the husband of one of plaintiffs in error. Such proceedings were had as resulted in a dismissal of the cause and the discharge of the accused by reason of the failure of the prosecution to give security for costs. Defendants in error then brought suit in separate actions, alleging damages sustained by reason of the arrest, etc., and that the prosecution was malicious and without probable cause. Averments are made in the petitions charging both of plaintiffs in error with causing the arrest.

Plaintiffs in error filed separate answers, Mary Drahoble denying generally the allegations of the petitions, and John Casebeer admitting the prosecution, but denying any connection with it. By agreement the causes were tried together. The jury found for defendants in error, and returned verdicts assessing Rice's damages at \$102, and M. Candace Casebeer's at \$200. Defendants in that case prosecute error to this court.

The first contention is, that the dismissal of the criminal prosecution was not such a final determination thereof as would entitle defendants in error to recover. While there are some cases which seem to hold with plaintiffs in error upon that point, yet we deem it well settled by the great weight of authority that there was such a final termination of the prosecution as would enable defendants in error to maintain their action if the prosecution was found to be malicious and without probable cause. In *Casebeer v. Drahoble*, 13 Neb., 465, it was held that the right of action accrues "whenever the particular prosecution be disposed of in such a manner that this (it) cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one."

It is next insisted that neither of the plaintiffs in error had anything to do with the criminal prosecution and are

therefore in no way responsible for the same, nor in any sense liable in this action, even if the prosecution was malicious and without probable cause. Upon this branch of the case there was a direct conflict of testimony. The rule is well settled in this court that in such cases the verdict will not be molested unless the preponderance of the testimony is so clearly against it as to satisfy the mind that it is clearly and manifestly wrong. *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb., 537. Applying this rule to the case at bar, we are to inquire whether or not there was sufficient testimony upon this point to sustain the verdict.

Hon. J. E. Cobbey, the county judge before whom the criminal prosecution was conducted, was called as a witness on the part of defendants in error, and after the preliminary proof of signatures, etc., to certain files and records had been made, he is asked to state who filed the complaint with him. His answer was, "Why, Mrs. Drahoble filed it, I think—that is, handed it to me. It was not sworn to before me, but it was handed to me by Mrs. Drahoble, as I remember it." As there is evidently a want of agreement between counsel as to the effect of Judge Cobbey's testimony, we copy that part bearing upon this question, omitting all questions the objections to which were sustained:

Q. Was it handed to you by Mathias Drahoble?

A. It was not handed to me by a man.

Q. State whether it was handed you by a man or woman.

A. It was handed to me by a woman.

Q. You may state what John Casebeer and Mary Drahoble did about this prosecution which has been introduced in evidence.

A. I think it was in the morning; Mrs. Drahoble, or a woman who introduced herself as such, came in considerably agitated and flurried, and handed me a paper, saying she wanted that filed. I looked it over a little, and while I was looking it over and making the proper entries, she told me

they were having a fearful time down there—and some got hurt—and had a fight—a big time, and went on as a woman will sometimes; said she left them to come up and see her attorney, and they decided to put a stop to it, and this was a step in putting a stop to it. She talked some time; I think she was in the office an hour, may be; I did not charge my mind with it, but she told me all about it—everything that had happened, or she thought would happen. That is about all I had to do with her. My impression is she took the warrant down to her attorney; I am not certain; I did not charge my mind with it at the time.

Q. State what, if anything, John Casebeer had to do with it.

A. I don't remember anything about John Casebeer, I think—that is, I don't remember anything in particular; he was around there during the prosecution, but I don't have any particular remembrance of him.

Q. Do you remember him ordering out a subpoena in the case for the plaintiffs?

A. I would not be positive he ordered the subpoena; it might be; the record shows somewhere; I don't remember; I have very little remembrance about it; I have an idea he did it, but I would not be positive about it.

Q. State whether or not John Casebeer was there during the proceedings at any time?

A. John Casebeer was not there that morning, but I think he was there afterwards, twice, that is what I think; he was there twice, perhaps it might have been on the same day, and I think he talked to me once about there, and another time with Colby.

Q. State whether or not he was there on the 3d day November, the time the case was finally disposed of?

A. I cannot say as to that whether he was or not. If this record shows that he was there, he was.

CROSS-EXAMINATION.

Q. Can you describe the kind of a woman that appeared at your office with that paper?

A. I think she was a large woman; rather fleshy. I don't know that I could identify her.

Q. Are you certain it was a woman handed it to you?

A. Oh, yes; there is no doubt about that.

Q. What time of day?

A. I judge about nine o'clock in the morning.

Q. Might you not be mistaken, and might not this have been the day of the trial?

A. No, sir; I am quite certain. That is the only thing in which I might be mistaken, if there was another case on this docket, started in this Casebeer matter, it might be she appeared in that and not in this.

Q. Is there no possibility of being mistaken?

A. There is always a possibility.

Q. You are not certain she appeared?

A. I am quite positive of that. I am pretty positive it was this case.

Q. If she should testify here she was in Blue Springs that day, you would still be positive?

A. If she was in Blue Springs that day, of course I am mistaken, but I think I would want considerable evidence to convince me.

Q. Is it not a fact that the party who signed that complaint never took it out of your office after it was sworn to?

A. I think it was not sworn to before me.

Q. This was 9 o'clock in the morning of the day that entry was made?

A. That is my impression. The entry don't show, but that is my impression. It was in the morning. I would not be very positive about that.

Q. You say in your examination that John Casebeer was there at the time of this examination.

A. Why, I said he was there twice, I think. I think John talked to me about it once.

Q. Was there any other parties about the court room?

A. Oh, yes; there was a number there. There has been so much of that Casebeer business.

The theory of the defendants in error is, that plaintiffs in error caused their arrest so that during the time occupied by defendants in error in going from Blue Springs to Beatrice, in charge of the officer making the arrest, plaintiffs in error could, and did, by force and violence remove defendants in error and certain personal property of Mrs. Casebeer from a house in Blue Springs (the title to the land on which it stood being held in common), and thereby by force and violence, with the aid of the arrest, accomplish what could not be brought about by peaceable methods. One W. E. Parker, a constable at Blue Springs, was called in for the purpose of protecting Mrs. Casebeer during the enforced absence of her husband, and he testified that while he was returning the personal property which had been forcibly removed from the house of defendant in error (Casebeer) he saw plaintiff in error, John Casebeer, there, who stated to the witness that the arrest was made on purpose so he could get a chance to get into that property—get possession of the property, and if he, the witness, didn't keep away, he would do the same thing with him. In addition to the testimony of the two witnesses above referred to, it was shown that soon after the arrest of defendants in error, with five others, and their removal to Beatrice, excepting Mrs. Candace Casebeer, who gave bail in Blue Springs to appear for trial, plaintiffs in error, with a concert of action which appeared to be the result of an understanding, appeared upon the premises in dispute, and by force removed the property there, turning out stock and removing household property, as well as quantities of grain, etc., until restrained by the presence of the officers, who returned the property in part,

and prevented further removals. It is also testified to that at the time to which the criminal prosecution was adjourned plaintiffs in error were present, although by subpoena, counseling with the attorney who conducted the prosecution, and otherwise showing an interest in the result, while defendant in error, Mrs. Casebeer, testified that plaintiffs in error stated to her that the arrest was made to enable defendants in error to get possession of the property.

While to some this testimony might not be satisfactory proof of the connection of plaintiffs in error with the criminal prosecution, yet to the jury it seems to have been satisfactory, and we cannot say there was not enough to sustain the finding. A question of fact was thus presented, which it was the special province of the jury to try. In view of the array of contradictory testimony produced upon the part of the plaintiffs in error, the writer would have perhaps found otherwise, but that is not enough to warrant a court in setting aside a verdict.

It is insisted that if the conclusion that plaintiffs in error were connected with the criminal prosecution can be sustained, it is shown that there was sufficient cause for the arrest, and the verdict must, for that reason, be set aside. We have carefully examined the testimony adduced upon that branch of the case, and are satisfied with the verdict upon that point. Giving the most liberal construction to the testimony of the witnesses for plaintiff in error, the most that could be said is, that there was a conflict and that the jury were justified in finding as they did.

Objection is made to the fourth instruction given to the jury upon the request of defendant in error. It is as follows: "If you find from the evidence that the defendants, or either of them, brought, or caused to be brought, or aided, advised, or assisted in bringing the prosecution against plaintiffs, mentioned and described in plaintiffs' petition, and that the acts and deeds of the plaintiffs which caused said prosecution to be brought were committed by plain-

tiffs in defense of property, of which either or both of them were in lawful possession, either alone or in common with any other person or persons, against the unlawful attempt of defendants to get possession thereof, and that said acts and deeds of plaintiffs were no more forcible and violent than was necessary for the protection of said property against the unlawful attempts of defendants to get possession of said property, then the court instructs you that the defendants had no probable cause for bringing said prosecution; and if you further find that said prosecution was wrongful and injurious to plaintiffs, and known and intended by defendants so to be, you will find a verdict for plaintiffs." The objection to this instruction is, that it misstated the law and left no alternative to the jury but to find a verdict in favor of defendants in error.

As we understand this instruction, and as we think it must have been understood by the jury, it amounts to no more than that if defendants in error were in the lawful possession of property, and that the acts complained of in the criminal prosecution were committed in defense thereof, and that such acts were no more forcible and violent than was necessary for the protection of such property against the unlawful attempts of plaintiffs in error to get possession, then there was no probable cause for the arrest. And if the jury further found that the prosecution was known and intended to be wrongful and injurious by plaintiffs in error, the verdict should be in favor of defendants in error.

We cannot see how this instruction can be said to misstate the law, nor how it could mislead the jury. The right of defense of person and property against the unlawful and violent invasion of either, so long as that defense is within proper bounds and does not become aggressive, has long been recognized, and we think no citation of authorities in its support is necessary. This being true, it must follow that in the proper and legitimate defense of one's possession no crime is committed. If, then, the attacking party

causes and procures the arrest of the other for what the complainant knows is no crime, how can it be said he had probable cause for making the arrest? Then, if in addition to the want of probable cause there is the knowledge and intention that the arrest was and should be both wrongful and injurious, this would amount to malice and the case would be made.

The rights of the parties were properly separated by the fifth instruction, and the jury were fully instructed upon that part of the case.

Plaintiffs in error requested the court to instruct the jury, "That although the plaintiffs may show the want of probable cause by a preponderance of evidence, yet it is not sufficient to support a recovery unless malice be shown also. Malice is not to be presumed but must be shown to exist, as well also as probable cause, so that the plaintiff must prove that the defendants were actuated by a malicious desire to injure him. Therefore, if the jury find from the testimony that the plaintiffs have failed to show by a preponderance of evidence that the defendants commenced the alleged criminal prosecution against him with a malicious intent to injure him you will find for the defendants."

This instruction was refused, and such refusal is assigned for error. It is insisted that the chief error of the trial court in refusing this instruction lay in the fact that the court refused to instruct the jury that malice must be proved, and is not presumed from the fact of there being a want of probable cause. While this might be conceded to be the law as applicable to prosecutions of this kind, yet it is undoubtedly the law that where a want of probable cause is clearly shown all the facts and circumstances of the case are presented to the jury, and if they be of such a character as to imply malice it will be inferred from such facts. The law does not require a plaintiff in an action of this kind to prove by direct testimony the mental condition or

purpose of a person in committing or performing an act, but the character of the act itself with all the surrounding facts and circumstances must be looked to for the purpose of ascertaining, under well-known rules applicable to human conduct, the intent and purpose of the person committing the act. But assuming that the instruction properly states the law we can not say that the court erred in refusing to give it. Plaintiffs in error requested and the court gave, with others, the following instructions bearing upon the question of malice:

"*First.* The general issue being plead in an action of malicious prosecution, the burden of proving these five facts is cast upon the plaintiff, viz.:

"1st. The fact of the prosecution.

"2d. That the defendants were the prosecutors or instigators of it.

"3d. That the prosecution terminated in favor of the plaintiffs.

"4th. That the charge was made without reasonable or probable cause.

"5th. That the defendants in making it were actuated by malice."

"*Second.* That to maintain an action for malicious prosecution the plaintiff must show by a preponderance of evidence malice and want of probable cause. Therefore, if the jury find from the testimony that the plaintiff has failed to prove by a preponderance of evidence that the defendants, maliciously and without probable cause, commenced said alleged criminal prosecution against him, you will find for the defendants."

"*Seventh.* That although the plaintiff may show the want of probable cause by the preponderance of evidence, yet it is not sufficient to support a recovery, unless malice be shown, or may be inferred also, so that the plaintiff must prove that the defendants were actuated by a malicious desire to injure him. Therefore, if the jury find from the

testimony that the plaintiff has failed to show by a preponderance of evidence that the defendants commenced the alleged criminal prosecution against him with a malicious intent to injure him, you will find for the defendants, but proof of the institution of a criminal prosecution without probable cause may be sufficient proof from which malice may be inferred."

As we understand the law applicable to the question of malice, these instructions, when applied to the testimony before the jury, contain a fair statement of it, and in substance give all the essential ingredients contained in the instruction which was refused. But it is not necessary in such cases that express malice be shown. Malice in a prosecution may be inferred from a clear want of probable cause. *Holliday v. Sterling*, 62 Mo., 321. *Newell v. Downs*, 8 Blackf., 523. *Callahan v. Caffarata*, 39 Mo., 136. *Harp- ham v. Whitney*, 77 Ill., 32. *Burt v. Gibbons*, 3 L. J. Exch., 75. *Mowry v. Whipple*, 8 R. I., 360. *Strauss v. Young*, 36 Md., 246. And it may be found by the jury from the same facts which show a want of probable cause. *Harkrader v. Moore*, 44 Cal., 144. *Oliver v. Pate*, 43 Ind., 182. *Ammerman v. Crosby*, 26 Ind., 451.

And if the prosecution was wholly without cause no further evidence of malice is necessary. *Hayes v. Hayman*, 20 La. An., 336. *Holburn v. Neal*, 4 Dana, Ky., 120.

It is next insisted that the court erred in permitting defendants in error to testify as to their guilt or innocence of the offense as charged in the criminal complaint. This objection may be met in brief by observing that we have been unable to find any record of a ruling upon that question by the trial court adverse to plaintiffs in error with the necessary exceptions thereto, and the further suggestion that the whole question was inquired into by both parties. But we are not prepared to say that in a case like the one at bar the investigation was not proper, even if it had been resisted by plaintiffs in error. The proof shows

that plaintiffs in error, at the time of the filing of the complaint had full knowledge of all the real facts constituting the alleged crime. It was competent for defendants in error, upon their theory of the case, to show, if they could, that no crime had been committed by them, and that plaintiffs in error knew that fact. This, if true, and of that the jury were the sole judges, would tend to show a want of probable cause, and that the prosecution was malicious.

We find no prejudicial error in the case, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY, PLAINTIFF IN ERROR, V. WALKER WEBB,
DEFENDANT IN ERROR.

18 215
59 897

Railroads: LIABILITY FOR STOCK KILLED: NEGLIGENCE.

Under the provisions of section one of the act of 1867, Compiled Statutes 1885, Ch. 72, where a railroad corporation neglects to maintain fences and cattle-guards along its road, and horses get thereon, and are injured or killed by the engines or trains running on the road, the railroad company is liable to the owner in damages therefor, and the negligence of the owner in allowing the horses to escape from him will constitute no defense to the action.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error.

T. Appleget & Son, for defendant in error.

REESE, J.

The original action in this cause was instituted for the recovery of damages resulting from injury to a team of horses, caused by a train of cars belonging to plaintiff in error. The allegation of the petition in which the injury to the property is charged is as follows: "That on or about the second day of August, 1882, said defendant was operating a railroad through Johnson county, state of Nebraska, said railroad having been open for use for more than six months in and through said county, and while so operating the same, at the time above stated, and in the day-time, at a place on said road therein where it was required by law to fence its track, but had failed to do so said defendant, by its agents and employes, carelessly and negligently ran an engine and train of cars upon and over one team of horses and one lumber wagon, the same being the property of this plaintiff, and of the value of \$283.00, by reason of which said team of horses was so injured as to be entirely worthless, and it became necessary to kill the same."

The answer admits the injury to the horses, and that the railroad was not fenced, but alleges that the horses were harnessed and hitched to the wagon, equipped and ready for traveling as a team, and that while so hitched the defendant in error left the team standing near the railroad track without anyone to manage and control it, and without being secured or fastened, while he went away from it, and while it was thus left the train came along, at which the team became frightened and dashed across the railroad track in front of the train, and was injured without any fault or negligence on the part of plaintiff in error, and that the carelessness and negligence of defendant in error contributed to the injury complained of. The reply was a denial of the allegations of the answer.

Upon the trial plaintiff in error sought to present to the

jury, as a defense, the question of the contributory negligence of defendant in error, but its prayers for instructions in that direction were refused by the court. This action of the trial court is assigned for error. Two questions are presented for decision. The first contention of plaintiff in error is, that under the issues presented by the pleadings the question of the negligence of both parties was made a prominent one, and that upon the issue so presented the jury was called to pass, and therefore it should have been submitted with proper instructions for their guidance.

By comparing the petition with section one of the act of June 22, 1867, which we will presently notice more fully, it will be observed that the pleader brings himself directly within its provisions. The team was injured by the engine of the railroad company on the track and at a point where the company was required by law to fence its track, but had failed so to do for more than six months. This, with the other allegations of the petition, constituted a cause of action. The fact that plaintiff in error pleaded a statement of facts which did not constitute a defense, and that these facts were denied, did not render it absolutely essential that these immaterial facts or questions (if they were such) should be submitted to the jury.

The whole case must depend upon the second question presented, which is, would the contributory negligence of defendant in error relieve plaintiff in error from its obligation to pay for the injury done to the horses of defendant in error upon its track at a place where it was unfenced, and where, by law, the railroad company was required to fence? The section above referred to is as follows:

"That every railroad corporation whose line of road or any part thereof is open for use shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad

or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, with opens, or gates, or bars, at all the farm crossings of such railroads, for the use of the proprietors of lands adjoining such railroad, and shall also construct, where the same has not already been done, and hereafter maintain at all road crossings now existing or hereafter established, cattle-guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting onto such railroad, and so long as such fences and cattle guards shall be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same is herein prescribed is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any such corporation, or by the locomotives, engines, or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done." Comp. Stat., Ch. 72.

By a fair analysis of this section we think its provisions as applicable to the case at bar are, that the railroad company shall erect and maintain fences on the sides of its track, suitably and amply sufficient to prevent horses from getting on the railroad (except at places other than that where the injury occurred), and in case of its failure so to do it shall be liable for *any* and *all* damages which shall be done by the engines or trains of the company to any

horses thereon. If we are correct in this it is clear that the simple negligence of the owner of the stock injured can be no defense and the ruling of the district court was correct. It may be said that this construction of the act under consideration would render the railroad company liable for injury to stock when the owner had driven them and left them upon the road. But when we consider the purpose of the act, and give it that reasonable construction which such statutes require, no such conclusion necessarily follows. The maxim that "no injustice is done to the consenting person, that is, by a proceeding to which he consents," would then apply. Besides, such an act, if done for the purpose of obstructing the track, would be a violation of the criminal law of the state. It cannot be said that the protection of stock upon a railroad track was the sole object of the law. When we consider that these tracks are incessantly traversed by trains running at a high rate of speed, all of which are carrying persons, and many of which are loaded with passengers, and that it is absolutely necessary to their safety that the track should be kept clear of all obstructions which might endanger their lives, it is apparent that the purpose of the legislature was that, first, perhaps, passengers and employes on the train should be protected; and second, that stock near the line of the road might not be destroyed. It was therefore made the duty of the railroad company to fence its road. The language of the statute is, that "*every railroad corporation whose line of road * * * is open for use shall fence the road.*"

As said by Denio, J., in *Corwin v. R. R. Co.*, 13 N. Y., 54: "Having imposed this general and public duty, the legislature has next proceeded to declare some of the consequences of its omission. The corporation in that case is liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon."

The section under consideration is substantially the same as section 42 of the railroad law of New York, enacted in

1848, which has been construed by the courts of that state substantially as herein held. See *B. & M. R. R. Co. v. Brinkman*, 14 Neb., 70, and cases there cited.

The question presented in the case last cited was not identical with the case at bar, and called for a construction of section two of the act of 1867, which applies to "live stock running at large." This section is substantially a copy of the Iowa law, and has been repeatedly construed by the courts of that state. But it must be observed that there is a great difference between the provisions of the two sections, and as section one of our law is not found in the Iowa act we can not look to the decisions in that state for light in its construction.

We are reminded that in construing statutes we are to give force to all their parts, and if section one was intended by the legislature to be as sweeping in its provisions as is here contended for, what could be the use of the second section, and why the provision that a railroad company should be "absolutely liable" for stock injured or killed? To this we reply that, to our mind, the purpose of the second section is, in the main, to afford to the owners of stock running at large a speedy and effectual remedy for the collection of their damages. Stock "running at large" has reference to stock under the control of no person; free commoners, as it is sometimes termed. If stock are *running at large*, not under the dominion of the owner, there can be no defense to an action brought for damages where they have been injured or killed by trains, at a point where the company were required to fence, but had failed to do so. Again, the section provides that certain proceedings may be had for the purpose of ascertaining the value of stock injured or killed, and further, that in case of the failure of the company to pay the value thus found the measure of damages shall be double the value of the property killed or destroyed. To our mind the provisions of section two may all be given force, and no conflict can be found between the two sections. We are aware that the

"double damage" part of section two has been held unconstitutional (*A. & N. R. R. Co. v. Baty*, 6 Neb., 37), but that fact, even if correct (and upon which we express no opinion), can not militate against the view here expressed as to the purpose of the legislature in enacting the law.

By the first section it is declared that the company must fence its road, that the fences must be amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the track, and in case of default the railroad company shall be liable for any and all damages which shall be done by the engines or trains running on the road. No allusion is made to any conditions with regard to care, or the want thereof, either by the company or the owner of the stock, as affecting the liability of the company, excepting in the last clause of the section where it is provided that if the proper fences, etc., are constructed and maintained the railroad company shall not be liable unless the injury is negligently or willfully done.

We therefore hold that the negligence of defendant in error, if any existed, was no defense to the action, and that the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., concurs.

COBB, CH. J., dissents.

THE STATE OF NEBRASKA, EX REL. ROBERT B. GRAHAM,
v. H. A. BABCOCK, AUDITOR OF PUBLIC ACCOUNTS.

Constitutional Law: APPROPRIATION BY LEGISLATURE. Under the provision of the constitution of the state, that "no money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law," the auditor of public accounts has no authority to draw a warrant upon the treasury for commissions due county treasurers for money collected by them and paid into the treasury, unless a specific appropriation had been made for that purpose.

18	221
50	99
54	667

ORIGINAL application for mandamus.

Mason & Whedon, for relator.

William Leese, Attorney General, for respondent.

REESE, J.

This is an application to this court in the exercise of its original jurisdiction for a writ of mandamus to compel the auditor of public accounts to issue his warrant on the state treasury for a sum of money which the relator claims is due him as commission or fees, for collecting moneys due the state as proceeds from the sale and leasing of school lands. The relator alleges that he collected the moneys referred to and paid them over to the state treasurer without deducting therefrom his commission for making the collection. It is alleged that it is the custom for all county treasurers not to deduct their commissions from the money they collect for the state, but to pay it all to the state treasurer and then to receive from the auditor a warrant for the amount of commissions to which such treasurer may be entitled; that he has demanded from the auditor a warrant for the amount of commissions due him, but that the auditor has refused to issue it.

It is claimed that, under the provisions of section 164, chapter 77 of the Compiled Statutes, he is entitled to this warrant as for money which he has overpaid. This section provides that: "If any county treasurer shall have paid, or may hereafter pay, into the state treasury, any greater sum or sums of money than are legally and justly due from such collector, after deducting abatements and commissions, the auditor shall issue his warrant for the amount so overpaid, which shall be paid out of the fund or funds so overpaid on said warrant."

This section would seem to give the auditor the authority

contended for by the relator, but we must hold that it does not give this authority.

Section twenty-two of article three, entitled legislation, of the Constitution of this state, provides, among other things, that "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law and on the presentation of a warrant issued by the auditor thereon." * * This section must be treated as and is a complete denial of the right or power of the auditor to draw his warrant on the treasury for any sum of money for any purpose except in pursuance of an appropriation made by law. The money is conceded to be in the treasury. It must remain there until drawn out "in pursuance of a specific appropriation" giving authority therefor.

In so far as the section of the revenue law above quoted is in conflict with the provision of the constitution, if at all, it is void. But as the two sections must be construed together, and if possible harmonized, it may be said that there is nothing in the section requiring the warrant to issue without an appropriation being first made, and that there is no conflict. However that may be, it is clear the auditor cannot legally draw the required warrant.

The other questions discussed by counsel need not be noticed, as in our view the writ cannot issue, and is therefore denied.

WRIT DENIED.

THE other judges concur.

18	224
18	453
18	224
49	769

R. LORTON ET AL., PLAINTIFFS IN ERROR, v. JAMES M. FOWLER, DEFENDANT IN ERROR.

Chattel Mortgage: REPLEVIN BY MORTGAGEE. In an action of replevin by a mortgagee of chattels against the sheriff for taking such chattels on an attachment at the suit of a creditor, and it clearly appearing from the evidence that the sale or assignment of the goods as evidenced by the mortgage under which the plaintiff claims was made in good faith, and without any intent to defraud such creditor, or any creditor of the mortgagor, and that such mortgage was duly recorded, the plaintiff is entitled to recover, although there was not that immediate delivery followed by an actual and continued change of possession of such chattels as is contemplated by Sec. 11 of Chap. 32, of Comp. Stats.

ERROR to the district court for Nemaha county. Tried below before BROADY, J.

John C. Watson, for plaintiffs in error, cited: *Linger v. Raymond*, 12 Neb., 25. *Nelson v. Garey*, 15 Id., 531. *Bierbower v. Polk*, 17 Id., 268.

Groff & Montgomery, for defendant in error, cited: *Brunswick v. McClay*, 7 Neb., 137. *Gregory v. Whedon*, 8 Neb., 377. *Tallon v. Ellison*, 3 Id., 63. *Hedman v. Anderson*, 6 Id., 392. *Tootle v. Dunn*, 6 Neb., 99. *Temple v. Smith*, 13 Neb., 513. *Dorrington v. Minnick*, 15 Neb., 403-404. *Wake v. Griffin*, 9 Neb., 47. *Twyné's Case*, 2 Coke, 80.

COBB, CH. J.

The firm of Brown & Prouty, general merchants, of Brock, Nemaha county, were indebted to Lorton & Co., wholesale merchants, of Nebraska City, in the sum of thirteen hundred dollars, which was evidenced by a promissory note for that sum, bearing date Nov. 25th, 1884, due one day after date, and drawing interest at 10 per cent per

annum; and on the 28th day of November, 1884, for the purpose of securing this indebtedness, they executed and delivered to said Lorton & Co. a chattel mortgage upon their entire stock of goods and merchandise, and the furniture and fixtures of their store. The mortgage was in the ordinary and usual form, except that in the clause authorizing the mortgagees upon default to take possession of the goods, they were, by interlineation, authorized to sell the same at private sale as well as at public auction. The mortgage was recorded on the 29th day of November, the day after its execution.

On the 12th day of December, 1884, W. V. Morse and Owen J. Lewis, to whom the said Brown & Prouty were also indebted in the sum of four hundred and eight dollars, sued a writ of attachment out of the county court of Nemaha county, and placed the same in the hands of J. M. Fowler, sheriff of said county, who by virtue thereof attached and seized the said goods.

On the 16th day of December, 1884, the said Lorton & Co. commenced this action for such taking, and replevied the said goods. The cause was tried to the court (a jury being waived by both parties), who found in favor of the defendant, and for a return of said property in case a return thereof could be had; if not, that the defendant recover of the plaintiffs the amount of his special property, the same found by the said court at the sum of four hundred and thirty-three dollars and ten cents, with costs, etc. The plaintiffs bring the cause to this court on error.

The statute, Sec. 11 of Chap. 32, Comp. Stats., provides as follows: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned shall be presumed to

Lorton v. Fowler.

be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the person claiming under such sale or assignment that the same was made in good faith and without any intent to defraud such creditors or purchasers."

In the trial of the case at bar the effort of the defendant seems to have been to establish the proposition that there had been no such immediate, actual, and continued change of the possession of the goods as is contemplated by this section, and in this the learned district court must have been of the opinion that he succeeded. If the case turned solely upon that point, while we would probably differ with that court as to the weight of evidence, I do not think we could say there was such an entire want of evidence to sustain the finding as would justify us in its reversal. But the evidence on the part of the plaintiffs was amply sufficient to prove that the mortgage of the goods was made in good faith and without any intent to defraud the other creditors of the mortgagors, and there was no conflicting evidence whatever as to this point. No objection is made to the form of the chattel mortgage, nor to its filing for record. I am, therefore, of the opinion that the finding and judgment of the district court is without evidence to sustain it. It is, therefore, reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

JABEZ C. CROOKER, PLAINTIFF IN ERROR, v. SAMUEL
M. MELICK, DEFENDANT IN ERROR.

18	227
19	155
18	237
33	780

1. **Amercement of Officers.** Section 513 of the Civil Code gives a more expeditious remedy against sheriffs and other officers in certain cases, but gives no additional right, unless it be the penalty therein provided, and as to that, *quære*.
2. ———: **DAMAGES.** In all actions against sheriffs or other officers for failure to return writs of execution, etc., the inquiry is permitted whether the debt could have been collected, and whether its collection has been prejudiced by the acts of the defendant.
3. ———: ———. The actual loss sustained by the plaintiff in the value or availability of his security by reason of the act or negligence of the defendant is the measure of his damages.
4. ———: ———: **EVIDENCE.** All legal facts necessary and proper to prove or disprove such damages may be pleaded and proved.

ERROR to the district court for Lancaster county. Heard below before MITCHELL, J.

John S. Gregory, for plaintiff in error.

Caldwell & Christy, for defendant in error.

COBB, CH. J.

The plaintiff in error made and presented in the district court of Lancaster county his motion in writing against the defendant in error, in the following words:

"Now comes the plaintiff in said cause, and moves the court for an order of amercement against Samuel Melick, sheriff of Lancaster county, in two causes of action, wherein Jabez C. Crooker is plaintiff, and Edward Haley is defendant, for the reason that executions in said sheriff's hands were not returned by him within the time and manner provided by law, and the sheriff neglected and refused to levy the same upon property of the said Haley, when requested so to do by said plaintiff.

"The amount of amercement demanded is the sum of \$297.00, being the amount and interest due upon said judgments and executions.

"(Signed)

J. C. CROOKER."

To which the defendant in error made and filed the following answer:

"In regard to the motion of Jabez C. Crooker to amerce Samuel Melick, sheriff of Lancaster county, Nebraska, in two causes of action wherein Jabez C. Crooker is plaintiff, and Edward Haley is defendant.

"1. The said Samuel Melick, sheriff of Lancaster county, did within the sixty days make diligent search and inquiry, and found no property of the judgment debtor upon which to make a levy, and informed the said J. C. Crooker, and also notified him within the sixty days, that if he could point out property belonging to the said defendant that he would make a levy upon the same.

"2. That the judgment debtor was possessed of no property subject to execution in Lancaster county.

"3. The money could at no time have been made upon said execution between the issue and the return of said execution.

"4. That the judgment debtor was wholly insolvent, and was possessed of no property subject to execution between September the 24th, and December the 16th, 1884.

"(Signed)

SAMUEL MELICK."

With affidavit of verification.

The following is the journal entry showing the final order of the court in said matter:

"This cause having been submitted to the court at a former day of this term, to-wit, June 29th, A.D. 1885, without argument, upon the motion of the plaintiff for an order of amercement against Samuel Melick, sheriff of Lancaster county, in two causes wherein Jabez C. Crooker

is plaintiff, and Edward Haley is defendant, for the reason that executions in said sheriff's hands were not returned by him within the time and manner provided by law, and the sheriff neglected and refused to levy the same upon property of the said defendant when requested so to do by said plaintiff, and now upon due consideration of said motion, and the answer to said motion filed herein by said sheriff, the court overrules said motion, to which plaintiff duly excepts, and forty days from the rising of court is hereby given plaintiff to reduce his exceptions to writing."

The record also contains copies of the executions in the two causes, with the sheriff's returns thereon. There is no bill of exceptions, and as neither the petition in error nor the brief of counsel point out the error of the district court with greater particularity than that the court erred in overruling the motion for amercement, I conclude that the case was disposed of as though the answer of the sheriff was demurred to by general demurrer on the part of the plaintiff, and it will be disposed of here upon that theory.

Our statute, sec. 513, Civil Code, provides as follows:

"If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come into his hands; or shall neglect or refuse to sell any goods and chattels, lands, and tenements; or shall neglect to call an inquest and return a copy thereof forthwith to the clerk's office; or shall neglect to return any writ of execution to the proper court, on or before the return day thereof * * * such sheriff or other officer shall, on motion in court and two days' notice thereof in writing, be amerced in the amount of said debt, damages, and costs, with ten per centum thereon, to and for the use of said plaintiff or defendant as the case may be."

The only new liability sought to be created by the above statute is the penalty of ten per cent. Without the statute the sheriff would be equally liable for all but the pen-

alty. With it he is only liable for actual damages, possibly with the penalty added. The statute gives a short, cheap, and expeditious remedy, but it only lies where an action in the nature of trespass on the case would lie.

In the case at bar, if it be true, as stated by the sheriff in his answer, that Edward Haley, the execution defendant, had no property within the county at any time during the life of said writs of execution out of which the same or any part thereof could have been collected, how can it be said that the plaintiff was damaged by the failure of the sheriff to return the writs in time?

If the writs had no value when they came into the sheriff's hands, they could lose none by reason of their retention by him until after the return day. And they could gain none, except on the principle of forfeiture. Our laws do not favor forfeitures, and under the provisions of the constitution it is doubtful if the plaintiff can recover a technical *forfeiture* from the sheriff in such a case.

It is the boast of our improved system of pleading and practice that the actual facts of every case may be pleaded and proved without regard to fictions or technicalities. This would be of little avail if in cases like the one at bar the law had closed the door of investigation and ascribed to excusable neglect or unavoidable accident the same consequences of punishment and loss as those which follow criminal malpractice. But such is not the law. It is the actual damage which the plaintiff has sustained in the value or availability of his security that he is entitled to recover in such cases in either form of proceeding, and all legal facts touching such value and availability may always be plead and proved.

"Notwithstanding the proof of the debt and the sheriff's neglect, the inquiry is permitted whether the debt could have been collected. The original debt is, of course, the gist of

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the action, and it is perfectly well settled that the existence of such debt must be proved by the plaintiff. But if that fact is established, the equally important inquiry remains, whether the recovery of the debt has been prejudiced by the acts of the defendant. In other words, whether under any circumstances it could have been collected of the defendant's property." 2 Sedgwick on the Measure of Damages, 7 Ed., p. 447.

The order of the district court is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

E. J. DARST, APPELLEE, v. GUSTAVUS BACKUS, APPELLANT.

Usury: BURDEN OF PROOF. Where usury in the original transaction for which negotiable promissory notes were given is proved, a party who claims to have purchased the notes before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value before maturity and without notice.

APPEAL from Burt county. Tried below before NEVILLE, J.

H. H. Boves, for appellant.

R. B. Daley, and Hopewell & Dickinson, for appellee.

MAXWELL, J.

This action is brought upon two promissory notes, as follows:

"\$974. TEKAMAH, Neb., June 17th, 1883.

"Ninety days after date I promise to pay to C. W. Conklin or order, nine hundred seventy-four dollars, for

18	231
24	633
18	231
25	380
18	231
27	275
18	231
34	515
18	231
39	667
18	231
41	42

Darst v. Backus.

value received, payable at the office of C. W. Conklin, Tekamah, Nebraska, with interest at the rate of ten per cent per annum. If this note is not paid at maturity, to draw ten per cent from date.

“JOHN S. LEMMON,

“JOHN TALLIN.

“L. PHELIN.

“Witness to mark :

“A. T. LARSON.

“GUSTAVUS ^{his} X BACKUS,

mark.

“JOHAN LARSON.”

“\$315 48.

“TEKAMAH, January 23d, 1888.

Ninety days after date I promise to pay to C. W. Conklin, or order, three hundred fifteen and $\frac{48}{100}$ dollars for value received, payable at the office of C. W. Conklin, Tekamah, Nebraska, with interest at the rate of — per cent per annum. If this note is not paid at maturity, to draw ten per cent interest from date.

“JOHN S. LEMMON,

“JOHN THALIN,

“L. THELIN,

“Witness to mark :

“A. T. LARSON.

“GUSTAVUS ^{his} X BACKUS,

mark.

“JOHAN LARSON.”

Darst claims as assignee before maturity of the notes. The defendant Backus filed an answer to the petition, wherein he alleges in substance that the notes in question were not transferred until after they became due; that he is merely a surety on said notes, John S. Lemmon being the principal; “that the notes sued on were given to renew and extend notes given by said Lemmon to said Conklin on December 2d, 1882, one for \$974, and another for \$168.48, the interest on said \$974 at the rate of 24 per centum for six months. That to said sum of \$168.48 was added 24 per centum per hundred on said sums of \$974 and \$168.48, and for which, together with said sum

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of \$168.48 of said note of \$315.48 mentioned in the 2d paragraph of said plaintiff's petition was given," etc. The reply is a general denial. On the trial of the cause, judgment was rendered in favor of the plaintiff for the sum of \$1,453.63. The defendant Backus appeals.

The testimony fully sustains the plea of usury. The principle is now well settled that mere illegality in the consideration of a note which is not declared void by statute will not affect the rights of a *bona fide* purchaser for value. *Wortendike v. Meehan*, 9 Neb., 228. *Norris v. Langley*, 19 New Hamp., 423. *State Bank v. Thompson*, 42 Id., 369. *Converse v. Foster*, 32 Vt., 828. *Sistermans v. Field*, 9 Gray, 331. *Smith v. Columbus State Bank*, 9 Neb., 31. *Paton v. Coit*, 5 Mich., 505. Where, however, the illegal consideration is shown, the burden of proof is on the plaintiff to show that he is a *bona fide* holder for value before the maturity of the note, and without notice. *Savings Bank v. Scott*, 10 Neb., 86. *Olmstead v. N. E. Mtge. Sec. Co.*, 11 Id., 492. *Cheney v. Cooper*, 14 Id., 416. *Evans v. De Roe*, 15 Id., 631. In this case there is not a particle of proof that the plaintiff either purchased the notes before maturity, paid any sum whatever for them, or that he was ignorant of usury in the transaction, which the undisputed testimony clearly shows to have existed. This being the case, the notes are subject to the defense of usury. The judgment of the district court must therefore be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

LUTHER R. WRIGHT ET AL., PLAINTIFFS IN ERROR, V.
CHARLES H. B. ROUSS, DEFENDANT IN ERROR.

Justice of Peace: LIABILITY FOR WRONGFUL ISSUE OF ATTACHMENT. Where an action by attachment is brought before a justice of the peace against a non-resident of the state, and his property attached and sold, the justice will be liable if the cause of action is not founded on contract, judgment, or decree.

ERROR to the district court for Douglas county. Heard below before NEVILLE, J.

W. J. Connell and Simeon Bloom, for plaintiffs in error, cited: *Clark v. Spicer*, 6 Kan., 440.

Warren Switzler, for defendant in error, cited: *Drake Attachments*, §§ 14, 15, 17, 19, 22, 34, 35, 36. *Jeffrey v. Wooley*, 5 Halst., 123. *Handy v. Brong*, 4 Neb., 60. *Elliott v. Jackson*, 3 Wis., 649. *Strock v. Little*, 45 Penn. State, 416.

MAXWELL, J.

This case was before this court in 1883, and is reported in 14 Nebraska, 457, the judgment of the court below being reversed. On the second trial the jury returned a verdict in favor of Rouss for the sum of \$131.08, upon which judgment was rendered. On the former hearing it was held that the affidavit for an attachment and bill of particulars filed with the defendant Wright as the foundation of the action did not show that the case was for a debt or demand arising upon contract, judgment, or decree, and did not authorize the issuing of an attachment against a non-resident. On the second trial the defendant Wright introduced testimony showing the nature of the transaction, claiming that the action was to recover damages for a breach of contract—delay in delivering goods.

The testimony shows the following facts: The defendant in error, Rouss, at the time this transaction took place, in 1879, was a merchant in New York City. In August of that year one Jacob Levi, who resided in Troy, New York, purchased of Rouss goods of the value of about \$124.70, to be shipped C. O. D. to one Isaac Levi, a brother of Jacob, at some point in Nebraska. It is claimed on behalf of the plaintiff in error that the goods were to be shipped to Omaha, and that Rouss shipped them to Homer, Dakota county, and that they did not reach Omaha until December, 1879. Jacob Levi, when he purchased the goods, paid thereon the sum of \$12.50, "as security that the goods would be taken out on arrival." The goods were directed to C. H. B. Rouss, Homer, Nebraska. A draft for the amount of the bill, with the bill of lading attached, was by direction of Jacob Levi sent to a bank at Omaha, but as Isaac Levi could not be found, they were sent to a bank at Troy, New York, and presented to Jacob Levi, who refused to pay the draft, upon the ground that the debt was that of his brother. Neither of the Levis paid for the goods nor offered to do so. At the time Jacob Levi purchased the goods in question he delivered to Rouss other goods of the value of about \$30.00, which Rouss agreed to ship with the goods in question. When Isaac Levi was informed that the goods were at the depot in Omaha he did not offer to pay for them or in any manner comply with the contract on his part, but at once instituted proceedings against Rouss before Wright, justice of the peace, and attached the goods in question, which were sold under the attachment. This action was brought against Wright to recover the value of the goods, upon the ground that the justice had no jurisdiction.

The testimony shows that the goods were sent at once to Homer, Nebraska, that being the place where Rouss testifies he was directed to send them. Isaac Levi testifies that he "had no particular one place as a center of business;"

that his "head-quarters during that time" was "wherever I put my hat down." He also testifies, "I received his (Rouss') invoice. They came to Plattsmouth first, and then got a letter." This seems to have been soon after the goods were shipped. Whether the invoice and letter contained a statement as to place of shipment does not appear, but as no complaint is made on that ground it is probable that such was the case. Rouss appears to have acted in good faith in the entire transaction. The goods appear to have been shipped immediately after they were purchased. The proof shows that Levi, without the slightest attempt on his part to comply with the contract, caused the attachment to be issued and levied upon the goods in question. The proof fails to show a cause of action arising upon contract, and does not aid the affidavit and bill of particulars in the case of *Levi v. Rouss*. The case, therefore, comes within the rule established by this court on the former hearing, viz., that where an attachment is issued by a justice of the peace against the property of a non-resident, and the cause of action is not founded on contract, judgment, or decree, the justice is without jurisdiction, and is liable. It follows that the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	286
18	421
20	97
21	654
24	591

18	236
37	16

18	236
56	673
56	674
56	676

18	236
459	110
50	568
18	286
60	383

STATE, EX REL. MARTIN J. HUFF, v. J. W. McLELLAND,
COUNTY CLERK, NANCE COUNTY.

1. **Constitutional Law:** ENROLLED BILL PRIMA FACIE EVIDENCE OF THE PASSAGE OF LAW. The certificate of the presiding officer of a branch of the legislature that a bill has duly passed the house over which he presides is merely *prima facie* evidence of that fact, and evidence may be received to ascertain whether or not the bill actually passed.

2. ——— : EVIDENCE. The journals of the respective houses are records of the proceedings therein, and if it should appear from them that a bill had not actually passed, the presumption in favor of the certificate would be overthrown and the act declared invalid.

ORIGINAL application for mandamus.

W. F. Critchfield, for relator.

George D. Meikeljohn, for respondent.

MAXWELL, J.

This is an application for a mandamus to compel the defendant, who is county clerk of Nance county, to give notice of an election for register of deeds of said county at the election to be held therein November 3d, 1885. At the last session of the legislature an act was passed by both branches of the legislature creating the office of register of deeds in counties having not less than fifteen thousand inhabitants. The bill was then enrolled, and the enrolled bill, properly certified by the presiding officers and chief clerks of each house, was duly presented to the governor, and by him approved. In the bill that passed the legislature the number of inhabitants in a county entitled to a register of deeds is expressed in figures "15,000." In the bill as enrolled the number given is "1,500." Laws 1885, Ch. 41. Comp. Stat., Ch. 18, secs. 77a-d. It will thus be seen that the bill providing for a register of deeds in counties having 15,000 or more inhabitants was never presented to or approved by the governor, while the bill actually approved was not passed by either house. The question for determination is, Is the enrolled bill, as certified by the presiding officers of both branches of the legislature and approved by the governor, the exclusive evidence of what the law is? Or can the court inquire whether the alleged act was in fact passed and is a valid law? The

question is presented to this court for the first time, and requires an examination of the authorities relating to the subject.

In *Pacific Railroad v. The Governor*, 23 Mo., 353, decided in 1856, a bill to issue the bonds of the state to the amount of \$800,000 to aid in the completion of the railroads of the state was passed by the legislature of Missouri and vetoed by the governor. It was alleged that the bill passed over the governor's objection by the requisite majority and had become a law. The court held, Leonard, J., dissenting, that the validity of an enrolled statute, authenticated in the manner pointed out by law by the certificate of the presiding officers of the two houses of assembly that it passed over the governor's veto by the constitutional majority, cannot be impeached by the journals showing a departure from the forms prescribed by the constitution in the reconsideration of the bill. It is said (page 364), "By the common law the statute roll was absolute and conclusive proof of a statute. The record could not be contradicted. It implied absolute verity."

In *Clare v. The State of Iowa*, 5 Iowa, 509, it was held that the original act on file in the office of the secretary of state is the ultimate proof of a statute. The question in that case was between the original statute and an erroneous copy thereof.

In *Duncombe v. Prindle*, 12 Iowa, 2, the object of the action seems to have been to obtain a construction of certain statutes for the purpose of determining whether townships 90-91, ranges 27-30, were within the territorial area of Webster or of Humboldt county, and it was held that the enrolled bill, signed by the presiding officers of the senate and house of representatives and approved by the governor, was the ultimate and conclusive proof of the legislative will, and *Clare v. The State*, 5 Clarke, 509, was cited with approval.

In *Green v. Weller*, 32 Miss., 651, an amendment to the

constitution abolishing the superior court of chancery and transferring full equity powers to the judges of the circuit courts, was passed by the legislature, submitted to the people of the state, and the amendment adopted, and it was held that an enrolled bill, when duly authenticated and signed by the governor, was conclusive evidence of its enactment, and that it cannot be impeached.

In *Evans v. Browne*, 30 Ind., 514, the question arose as to the passage of an act by the requisite majority, and it was held that an enrolled bill, properly authenticated by the proper officers of the respective branches of the legislature and approved by the governor, was conclusive evidence of its existence as a law.

In *Fouke v. Fleming*, 13 Md., 392, the question involved was the validity of certain statutes affecting bills of sale and mortgages of personal property, and it was held in effect that the engrossed bill signed by the governor was better evidence of what the law was than the journals of the two branches.

In *People v. Devlin*, 33 N. Y., 269, an action was brought by the attorney general under a statute to recover from the defendant certain fees and commissions held by him as chamberlain of the city and county of New York. The defense was, that after the passage of the act and before its approval by the governor he, at the request of the assembly, returned the bill to it. Sec. 5 of the act was then stricken out, the bill sent to the senate, which denied the authority of the assembly to change the bill. The court held that the assembly had no power to recall the bill, nor the governor any power to return it. That "when both houses have thus finally passed a bill and sent it to the governor, they have exhausted their powers upon it, except the power of sending it to the governor by the house in which it originated, according to parliamentary law." There are expressions in the opinion that the journals could not be resorted to for the purpose of ascertain-

ing whether an act had been passed by the requisite majority or not; but the question does not seem to have arisen in the case.

In *Pangborn v. Young*, 32 N. J. Law, 29, the question involved was the validity of "An act to establish a police district in the county of Hudson, and to provide for the government thereof." The case cited, in some of its features, resembles the one at bar, yet the court held that it was not competent for the court to go behind the attestation of the presiding officer of each house and the approval of the governor, and admit evidence that the bill actually passed by the legislature was different from the one submitted to and approved by the governor. These decisions are based principally on the common law, and questions relating to constitutional restrictions are not discussed, or but briefly referred to. While at common law the journals of either house are proper evidence of the action of that branch of the legislature upon all matters before it (*Jones v. Randall*, Comp., 17; *Root v. King*, 7 Cowen, 613), yet no case has been cited where it has been held that under the common law power the court would resort to the journals for the purpose of establishing the *invalidity* of an act properly certified by the presiding officers of each house and approved by the executive.

It must be borne in mind that the parliament of England before its separation into two bodies was a high court of judicature, possessed of the general power belonging to such court; and after the separation the power remained with each body, because each was considered to be a court of judicature and exercised the functions of such court. Cooley Const. Lim., 5th Ed., 161. Hence the power of either house of parliament to punish for contempt. *Id.* *Kelbourne v. Thompson*, 103 U. S., 168. Being a court the record of each house imported absolute verity. In this country, however, legislative bodies do not possess judicial powers. The records, therefore, are not those of a

court; but are, nevertheless, primary evidence to show the action of each house upon any matter before it. The constitution of this and a number of other states require each house to keep a journal of its proceedings, and publish the same, and provides that "no bill shall be passed unless by the assent of a majority of all the members elected to each house of the legislature. And the question upon final passage shall be taken immediately upon its last reading, and the yeas and nays shall be entered on the journal." It is also provided that "every bill and concurrent resolution shall be read at large on three different days in each house," etc.

It is well known that the object of these provisions was to prevent crude and hasty legislation. The journals must show that a majority of all the members elected to each house voted in favor of the passage of a bill before it can become a law. In this state at least, from its earliest legislature, the rules have required the reading in each house of the proceedings of the preceding day in order that the journals might be corrected. The certificate of the presiding officer of each house that a bill has been duly passed by the house over which he presided, therefore, is merely *prima facie* evidence of that fact, and the court may go behind such certificate and inquire into the facts of the case. And this is the view of the supreme court of the United States in *Gardener v. Collector*, 6 Wall., 499, where it is said (page 511): "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

In *Legg v. Mayor*, 42 Md., 220-225, the case of *Gardiner v. Collector* is cited with approval. It is said: "While the presumption arising from the proper forms of authentication of a statute is very strong, that the statute was regularly and constitutionally enacted by the legislature, the authorities maintain that such presumption may be overcome by competent evidence, and the statute may be shown to have never been constitutionally enacted. And this court has so decided at the present term in the case of *Berry v. Drum Point Railroad*, 41 Md., 446. A valid statute can only be passed in the manner prescribed by the constitution, and where the provisions of that instrument in regard to the manner of enacting laws are wholly disregarded in respect to a particular act it would seem to be a necessary conclusion that the act, though having the forms of authenticity, must be declared to be a nullity. otherwise the express mandatory provisions of the constitution would be of no avail or force whatever."

In *Spangler v. Jacoby*, 14 Ill., 297, it was held that the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and that the signature of the speakers and governor to an act are presumptive that it became a law in pursuance of the constitution; but that this presumption may be overcome by the journals. To the same effect are *People v. Mahaney*, 13 Mich., 482. *Moody v. State*, 48 Ala., 115. *People v. De Wolf*, 62 Ill., 253. *State v. City of Hastings*, 24 Minn., 78. *Southwick Bank v. Com.*, 26 Penn. St., 446. *Jones v. Hutchinson*, 43 Ala., 721. *Fowler v. Pierce*, 2 Cal., 165. *People v. Supervisors*, 8 N. Y., 318. *Speer v. Plank Road Co.*, 22 Penn. St., 376. Opinion of the Justices, 35 N. H., 579-584. Opinion of the Justices, 45 Id., 607-614. Opinion of the Justices, 52 N. H., 622-625. *People v. Pardy*, 2 Hill, 31. *Prescott v. Board of Trustees*, 19 Ill., 324. *People v. Starne*, 35 Ill., 121. *Coleman v. Dobbins*, 8 Ind., 156-157.

In the last case cited, it is said (page 162): "It is said, *arguendo*, in *Purdy v. The People*, 4 Hill, 384, that *nul tiel* record cannot be pleaded to a statute; and in support of this position several English authorities are cited. This undoubtedly is the English doctrine, growing out of their peculiar institutions. Their law-making power is omnipotent. Not only the common statute law governing the ordinary relations of life, but the British constitution itself, is the creature of parliament. In this country legislative bodies are created by the constitution. Thus every act may be tested by that instrument and declared void if not in conformity to its requirements."

The journals of each house were evidently intended to furnish the public and the courts with the means of ascertaining what was actually done in each branch of the legislature. They are to be treated as authentic records of the proceedings, and the court may resort to them when the validity of an act is questioned upon the ground of the failure of the legislature to observe a matter of substance in its passage, for the purpose of ascertaining whether the constitutional provisions have been substantially complied with or not. The certificate of the presiding officers is merely *prima facie* evidence that an act has been duly passed, and will be overthrown if it appears from the journals that it was not. The necessity for such a provision is apparent, as this is the second act passed at the last session of the legislature which has been before this court where the provisions of the original act were changed and others inserted, apparently without the knowledge of the members. These acts were properly certified when presented to the governor for his approval, but this one at least did not pass. It follows that the act is of no force and effect, and the writ must be denied.

WRIT DENIED.

THE other judges concur.

CITY OF LINCOLN, PLAINTIFF IN ERROR, v. SAMUEL B. WALKER, DEFENDANT IN ERROR.

1. **Negligence:** CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF. In an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant.
2. ———: EXCAVATION IN STREETS OF CITY. A person traveling in a public street, if he exercise ordinary care, has a right to be absolutely safe against all accidents arising from obstructions or imperfections in the street. And if a person is authorized to make an excavation in the street, he is bound at his peril to protect the same and leave the street in as safe condition as it would be if the excavation had not been made.

ERROR to the district court for Lancaster county. Tried below before GASLIN, J., sitting for POUND, J.

A. C. Ricketts (*Mason & Whedon* with him), for plaintiff in error, cited: *Reynolds v. N. Y. C. & H. R. R.*, 58 N. Y., 248. *Weber v. Id.*, 58 Id., 451. *Masseth v. R. R.*, 64 Id., 524. *Thompson on Negligence*, 1236. *Rudolph v. French*, 44 How. Pr., 160. *Wendell v. R. R.*, 91 N. Y., 420. *Aurora & C. R. R. Co. v. Grimes*, 13 Ill., 585. *Dyer v. Talcott*, 16 Ill., 300. *Galena, &c., R. R. Co. v. Fay*, 16 Ill., 558. *Brannan v. May*, 17 Ga., 136. *Edwards v. Carr*, 13 Gray (Mass.), 234. *Perkins v. Eastern &c., R. R. Co.*, 29 Me., 307. *Walker v. Herron*, 22 Tex., 55. *Hyde v. Jamaica*, 27 Vt., 443. *Dressler v. Davis*, 7 Wis., 527. *Chamberlain v. M. & M. R. R. Co.*, 7 Wis., 426. *M. & C. R. R. Co. v. Hunter*, 11 Wis., 160.

Lamb, Billingsley & Lambertson, for defendant in error, cited: *Randall v. N. W. Tel. Co.*, 54 Wis., 147. *Omaha R. R. v. Doolittle*, 7 Neb., 125. *Mayor v. Dodd*, 58 Ga., 238.

MAXWELL, J.

This action was brought by the defendant in error against the city of Lincoln to recover damages alleged to have been sustained by him from falling into an excavation on O street, in front of block 52, whereby he sustained damages to the amount of \$3,000. The answer is, that said plaintiff well knew of said excavation; that it was well protected by guards placed over and across the sidewalks where they approached said excavation; that the street lamp of the St. Charles Hotel lighted up the same, and would have enabled the most casual observer to see the nature and extent of the excavation; that the injury was occasioned wholly by the plaintiff's negligence, etc. The jury returned a verdict in favor of the plaintiff below for the sum of \$1,200. The city filed a motion for a new trial, in which are forty-one assignments of error. The motion was overruled and judgment rendered on the verdict, but taxing the costs to each party.

The errors relied upon are to the giving and refusing certain instructions.

The testimony tends to show that at the time the accident occurred a large brick building was being constructed on the north-east corner of block 52, fronting on 8th and O streets; that an excavation of the same depth as the cellar extended into O street from 12 to 15 feet, and from 50 to 65 feet in length; that this excavation was walled up a little above the surface of the ground, being about four inches above at the north-east corner, and nineteen at the north-west; that as this excavation extended across the sidewalk a temporary fence was erected across the sidewalk on the east and west sides by nailing up two six or eight inch boards at each of said places; that a similar fence was constructed on the north side, the posts consisting of 2x4 scantling 5 feet in length, driven into the ground about 18 inches, and two 6 or 8 inch boards nailed on to

these posts. There were two openings left for carrying material into the building, one being near the north-east corner, and the other near the north-west corner. It is claimed that these openings were closed at night, but this is denied.

The distance this fence was from the excavation is not certain, some of the witnesses saying it was close to the wall of the excavation, while others state that it was three feet away. A temporary sidewalk from three to four feet in width was constructed around this excavation, laid on 2x4 inch scantling, and the fence posts were nailed to the south side of the temporary walk. The St. Charles Hotel was immediately west of the excavation in question, and the fence around it commenced on the east side of the hotel. There was a dim light in front of the hotel, apparently at the outer edge of the sidewalk, showing the name of the hotel. O street is one of the public streets of Lincoln, the Union Pacific depot being located at the foot of the street, and there being a very large number of persons passing and repassing along said street. On the 24th of November, 1881, the plaintiff below, being a stranger in Lincoln, left the Oriental Hotel in said city about 7 o'clock in the evening to go to the Union Pacific depot. On inquiring the way he was directed to go north to O street, thence west along said street to the depot. The night seems to have been very dark, and the plaintiff not knowing of the obstruction in question, while a short distance east of the same, two men passed on to the sidewalk about 40 feet in front of him, going in the same direction that he was, and supposing them to be more familiar with the streets than he was he followed them, being guided by their voices. As the two persons named came in front of the St. Charles Hotel he observed that they passed between the light in front of the hotel and that building, being considerably to his left, and he believing that he was too far into the street, stepped to the left and fell into the ex-

cavation in question, a depth of 7 feet 3 inches, and sustained serious injuries by which he was rendered incapable of performing any labor for a number of months. The verdict is not too large if the city is liable. The attorneys for the city asked the following instruction, which was refused:

"The jury is instructed that before the plaintiff can recover in this action it is incumbent upon him to show that no negligence of his contributed to the injury, damages for which are claimed herein, and that upon the plaintiff rests the burden of proof of the absence of such contributory negligence."

There is no uniform rule established in regard to the party upon whom rests the burden of proof of contributory negligence. In some of the states it is held that where the plaintiff can prove his case without showing contributory negligence, the burden is on the defendant. In others, that the plaintiff's care is not presumed, and he must disprove contributory negligence. In some of the cases it is held that there is no presumption as to care, or the want of it; and that if the facts show a duty of care, the plaintiff must give some evidence that he exercised it, otherwise not. The question is presented to this court for the first time.

In *Randall v. N. W. Tel. Co.*, 54 Wis., 140 (11 N. W. R., 419), it was held that contributory negligence was purely matter of defense, citing *Milwaukee R. R. Co. v. Hunter*, 11 Wis., 160. *Hoyt v. Hudson*, 41 Id., 105. *Prideaux v. Mineral Point*, 43 Id., 524. *Bessex v. R. R. Co.*, 45 Id., 477. And this seems to be the rule of the United States courts. *R. R. Co. v. Gladmon*, 15 Wall., 401. *I. R. R. Co. v. Horst*, 93 U. S., 291. See also *Kelly v. C. & N. W. R'y Co.*, 19 N. W. R., 521.

The New York rule seems to be, that if the evidence shows the plaintiff's presence or conduct, or that of his servant or agent, to have been involved in the disaster or

its causes, then he must disprove contributory negligence. Abbott's Tr. Ev., 596. See the New York cases cited in 18 Albany Law Journal, 144, 164, 184; and this rule is recognized in Massachusetts. *Parker v. Lowell*, 11 Gray, 353.

In Pennsylvania it is held that contributory negligence is matter of defense, and ordinarily the burden of proving it is on the defendant. *Mallory v. Griffey*, 85 Penn. St., 275. *Penn. Canal Co. v. Bentley*, 66 Id., 30. *Penn. R. R. Co. v. McTighe*, 46 Id., 316. *Beatty v. Gilmore*, 16 Id., 463. And in Vermont. *Hill v. New Haven*, 37 Vt., 501. *Lester v. Pittsford*, 7 Id., 158. And the same rule prevails in New Jersey. *Durant v. Palmer*, 4 Dutch., 544. There are many other cases, both in support of and against the rule, to which we need not now refer. In view of the conflict in the authorities we are compelled to adopt such rule as may seem most consonant with justice. This being so, there certainly is no presumption that the plaintiff was negligent; we therefore hold the rule to be that if the plaintiff can prove his case without showing contributory negligence, it is a matter of defense to be proved by the defendant. Abbot Trial Ev., 595, and cases cited.

There is nothing in the testimony on behalf of the plaintiff tending to show that he was guilty of contributory negligence. The burden of proof of that fact, therefore, was on the defendant. The court did not err, therefore, in refusing to give the instruction in question. And no contributory negligence being shown, the plaintiff was entitled to recover for his injuries if the proper precautions were not taken to prevent persons passing along the temporary sidewalk adjoining the excavation from falling into it. As to the liability of the city in such case there is no doubt.

In *Palmer v. Lincoln*, 5 Neb., 136, it was held that where the obstruction results directly from the acts which the contractor is required to do, the person who employs

him is equally liable for the injury. *Robbins v. Chicago*, 4 Wall., 679. *Storrs v. Utica*, 17 N. Y., 108. *Scammon v. Chicago*, 25 Ill., 424. That is, where the contract itself requires the performance of a work intrinsically dangerous, however skillfully performed, the party authorizing the work is regarded as the principal. Dillon on Mun. Cor., § 792. And any person traveling in a public street has a right to be absolutely safe, if he exercise ordinary care, against all accidents arising from obstructions or imperfections in the street. If a person is authorized by the proper authorities to make an excavation in the street, he is bound at his peril to protect the same, and keep it properly guarded. He must have the walk or street in as safe a condition as it would be if the excavation had not been made. The city cannot exempt itself from liability resulting from the unsafe condition of the streets, and has no authority to authorize another to make them unsafe. *Irvine v. Wood*, 4 Robt., 138. *Cosgrove v. Morgan*, 18 N. Y., 84. *Hart v. Mayor*, 9 Wend., 607. *Dygert v. Schenk*, 23 Wend., 446.

In the case last cited the defendant dug a raceway across the highway on his own premises to conduct water, and erected a bridge over the race. The plaintiff's horse fell through by the breaking of a plank, and was injured. The court say (page 447): "All the public could require was that he should make and keep the road as good as it was before he dug the ditch. That he accomplished by building a substantial bridge originally, which did not get out of repairs for a number of years. The road, however, in the end proved to be less safe than it was when the bridge was first built, certainly less so than before the ditch was dug. In suffering this the defendant came short of his obligation to the public," etc. *Robbins v. Chicago*, 2 Black., 418. Wood on Nuisance, 276-277, and cases cited in notes. We have no doubt of the liability of the city in such case. We see no error in the instruc-

City of Lincoln v. Walker.

tions of the court, and it is evident that substantial justice has been done.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SAME v. SAME.

Negligence: EXCAVATION IN STREET. A person who passes along a public street open to travel has a right to presume that it is in a reasonably safe condition, and if in the exercise of reasonable care he falls into an excavation in the street, which was not adequately protected, and sustains injuries, he may recover therefor in a proper case.

REHEARING of foregoing case.

C. E. Magoon and *O. P. Mason*, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendant in error.

MAXWELL, J.

A motion for a rehearing was filed on behalf of the city, upon the filing of the foregoing opinion, accompanied by an elaborate brief, in which the principal questions involved in the case were ably discussed and presented, and a rehearing was granted and the case again argued and submitted. The facts are stated in the former opinion and need not be repeated here. The chief justice, in a lengthy and able dissenting opinion filed herewith, has stated a considerable portion of the evidence and copied the instructions given and refused. It is unnecessary, therefore, to copy the same here.

It will be seen that the instructions of the court were very favorable to the city, and that all the instructions asked were given in other instructions, particularly No. 9 asked by the city and refused.

If, on the facts proved in this case, a plaintiff was unable to recover, the effect would be virtually to exempt municipal corporations from liability where excavations were made in the sidewalks and left without sufficient protection. If such a change in the law is made it should be done by the legislature, and not the courts. The rule as to contributory negligence adopted by this court is conceded in the dissenting opinion to be the correct one, and as the evidence on the part of the plaintiff below not only failed to show contributory negligence on his part, but tended to negative the existence of such negligence the burden of proving the same devolved on the city. The instruction asked, therefore, was properly refused.

It is very clear that justice has been done. The undisputed testimony shows that the plaintiff below, while walking along O street, on his way to the U. P. depot, between 7 and 8 o'clock in the evening, fell into the excavation in question and sustained injuries of a serious character, and which he did not recover from for several months. The clear weight of testimony also shows that the excavation on the whole or a considerable part of the north side of the lot in question was left unguarded—without barriers to prevent persons from falling into the same. A person who by night or day passes along a public street open to travel has a right to presume that it is in a safe condition; and if, in the exercise of reasonable care, he falls into an excavation in the street which was not adequately protected, and sustains injuries, he may in a proper case recover therefor. *Barnham v. Boston*, 10 Allen, 290. *Stinson v. City of Gardiner*, 42 Me., 248. *Williams v. Clinton*, 28 Conn., 264. *Tolland v. Willington*, 28 Id., 578. We ad-

here to our former opinion, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

REESE, J., concurs.

COBB, CH. J., dissenting.

Being unable to agree with the majority of the court in the opinion at which they have arrived in this case, and in view of the importance of the questions involved, and the growing frequency of actions for injuries of this kind, seriously threatening the value of property within the limits of our municipal corporations, I present my views of the law of the case somewhat more at length than is usual in dissenting opinions.

This cause was heard at the January term, 1884, when the judgment was affirmed. An application for a rehearing on the part of the plaintiff in error having been allowed, the cause was thoroughly reargued at the present term.

The action was for damages sustained by the plaintiff by reason of his falling into an area of a new building in course of construction, which, it is alleged, had been negligently left unguarded.

There was evidence tending to prove that at the time of the injury there was in front of the new building at the corner of O and Eighth streets, on the south side of O and west side of Eighth, opposite the Metropolitan hotel in the city of Lincoln, an excavation (area) extending along the O street front of the building, about 65 feet in length, 18 or 20 feet in breadth, and from 8 to 9 feet in depth. There was an area wall around this excavation, extending from the bottom to the top of the ground, and five or six inches above it, at or near the west end (where the injury occurred). One witness testified that a few evenings previous

to the night of the injury he noticed the excavation and the guards around it; that the guards extended across the east end, and went part way down the side of O street, the north side across the opening, and went across the west end. The board extended down the side about 16 feet—common fence board. The one at the west end ran across to the corner of the St. Charles hotel; and extended around the corner 7 or 8 feet, perhaps. The examination of this witness was continued as follows:

Q. What was the condition as to the remainder of the way at such times along O street?

A. There was none outside of those mentioned, that I saw.

Q. No guards or boards?

A. No.

Q. What was the distance of that opening where there was no guards or boards along O street?

A. Perhaps 40 feet—40, I should judge.

Q. At such time was the area wall erected?

A. Yes, sir.

Q. And the cellar dug?

A. Yes, sir.

Q. Do you know the condition of that place on the evening or after night-fall on the evening of the 24th of November, or Thanksgiving evening of 1881, if noticed, the night he was injured?

A. It was about the same as it had been two or three days previous.

Q. Did you pass by on that evening?

A. Yes.

Q. How often, if more than once?

A. I came by that evening as I came from work.

Q. That evening?

A. I did not pass by as I remember of; I was out there.

Q. What time in the evening was it you passed by and saw that?

A. Just at dusk.

Q. Was it after or before the men had quit work on the building in and around there?

A. After they had quit work.

Q. Were you in and about the place when the plaintiff was injured?

A. Yes, sir.

* * * * *

Q. What was the condition of that evening, as to light or dark?

A. It was a very dark evening.

Q. What time of the evening was it?

A. I think it was about eight o'clock.

Q. Could you see the man in the cellar?

A. They had a light when I went out; took a lamp with them.

* * * * *

Q. About how far from the north-west corner was it where this man lay; how far from the west end would you judge he was laying that evening?

A. About twenty or twenty-five feet.

Q. Did you notice as to the condition of the guards that evening along opposite on O street from where he fell in?

A. There was none there.

* * * * *

Q. What kind of barriers had been kept along there?

A. There had been posts set between the ground and the stone wall, and boards nailed up against the posts.

Q. Had there been a temporary walk up to the barrier on the outside?

A. Yes.

Q. How close was that walk and temporary barrier to that excavation?

A. Close up to the stone wall.

The plaintiff testified in his own behalf as follows:

Q. On what day did you arrive in the city of Lincoln?

A. I arrived here about four o'clock on the evening of the 24th of November, 1881.

Q. You know the place in controversy, where you received your injuries? State where it is located.

A. It is located on O street, a little west from 8th street, I think, and on the south side of O street.

Q. State when was the first time you ever passed along that side of O street at or near the place where this excavation was.

A. That was the first time I passed along O street—along that part of it. I had been on O street, that evening before dark, from the corner where that furniture store is kept on the west side of Government square. I had been east on Eighth street (evidently meaning O street) to about Sixteenth street, where I turned south.

A. Had you before that time been along the south side of O street, between Seventh and Eighth streets, where this excavation was?

A. I never had; had never before that time seen that excavation.

Q. State at what time in the evening you approached that excavation, and in what direction?

A. It was not far from seven o'clock, as I can remember, and I approached—I left the Oriental Hotel with the instructions there, and was attempting to go to the Union Pacific depot. They told me to go straight north on that street till I got to O street, and when I got there I was to go directly west, when I would reach the Union Pacific depot, to which my daughter was coming; I expected her home. They told me the streets were by letters. I asked if that was O street; they told me it was, and I went directly west.

Q. On the south side of O street?

A. On the south side of O street.

Q. About what kind of a night was it as you were going down there?

A. It was dark and somewhat foggy, as I remember it.

Q. Describe to the jury just how you were precipitated into that excavation. You are the party, are you?

A. I am; there were two gentlemen walking in front of me, perhaps forty feet, and it being quite dark, and supposing that they understood the streets of the town better than I did, was following, as it were, very fast, the sound of their footsteps on the walk.

Q. Which way were they going?

A. West, on O street. There was a light some forty or fifty feet west of where I was, a dim light upon a post, and I observed that these men forty or fifty feet ahead of me were inside the light, next the building. My supposition was that I had got out of the street, and that it was quite dark. I was getting out of the beaten path. I turned to the left, or attempted to turn to the left, and this foot was going on nothing (indicating the left foot). My impression was that I had stepped into a hole, and I attempted to recover myself, I suppose, by my throwing this foot round (the right), and I continued to go down, and landed on the right foot, and then I fell in this position on the right hand (witness illustrates the position), and my head hit something hard about here, above the left temple. The swelling appeared here where my hand is, after; I cannot tell for how long a time. I have no recollection after my head was hit that I lay—I thought for quite a length of time; or I cannot tell anything about the length of time; it might have been a long or a shorter time, but I was quite chilled when I came to myself, and I was not chilled when I fell. My first recollection is, that when I came to myself I was hunting for my hat. I got my hat, and looked above; I could see the light; then I remembered what I was doing when this thing happened, and I could see that I was in a cellar, or some place I was in; I knew it was impossible for me to get out of there, and I began to halloo for help, and I continued so for some time.

* * * * *

Q. State what guard or barrier there was, if any, between the walk and the place where you fell into the excavation, on the night you received the injury.

A. There was none.

There was other testimony, but I have quoted sufficient to show the application of the instructions given and refused upon the two points of the negligence of the city or of the builder in leaving the area open and unguarded, and the contributory negligence of the plaintiff in walking into it.

The following instructions were given to the jury by the court on its own motion:

"I. If you find the injury to the plaintiff complained of was occasioned by the negligence and want of ordinary care of defendant, it then devolves upon the defendant to satisfy you that the negligence and want of ordinary care of the plaintiff contributed thereto to prevent a recovery in the case.

"II. If you find defendant did not use ordinary care and diligence in and about the excavating referred to, and in guarding and protecting the same, and in the use of the street, and you find the plaintiff was injured by want of such ordinary care of the defendant, he cannot recover in this case, if you find the plaintiff in passing and walking along the street or sidewalk therein was guilty of negligence and want of ordinary care, and that such negligence and want of ordinary care on the part of the plaintiff contributed to the injury received, or claimed to be received, by the plaintiff.

"III. Ordinary care on the part of plaintiff is that degree of care and diligence which persons of ordinary prudence would usually use under the circumstances in which the plaintiff was placed at time of falling into the excavation in question.

"IV. A slight want of care and diligence on part of

plaintiff will not prevent a recovery in this case, provided the injury complained of was occasioned by want of ordinary care and diligence of the defendant.

"V. Ordinary care required on the part of defendants is that degree of care which a man of ordinary prudence would usually use under the same circumstances in excavating and using the street in question and guarding and protecting the same so travelers would not be injured during the excavation and use of the street.

"VI. If you find the defendant used ordinary care in and about the excavation and use of the street in question, and guarding and protecting the same, then you will find for the defendant."

The following instructions were given at the request of the plaintiff:

"I. The court instructs the jury that the defendant, the city, is bound by law to use reasonable and ordinary caution, and care, and supervision, to keep its sidewalks and streets in a safe condition for travel by night as well as by day, and if it fails to do so it is liable for injuries sustained in consequence of such failure, provided the party injured is himself exercising reasonable and ordinary care and caution; and the fact that the plaintiff may in some way have caused the injury sustained by him will not prevent his recovery, if by ordinary care he could not have avoided the consequence to himself of the defendant's negligence.

"II. If the jury believe from the evidence that the corporate authorities of the city of Lincoln did not exercise reasonable and ordinary care and supervision over that portion of the streets and sidewalk where the injury in question is alleged to have occurred, to keep it in good and safe condition, and by that means allowed it to become defective and unsafe; and if the jury further believe from the evidence that the plaintiff in attempting to walk along that portion of the street and sidewalk by reason of such

defects was injured, and has sustained damage thereby, as charged in the petition, and that he was at the time exercising reasonable and ordinary care and caution to avoid such injury, then the defendant is liable, and the jury should find for the plaintiff.

"III. The court instructs the jury that while the city has a right to permit lot owners, for the purpose of making improvements, to make excavations or holes in the public streets or sidewalks, yet when it does so it is bound to take notice of the character of such holes or excavations, and the condition in which the streets or sidewalks are left, and if such excavations are dangerous, it is the duty of the city to put up, or cause to be put up, and use reasonable care to keep up, guards or notices of some kind by day, and lights or guards by night, to warn travelers of the condition of the street or sidewalk at such place, and such duty cannot be shifted upon the lot owner or person making the excavation.

"IV. The court instructs the jury that when an excavation has been made in the streets or sidewalks of a city, without the consent of the public, and it is left unguarded and unprotected for such a length of time that the public authorities of the city, in the exercise of reasonable care and prudence, ought to have discovered the fact, then actual notice to such authorities of the condition of the street and sidewalk is not necessary to hold the city liable for injury sustained by a person in consequence of the dangerous condition of the street or sidewalk, if he is himself using reasonable and ordinary care to avoid such injury. [Modified as follows:] 'And does not by his own negligence directly contribute to produce the injury complained of.'

"V. The jury are further instructed that reasonable and ordinary care and caution required of the plaintiff, as mentioned in these instructions, means that degree of care and caution which might reasonably be expected from an

ordinary, prudent person under the circumstances surrounding the plaintiff at the time of the alleged injury; that the plaintiff was bound to exercise only ordinary care, and that slight negligence will not defeat his recovery for an injury received in consequence of a defect in the street. If the city authorities were guilty of negligence and want of ordinary care in permitting a dangerous excavation to be made, and remain unprotected in a publicly traveled street. [Modified as follows:] 'And you find the plaintiff's negligence did not directly contribute to produce the injury complained of.'

"VI. If the jury believe from the evidence that the plaintiff was injured by reason of the defendant's negligence and want of ordinary care in failing to keep its sidewalks and streets in reasonably good repair, or negligently allowing the same to remain in an unsafe condition, as explained in these instructions, and without fault on his part, and that he has sustained damage, then the jury has a right to find for him such an amount of damages as the jury believe from the evidence will compensate him for the personal injuries so received, and for his loss of time in endeavoring to be cured, and his expenses necessarily incurred in respect thereto, if any such loss or expenses have been proved, and also for the pain and suffering undergone by him, and any permanent injury, if any such has been proven."

The following instructions, prayed for by the defendant, were given:

"I. While the plaintiff had a right to presume that defendant's sidewalks were in good repair, and was only bound to exercise ordinary care, yet if the jury find from the evidence that the plaintiff was apprised and knew of the excavation in the sidewalk, by a barricade across the same, or otherwise, before receiving the alleged injury, then the presumption of good repair ceased, and you will find for the defendant, unless you further find that the plaintiff thereafter exercised extraordinary care and precaution, and

was so exercising extraordinary care and precaution at the time of this alleged injury.

"II. If you find from the evidence that the plaintiff was apprised of the excavation by the barriers placed across the sidewalk just before receiving the alleged injury, you will find for the defendant, unless you further find that the subsequent negligence of the plaintiff in no way contributed to the alleged injury.

"III. The mere fact that the defendant city permitted an excavation to be made and exist in the sidewalk was not of itself negligence, but suffering it to be made and exist without suitable protection would be negligence, and if the jury believe from the evidence the excavation was, on the evening of the day of the alleged injury, surrounded by a suitable, substantial protection, or barricade, then you will find for the defendant, unless you further find that the city was notified that said barricade, or a portion of it, had been removed and had sufficient time to repair the same before the alleged injury occurred.

"IV. The jury are instructed that, while it was the duty of the city to keep its sidewalks in repair for safe passage, yet it had the right to permit the excavation to be made under the sidewalk, so long as it did not interfere with the public interest, and the city would only be liable in case of negligence in permitting the excavation to remain open and unprotected by suitable barriers. And if the jury believe from the evidence that the excavation into which the plaintiff claims to have fallen and received the alleged injury was surrounded by barriers sufficient to apprise a person exercising ordinary care while passing along the sidewalk, of the excavation, then you will find for the defendant.

"V. The plaintiff was bound to exercise ordinary care for his personal safety while passing along the sidewalk of the defendant, and if the jury believe from the evidence that plaintiff's slight negligence contributed to the alleged injury, then you will find for the defendant. [Modified

City of Lincoln v. Walker.

as follows:] 'Although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence—if you find there was negligence on part of defendant which caused the injury to plaintiff complained of—he, the said plaintiff is entitled to recover in the case.'

"VIII. The jury are instructed that ordinary care is that degree of ordinary care which a person of ordinary prudence is presumed to use under the particular circumstances to avoid injury. It must be in proportion to the danger to be avoided and the fatal consequences involved in its neglect."

The following instructions, prayed by the defendant, were refused by the court:

"If the jury believe from the evidence that there was a slight want of ordinary care on the part of the plaintiff, which slight want of ordinary care contributed to the injuries complained of, the plaintiff cannot recover, unless the jury further find the negligence on the part of the defendant was so gross as to justify the jury in finding that the alleged injury was caused by the willful and malicious act of the defendant or its agents or servants.

"VII.* The jury are instructed as a matter of law that if the plaintiff was guilty of any negligence, however slight, which contributed to the injury complained of, he cannot recover. [Modified as follows:] 'Provided such negligence directly contributed to the injury complained of.'

"IX. The jury are instructed that before the plaintiff can recover in this action it is incumbent upon him to show that no negligence of his contributed to the injury damages for which are claimed herein, and that upon him, the plaintiff, rests the burden of proof of the absence of such contributory negligence."

* NOTE.—The writer of this opinion is unable to tell from the record whether the above instruction, No. 7, was given as modified or not.

The jury found for the plaintiff, and assessed his damages at \$1,200.

A motion for a new trial was overruled.

The opinion of the court upon the hearing of this case was chiefly directed to the consideration of the question of the burden of proof of contributory negligence on the part of the plaintiff, under the pleadings and evidence in the case. And the argument of counsel at the rehearing was addressed principally to this point.

As it is conceded by the writer of the original opinion in the case that there is a conflict of authority as to whether contributory negligence on the part of the plaintiff is a matter to be disproved or negated by the plaintiff in presenting his case, on pain of being non-suited, or whether it is a matter of defense, strictly, which the plaintiff may ignore, unless presented by the defendant, and the court having stated the rule which it was thought best to follow in such conflict of authority, it will be adhered to, unless upon careful review it shall be found illogical, or calculated to lead to injustice. The rule thus stated is as follows: "That if the plaintiff can prove his case without showing contributory negligence, it is a matter of defense to be proved by the defendant."

This rule is stated by the supreme court of the United States in the case of *Indianapolis & St. Louis Railroad Company v. Horst*, 93 U. S., 291, in the following language: "Where the evidence on the part of the plaintiff does not tend to establish contributory negligence on his part, and the court charged that the burden of proving it rested on the defendant, and that it must be established by a preponderance of the evidence, the charge was not erroneous." The supreme court of Wisconsin in the early cases of *Chamberlain v. The Milwaukee and Mississippi Railroad Co.*, 7 Wis., 425, and *Dressler v. Davis*, Id., 527, the latter case cited by counsel for defendant in their brief, held that "In general, where a party sues for an in-

jury to him, occurring through the alleged carelessness or negligence of the defendant, he must show that he was not guilty of negligence on his part." This rule was adhered to in the case of *Milwaukee & Chicago Railroad Company v. Hunter*, 11 Id., 167, but the reasoning of the opinion by Judge Paine is strongly against it. The next case in which the point was considered by that court was that of *Achtenhagen v. The City of Watertown*, 18 Id., 331, in which the rule is materially changed, if not reversed. I quote from the syllabus. "In an action for an injury sustained through the negligence of the defendant the plaintiff is not bound in the first instance to show that he himself was not guilty of negligence, which contributed to the injury, but it is enough if the proof introduced and the circumstances attending the injury established *prima facie* that it was occasioned by the negligence of the defendant. But if the plaintiff's own evidence raises an inference of negligence against himself, he must, in order to establish a *prima facie* case, show that he was guilty of no negligence."

In the case of *Hoyt v. The City of Hudson*, 41 Id., 105, the same court stated the rule as follows: "In an action for injuries from negligence, where there is nothing in plaintiff's evidence tending to show contributory negligence, the *presumption* is against it, and the burden of proof is upon the defendant. If contributory negligence conclusively appears from plaintiff's own evidence, he will be non-suited, while if the evidence merely *tends* to show such negligence, the question will be for the jury."

The rule thus laid down is explained and adhered to in *Prideaux v. The City of Mineral Point*, 48 Id., 513. The court, by C. J. Ryan, says, in speaking of the said case: "The rule intended in that case is, that a plaintiff giving evidence of the negligence of the defendant and the resulting injury to himself, without showing any contributory negligence, is bound to go no further—he is not required to negative his own negligence. If, however, the

plaintiff in proving the injury shows contributory negligence sufficient to defeat the action, he disproves his own case of injury by the negligence of the defendant alone. If the plaintiff's evidence leaves no doubt of the fact, his contributory negligence is taken as matter of law to warrant a non-suit. If the plaintiff's evidence leaves the fact in doubt, the evidence of contributory negligence on both sides should go to the jury."

The rule as above explained is adhered to in *Randall v. The Northwestern Telegraph Co.*, 54 Id., 140, and in *Kelly v. Chicago & N. W. Ry. Co.*, 19 N. W. Rep., 521.

This question came before the supreme court of Missouri in the case of *Thompson v. The North Missouri Railroad Company*, 51 Mo., 190. In that case the circuit court had sustained a demurrer to the petition because there was no averment that the plaintiff at the time was exercising due care, and was himself without negligence contributing to the injury. The judgment was reversed, the court in the opinion saying: "Negligence on the part of the plaintiff is a mere defense to be set up in the answer and shown like any other defense, though of course it may be inferred from the circumstances proved by the plaintiff upon the trial."

While there are many cases holding to the contrary, it cannot be denied that the rule laid down by this court in the original opinion is sustained by sufficient authority, is sufficiently logical and reasonable. And I think it free from the charge of tending to injustice.

Assuming the above conclusion to be correct, I think the instructions to the jury in the main correct upon the subject of contributory negligence and the burden of proof.

Counsel for plaintiff in error contends that by the giving of instruction No. 1, the court withdrew from the consideration of the jury the evidence of plaintiff below, which tended to show a want of ordinary care on his part.

As we have seen in the case of *Prideaux v. The City of Mineral Point*, *supra*, a case upon which this court relied among others in the conclusion to which it arrived upon the point above considered, the learned court say, in explaining the rule in *Hoyt v. Hudson*, *supra*: "It does not put the *onus probandi* in all cases upon the defendant, as the learned judge appears to have stated. The rule intended in the case is, that a plaintiff giving evidence of the negligence of the defendant and the resulting injury to himself, without showing any contributory negligence, is bound to go no further. He is not bound to negative his own negligence. If, however, the plaintiff in proving the injury shows contributory negligence sufficient to defeat the action, he disproves his own case of injury by the negligence of the defendant alone."

However the instruction complained of might have been intended by the judge who gave it, or might be understood by a lawyer, I think the jury may well be supposed to have understood it to mean that if they believed the statement of the plaintiff as to the facts and circumstances of his injury, as given in his evidence, they must then, in order to defeat his recovery, find from the evidence given on the part of the defendant "that the negligence and want of ordinary care of the plaintiff contributed" to the injury. This instruction can only be sustained, if at all, upon the assumption that as matter of law there was nothing in the evidence on the part of the plaintiff that tended to show contributory negligence on his part.

The plaintiff, according to his own evidence, was in a strange city, and in a part of it where he had never been before. The night was so dark that his eyesight did not enable him to keep on his way, and so he followed the sound of the footsteps and voices of two men going the same way, and some forty feet ahead of him. I quote further from the plaintiff's testimony on his cross-examination, counsel taking a plat and referring to the same in the examination.

Q. When you came down here did you not find a walk turning off there to go round this excavation?

A. It may have done so.

Q. Don't you know it did so?

A. It was dark, I could not say, and I was not back there again.

Q. But you was walking here when you took this to be the front of the building?

A. If this is O street I came down here.

Q. This is the street running here; this is supposed to be the street laying here; that is the area wall standing there—that black wall; that is the west side of the building—that point there; and this is the east side.

WITNESS. This is where the St. Charles is?

MASON. Yes.

Q. Where were you when you fell off this building. This is the east end of the cellar here; this is the sidewalk laying out here (marked sidewalk); this is the temporary walk; that is the area wall; this is O street; and this out here is O street. Where were you when you fell off?

A. I must have been fifteen feet from that corner of the cellar, or somewhere about it. That would make it there, would it not? (indicating on the plat to the north-west corner.)

Q. You think you was more than fifteen feet?

A. I cannot tell.

Q. Which way were you traveling?

A. I was going west.

Q. Well, now; when you struck this barrier up here, you came down here and struck this barrier. There was a barrier, was there not, there? Did you not see any barrier there? When you came down O street you came on the sidewalk down O street above here?

A. I did.

Q. Was it downhill or uphill?

A. I think it was downhill a little.

Q. Did you observe this barrier when you struck it here?

A. I did not.

Q. You swear there was not a barrier there, or that you did not see any.

A. My recollection is I turned a little to the right, following these two men.

Q. Where were the two men?

A. They were in front of me about forty yards.

Q. What makes you think about forty yards?

A. I could hear them talking—the sound of their voices, and the sound of their feet on the sidewalk.

Q. Could you measure the distance by the sound of voices ahead of you?

A. Certainly not.

Q. And could you measure the distance by the sound of their feet on the sidewalk?

A. It would give me an idea of the distance.

Q. Could you see them at all?

A. I think I could see the outline of them.

Q. Then you were following the outline of them, were you?

A. And the sound of their voices and their feet.

Q. These two men you were following, which way were they going?

A. They were going west.

Q. At the time were they in the light of this lamp down here, or of a lamp?

A. They were some distance on there to the left of me near to the lamp and the St. Charles Hotel.

Q. Between the lamp and building?

A. Yes.

Q. And when you walked off the walk you struck a straight line for them.

A. I turned a little to the left in order to go where the men were; I thought I had got too far in the street.

Q. You turned to the left in order to go where these men were?

A. Yes, sir.

Q. When you turned to the right up here were you following these men, you swore you were turning to the right here. Now were you following these two men?

A. I was following the two men, supposing they knew the streets better than I did, I followed after them.

Q. Then you were just following after these two men—that is the fact, ain't it?

A. I was governing my motions somewhat by theirs. I tried to explain in answer to —

Q. Never mind—answer me now. I want you should tell me when you turned here if you turned in consequence of this barrier, or you turned simply to follow these men?

A. My recollection is I noticed there was a turn in the street there. At the same time I followed the men round, I noticed the men turned, and I followed them, and was governing my motions by theirs.

Q. The same was true when you turned here (indicating on the plat), you was governing your motions by theirs?

A. I remember having the impression that I had got out on the street rather, because they were further to my left; I having that impression.

Q. What else do you remember?

A. I remember following.

Q. Which way was you looking? You had your eyes on these men. You remember of seeing them, don't you?

A. Yes, I was looking obliquely to the left.

Q. You were looking at these men, weren't you?

A. I was looking at them. I could see the dim outline of them at the time, and followed the men.

Q. Obliquely to the left?

A. I could hear the sound of their voices, and I thought I saw the outline of them inside of that lamp.

Q. That was at the time you followed. Could you not at that time have seen the walk if you had looked down on the walk?

A. I don't think I could.

Q. Will you swear you could not?

A. I don't think I could see the walk.

Q. Did you not answer or swear a few moments ago that you could see the dim outline of these men for forty feet?

A. I said by the lamp I could. I could hear their voices, and hear the sound of —

Q. Did I not ask you what made you turn up here, and you told me you did not see any barrier, but you saw the dim outline of these men and you were following them?

A. My recollection is not clear about that. I am confident that I was following them more from the sound of their voices and the sound of their feet than anything else.

Q. But you did not testify, or your recollection is not clear as to what you did testify on that point. Is that what you mean to say? I ask you if you did not testify to me that you was following them because you could see the dim outline of them? After I pressed you about following from the walk where you stepped off, did you not tell me you could see the dim outline of them?

A. I don't remember.

Q. Are you willing to swear that if you had been looking down at the plank that night, that you could not have seen the plank?

A. I don't think I could along here. I might if I had been down by the lamp.

Q. Are you willing to swear that you could not have seen the plank in any place—without a lamp, I mean?

A. Not definitely.

Q. Was it any lighter when you left the Oriental Hotel than it was when you fell off?

A. I don't remember.

* * * * *

Q. Now when you did fall into the cellar, you turned sharply to the left, did you, to go in the direction of these men?

A. I turned a little to the left—in that direction.

Q. Did you turn obliquely to the left? What I mean is, did you turn sharply and walk directly in that direction, or did not walk obliquely to the left gradually? Did you make a right angle?

A. I made one step in that direction and that foot went down.

* * * * *

Q. Were you on the ground or on the plank when you took that step?

A. I could not be certain.

* * * * *

Q. And you took that step in order to head in the direction of these men you saw?

A. I did.

Q. And these men you saw were between the St. Charles Hotel and the light?

A. They were.

Q. And you turned in that direction in order to go directly in the direction where these men stood? That was your motive, was it not?

A. I made the step to the left, thinking I had got too far into the street, and I thought that by seeing the men so far to my left.

Q. And they were the dogs, if such I may call them, that made you turn off in that direction?

A. They had something to do with it, yes.

* * * * *

Q. Do you still insist on swearing that that night you did not see a barrier on here?

A. I may have seen them.

Q. Do you still insist on swearing that you saw no guard there (counsel pointed to the eastern runway on the blotting-paper plat)?

A. I don't remember of—I don't remember to have seen any guard there.

Q. Do you still insist upon swearing that there was no guard there? Do you say you might have seen that barrier there (indicating on the plat the end of Eighth street)?

A. I remember this, that I turned to the right there. I may have seen a barrier, but I don't remember it.

Q. You say you may have seen the barrier?

A. I remember turning to the left, and may have seen an obstruction there—or to the right I mean, in place of the left.

* * * * *

Q. You did not see any poles or buildings there at all, did you?

A. I don't remember.

Q. You did not see that house in the street at all, against which the first barrier was nailed (taking a plat and referring to it)—this one? You did not see that house there, did you?

WITNESS—This is the sidewalk running down there.

MASON—Yes, this is the street off here.

A. I think I did see a house there.

Q. In the street?

A. I think so.

Q. You think you saw this barrier?

A. Yes.

Q. Did you see the Metropolitan lights across the street?

A. I don't remember, but I think I saw lights. I do not remember for certain, but I think I saw lights on the opposite side of the street.

Now can it be said as matter of law that there is nothing in the above testimony of the plaintiff which tends to

show contributory negligence on his part? The court told the jury in the first instruction prayed by the plaintiff in error, that if the jury should find from the evidence that plaintiff was apprised and knew of the excavation in the sidewalk by a barricade across the same, or otherwise, before receiving the alleged injury, then the presumption of good repair ceased, and that they should find for the defendant, unless they should further find that the plaintiff thereafter exercised extraordinary care and precaution, and was so exercising extraordinary care and precaution at the time of the alleged injury. Had this instruction not been entirely nullified by the first instruction above quoted, could the jury have found that the plaintiff was in the exercise of extraordinary, or even of ordinary care and precaution, when as testified by him he had seen the barrier across the sidewalk, and having turned to the right and pursued his course in or near the middle of the street for a short distance, he turned sharply to the left and walked into the excavation without feeling his way so as to avoid the same? I think not. Again, I do not think that the jury, had they considered the question before them, could have found the plaintiff to have been in the exercise of extraordinary, or even of ordinary, care and caution, when through the streets of a strange city on a dark night he followed the dim outline and the sound of the voices and footfall on the sidewalk of two strange men. Certainly he could shift no part of his own duty to the shoulders of these two men.

But the real point is, did the testimony of the plaintiff tend to show contributory negligence on his part? If so, it was matter proper for the consideration of the jury, and should not have been taken from them, as I think it was by a construction of the first instruction, which I think the jury were warranted in placing upon it, and actually did place upon it.

Read together, the two instructions (No. 1 of instruc-

tions given by the court on its own motion, and No. 1 of instructions given at the request of plaintiff below) not only nullify each other, but they do withdraw from the consideration of the jury the circumstances detailed by the plaintiff, which I think tend to prove contributory negligence. Negligence is the absence of care, and *vice versa*. Extraordinary care is, therefore, the absence of slight negligence, and the jury are told in effect that it being proved that the injury resulted from the negligence of the defendant, the burden devolved upon the *defense* to show by evidence offered on its part that under the circumstances the plaintiff was guilty of at least slight contributory negligence. To so instruct them was to direct their attention upon this branch of the case solely to the defendant's testimony, or rather lack of testimony, and to advise them that if from scanning that alone, they did not find proof of slight negligence on the part of the plaintiff, the latter would be entitled to recover. Such a rule, if carried to its logical limits, would leave a defendant powerless, or at the mercy of the individual opinion of the presiding judge in every not extreme case, in which he is obliged to depend upon a cross-examination of the plaintiff and his witnesses for a disclosure of his adversary's negligence, causing or contributing to the injury complained of. Such, in an extreme case, would probably not be contended for as being the law, but whatever rule is adopted must be applicable alike to extreme cases, and those which would not be so regarded, otherwise the determination as to what rule shall be applied in a particular case will depend upon the decision of the presiding judge as to what class it falls into, and this would be to commit the decision of causes to mere caprice. It follows, therefore, of necessity, that in every action of this kind, in which there is anywhere in the record *any* evidence tending in any degree to prove the existence of contributory negligence, the jury must be left to determine from all the evidence before them whether or not it in fact existed.

In the case of *Railroad Co. v. Stout*, 17 Wall., 657, the supreme court of the United States, in approving an instruction by the trial court, whereby a question of contributory negligence was left to the jury, say: "Upon the facts proven in such cases, it is matter of judgment and discretion of sound influence what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed. Another man, equally sensible, and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. * * * It is assumed that twelve men know more of the common affairs of life than does one man. That they can draw wiser and safer conclusions from admitted facts thus occurring than a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

The above case was cited with approval and followed by this court in the case of *A. & N. R. R. Co. v. Bailey*, 11 Neb., 332, which latter case was approved and followed in that of *Huff v. Ames*, 16 Id., 139.

I am therefore of the opinion that the court erred in giving the instruction number 1 of instructions given by the court on its own motion, and that for such error there ought to be a new trial.

THE STATE OF NEBRASKA, EX REL. THE ATTORNEY GENERAL, v. THE FARMERS AND MECHANICS MUTUAL BENEVOLENT ASSOCIATION OF LINCOLN, NEBRASKA, J. C. MCBRIDE, J. GILLESPIE, H. V. HOAGLAND, JOHN CURRIE, GEO. W. FLETCHER, AND J. B. TOMLIN.

1. **Insurance: CONTRACT DEFINED.** A contract by which one party for a consideration promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest, is a contract of insurance, whatever may be the terms of payment of the consideration by the assured, or the mode of estimating or securing payment of the sum to be paid by the insurer in the event of loss.
2. ———: **CASE STATED.** Upon the facts appearing in the record, *Held*, That defendant was a mutual insurance company, and as such must comply with the provisions of the act of June 1st, 1873, and receive the certificate of the auditor of the state before transacting business.

QUO WARRANTO.

William Leese, Attorney General, and N. K. Griggs, for relator.

Harwood, Ames & Kelly, for respondent.

REESE, J.

This is an original proceeding, instituted for the purpose of ousting defendants from transacting the business of life insurance.

The information alleges in substance that defendant association is now and has been for some time transacting the business of life insurance within the state, and issuing policies or certificates of insurance upon the lives of persons within the state. That it has not complied with the

laws of the state relating to the transaction of the business of life insurance, and has not at any time obtained a certificate from the auditor of the state permitting it to transact such business, and that it has no authority of law to engage therein. That defendants McBride, Gillespie, Hongland, Currie, Fletcher, and Tomlin are the officers of said association, and as such are soliciting risks and effecting contracts of insurance in its behalf. Exhibits are attached showing the form of "application for membership," "certificate of membership," "security note," "receipt for membership fee," circulars, etc., in use by defendants for the purpose of effecting the issuance of indemnity or insurance upon the lives of persons.

The answer consists alone of the denial "that the defendant, the Farmers and Mechanics Mutual Benevolent Association, has not complied with the laws of the state of Nebraska relating to the transaction of the business of life insurance within said state."

Upon the argument it was conceded by defendants that no certificate or permission of the auditor had been issued to them as is required by law to be issued to insurance companies, but it was contended that no such certificate was necessary. That defendant association is not an insurance company in contemplation of law, and therefore is not within the restrictions and prohibitions of the act of 1873 (chapters 16 and 43, Compiled Statutes, 1885).

The certificate of membership, omitting the name of the assured, is as follows:

"Farmers and Mechanics Mutual Benevolent Association, incorporated under laws of Nebraska, October 13th, 1884, Lincoln, Nebraska. This certificate of membership witnesseth and declares:

"That in consideration of the representations and agreements made in the application for this certificate of membership, and bearing even date herewith, which is made a part of this contract, the payment of an admission fee of

not exceeding ten dollars, the payment of one dollar and seventy-five cents on or before the 16th day of May, 1885, and the same amount semi-annually thereafter, and the payment on or before maturity of such benefit assessments as may be legally levied by the board of directors, the Farmers and Mechanics Mutual Benevolent Association issues this certificate of membership, and constitutes, of, county of, state of Nebraska, a member of said association with all the rights and privileges thereof, subject to the following conditions and agreements and the provisions of the by-laws of said association.

"DEATH BENEFIT.

"Upon the receipt at the office of the association in Lincoln, Nebraska, of satisfactory proofs of the death of said member, he having conformed to all the conditions of membership, this association will pay to, or the legal heirs of said member, the net proceeds of one full assessment at schedule rates upon all contributing members at date of such assessment, and which is received at the Lincoln office within thirty days from the date of the notice thereof to an amount not exceeding five thousand dollars, to be paid within thirty days thereafter at the office of the association at Lincoln, Nebraska.

"PERSONAL BENEFIT.

"And this association further agrees that whenever this certificate shall have been maintained in full force by the prompt payment by the said member on or before maturity of all dues and assessments for the period of ten full consecutive years, this certificate may then mature, in which case this association will then pay to the said member personally, the net proceeds of a half assessment at schedule rates upon all contributing members at that date, and which is received at the Lincoln office within thirty days from date of the notice of assessment thereof, not exceed-

ing two thousand dollars; *Provided*, That upon payment of said amount this certificate shall be canceled and surrendered to this association; and *Provided further*, If the said member shall allow his certificate to lapse from any cause whatever, that the time of estimating when said ten years shall commence to run shall date from the date of his restoration to membership, and not from the original date of certificate; *Provided*, The member shall not be assessed for this benefit, nor be entitled to the same, unless he has specially made application for this benefit when applying for membership.

"ACCIDENT BENEFIT—CLASS THREE.

"It is further stipulated, that in case the member above has been in good standing in this association for a period of six full consecutive months and becomes disabled by accident not contracted in an immoral way, so as to be unable to perform any ordinary business or duties of life, he shall be entitled to receive ten dollars per week while so disabled, provided that no sickness of less than one week shall be considered, and fractions of a week shall not be counted; and to pay this accident benefit and incidental expenses not otherwise provided for, a full assessment shall be made from time to time, as necessity may require, but no one person shall receive an accident benefit for a greater time than ten weeks at any one time for any one accident, nor shall they be paid exceeding the net proceeds of one full assessment.

"The special conditions on the back of this certificate are made a part hereof and binding on both parties.

"This certificate is for a personal benefit and is for an accident benefit and is——subject to assessments for personal and accident benefits as provided herein, and in the By-Laws of the association.

"In witness whereof the said Farmers and Mechanics Mutual Benevolent Association has caused this certifi-

cate of membership to be signed by the president and countersigned and sealed by the secretary, at the office of the association in Lincoln, Lancaster county, Nebraska, this 16th day of March, 1885.

".....

.....
President.

"Secretary."

The special conditions referred to as on the back of the certificate are too lengthy to be copied here, but it may be stated briefly: That the mailing of a printed or written notice to a member shall be considered a legal notice. The association reserves the right to make special assessments for the purpose of paying accident benefits and to pay for the expenses of the association not otherwise provided for. The name of the beneficiary may be changed upon written request of the member, the surrender of the certificate, and the payment of two dollars and fifty cents, and the issuance of a new certificate. Notice of the death or disability of the member shall be sent to the office of the association within ten days from the time of death or disability. If the certificate becomes void from any cause, all payments made thereon are forfeited to the association. Accident benefits may be waived upon application to the secretary. When a member fails to pay his dues or assessments his security note becomes due and payable. The member forfeits all rights in the association, by failure to pay assessments within thirty days from their date, the failure to pay semi-annual dues within thirty days after they become due, the immoderate use of alcoholic liquors, or the concealment or misrepresentation of any material facts as to health when applying for membership, the perpetration or attempt to perpetrate any fraud on the association by the member, his beneficiary or any one having an interest in the certificate, and the graduated schedule of rates, in blank, depending upon the age of the members.

That this is a contract of insurance, cannot, we think,

in the light of the almost, if not quite, uniform holdings of courts and opinions of text writers, be doubted.

In *Commonwealth v. Wetherbee*, 105 Mass., 149, it is held that "a contract by which one party for a consideration promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest is a contract of insurance, whatever may be the terms of payment of the consideration by the assured, or the mode of estimating or securing payment of the sum to be paid by the insurer in the event of loss; and although the object of the insurer in making the contract is benevolent and not speculative." The contract does not differ in any essential feature of form or substance from a contract of insurance. The subject insured is the life or health of the member. The assured pays a certain sum, ten dollars, at the inception of the contract, which is fixed by the insurer (association), a promise to pay assessments punctually, when called for, is made by the assured, together with stipulated semi-annual dues which are fixed by the directors. Upon the condition of these payments being promptly made the insurance is made to depend. At the death of the member (assured), upon proof of the fact within ten days thereafter, the beneficiary is to receive a sum of money not exceeding five thousand dollars. This is none the less an insurance because the amount to be paid is not a gross sum, but graduated by the number of "contributing members" at the date of the assessment therefor; nor because the contract provides no legal method of enforcing payment of the assessment necessary to provide for the payment of the "death benefit," but merely declares the contract of membership at an end and all payments made thereon forfeited to the company.

The courts have with a great degree of unanimity treated all such organizations as substantially life insurance companies, applying to them and to the mutual relations of the members the rules and principles applicable to the contract

of life insurance. May on Insurance, § 550. See also, *Bolton v. Bolton*, 73 Me., 299. *State v. Standard Life Association*, 38 Ohio State, 281. *State v. Miller et al.*, 23 N. W. Rep., 241. *State v. Bankers, etc., Association*, 23 Kas., 499. *Arthur v. Odd Fellows Association*, 29 Ohio State, 557. *Illinois Masons Benevolent Society v. Winthrop*, 85 Ills., 537. *Same v. Baldwin*, 86 Id., 479. *Shunk v. Gegenseitiger, Wittman & Co.*, 44 Wis., 369. *State v. Live Stock Association*, 16 Neb., 552.

It is virtually conceded by defendant in its brief and argument that the rules governing life insurance companies must be applied to defendant, but a vigorous attack is made upon the law of this state upon the subject of insurance, and it is claimed that the act above referred to is intended to crush out organizations like defendant, in the interest of what are usually termed the "old line" companies. It is nowhere suggested that the act is unconstitutional, nor that it was not legally passed by the legislature. Such being the case, we cannot inquire into the propriety of the action of the legislature, but must accept and enforce the law as we find it.

Since defendants have not complied with the provisions of section 6 of chapter 16, and sections 7 and 8 of chapter 43 of the Compiled Statutes, (being an insurance company against accident) they have no authority to transact the business in which they are engaged, and judgment must be entered in accordance with the prayer of the petition.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	283
51	33
51	210
54	100

THE STATE OF NEBRASKA, EX REL. WILLIAM GRADY,
V. THE BOARD OF COUNTY COMMISSIONERS OF LIN-
COLN COUNTY.

1. **Counties and County Officers.** Counties and county boards can only exercise such powers as are expressly granted by statute, and such grant of power must be strictly construed.
2. ———: **BONDS FOR JAIL.** Under the provisions of the law of 1879, now in force, county commissioners have no authority to issue county bonds for the purpose of raising money to build a jail, and a vote of the people of the county instructing them to issue such bonds will confer no authority so to do.

ORIGINAL application for mandamus.

Snelling & Talbot, for relator.

Hinman & Nesbitt, for respondent.

REESE, J.

The question presented for decision in this case is, whether or not counties have authority to borrow money by the issuance of bonds, for the purpose of constructing a county jail.

It is well settled in this state that counties have no inherent power, and that their commissioners, or agents, acting for them, have only such powers, generally, as are especially granted to them by statute, or such as are incidentally necessary to carry into effect those which are granted. *Hallenbeck v. Hahn*, 2 Neb., 397. *S. C. & P. R. R. Co. v. Washington County*, 3 Id., 42. *Sexson v. Kelly*, Id., 107. *The People v. Commissioners of Buffalo County*, 4 Id., 157. *Hamlin v. Meadville*, 6 Id., 233. *The State, ex rel., v. Buffalo Co.*, Id., 460. *McCann v. Otoe County*, 9 Id., 331. *Walsh v. Rogers*, 15 Id., 311. And the grant of power must be strictly construed. *S. C. & P.*

R. R. Co. v. Washington County, *supra*, and cases there cited. *Sezson v. Kelly*, *supra*. *The People v. Commissioners of Buffalo County*, *supra*. *Commissioners of Hamilton County v. Mighels*, 7 Ohio State, 115. *Treadwell v. Commissioners*, 11 Id., 190.

In *Hamlin v. Meadville*, *supra*, Judge MAXWELL, in writing the opinion of the court, says: "Whatever may be the rule as to municipal corporations, counties have no authority at common law to issue bonds. They are *quasi* corporations, mere governing agencies charged with certain objects of necessary local administration. The power to issue commercial paper must be conferred by statute, and such power must be exercised in the manner prescribed."

There being no question then upon the necessity of the grant of power before authority exists, it is only necessary to examine the statute and ascertain whether the grant has been made.

Defendants insist that the second subdivision of section 25, and sections 26 to 31, inclusive, of chapter 18 of the Compiled Statutes of 1885, gives the authority to them to issue the bonds. The second clause of section 25 provides that it shall be the duty of the county board of each county "to erect or otherwise provide, when necessary, and the finances of the county will justify it, and keep in repair, a suitable court-house, jail, and other necessary county buildings, and to provide suitable rooms and offices for the accommodation of the several courts of record, the county board, clerk, treasurer, sheriff, clerk of the district court, and county superintendent, and to provide suitable furniture therefor. But no appropriation exceeding fifteen hundred dollars shall be made for the erection of any county buildings, without first submitting the proposition to a vote of the people of the county at a general election, and the same is ordered by two-thirds of the legal voters voting thereon."

The other sections referred to are as follows:

"Sec. 26. Whenever the county board shall deem it necessary to assess taxes the aggregate of which shall exceed the rate of one dollar and fifty cents per one hundred dollars valuation of the property of the county, except when such excess is to be used for the payment of indebtedness existing at the adopting of the constitution, the county board may, by an order entered of record, set forth substantially the amount of such excess required and the purpose for which the same will be required, and if for the payment of interest or principal, or both, upon bonds, shall in a general way designate the bonds and specify the number of years such excess will require to be levied, and provide for the submission of the question of assessing the additional rate required to a vote of the people of the county, at the next election for county officers after the adoption of the resolution. If the proposition for such additional tax be carried, the same shall be paid in money, and in no other manner."

"Sec. 27. The mode of submitting questions to the people for any purpose authorized by law, shall be as follows: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty of its violation if there be one, is to be published for four weeks in some newspaper published in the county. If there be no such newspaper the publication must be made by being posted up in at least one of the most public places in each election precinct in the county, and in all cases the notices shall name the time when such question will be voted upon and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of the election."

"Sec. 28. When the question submitted involves the borrowing or expenditure of money or issuance of bonds,

the proposition of the question must be accompanied by a provision to levy a tax annually for the payment of interest, if any, thereof, and no vote adopting the question proposed shall be valid unless it likewise adopt the amount of tax to be levied to meet the liability incurred."

"Sec. 29. At the time specified in such notice a vote of the qualified electors shall be taken in each precinct at the place designated in such notice. The votes shall be received and returns thereof made, and the same shall be canvassed by the same officers and in the same manner as required at each general election."

"Sec. 30. If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the county board."

"Sec. 31. Money raised by the county board in pursuance to the provisions of the preceding sections of this act is specially appropriated and constituted a fund distinct from all others in the hands of the county treasurer, until the obligation assumed be discharged."

It could serve no good purpose to enter into an analysis of these sections. It is enough to say that nowhere is the authority given as claimed by defendants. While it is true that by section twenty-five it is made the duty of the commissioners to provide a county jail, yet this duty is made to depend upon the fact that the "finances of the county will justify it." It is contemplated that if the money is in the treasury it may be appropriated for that purpose. But no appropriation exceeding fifteen hundred dollars shall be made without being authorized by a vote of the people.

It might and doubtless would be proper for the commissioners after having made the proper estimate, to levy a tax upon the taxable property of the county to increase the funds of the county sufficiently for the appropriation to be made, or, in case that would exceed the constitutional limit, the levy might be increased by the authority of the vote of the people to an amount sufficient for the purpose. But no authority is given anywhere to *borrow* the money by the issuance of bonds.

It is contended that this question has been decided in favor of the position of defendants by this court in the *B. & M. Ry. Co. v. Clay County*, 13 Neb, 367. But we cannot so hold. It is true it was decided in that case that "the authority conferred upon the county commissioners when funds are needed to aid in the construction of county buildings is to borrow money for a specific purpose upon the credit of the county." But it will not do to lose sight of the fact that at that time there was an act of the legislature in force expressly giving that power. This authority was conferred by the fourth clause of section 14 of the act of February 27th, 1873, which provided that the board of county commissioners should have power to "apportion and order the levying of taxes as provided by law, and to *borrow upon the credit of the county* a sum sufficient for the erection of county buildings," etc. General Statutes, 234. This power was swept away by the repeal of the law in 1879, when our present law concerning "counties and county officers" was enacted.

We therefore hold that the bonds issued by the defendants are void, and they should be destroyed.

No objection is made upon the ground that mandamus is not the proper remedy in this case. A writ of mandamus is therefore awarded as prayed for.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CALVIN H. PARMELE, PLAINTIFF IN ERROR, V. JASPER
W. CONN, DEFENDANT IN ERROR.

1. **Verdict Sustained.** The verdict of a jury upon question of fact where the testimony is conflicting will not be set aside unless clearly wrong.
2. ———: **PARTNERSHIP.** So where one of the questions involved in a cause submitted to the jury was, whether or not a partnership relation existed between the parties to the suit, and upon the facts stated by some of the witnesses the jury could find that a partnership did not exist, and they so found, such finding will not be molested. And the same rule will be applied to all cases where there is conflicting testimony upon material or vital points in the case.

ERROR to the district court for Cass county. Tried below before POUND, J.

A. Beeson and Sam M. Chapman, for plaintiff in error, cited: *Leabow v. Renshaw*, 61 Mo., 292.

Crites & Ramsey, for defendant in error.

REESE, J.

There is but one error assigned in the petition in error, which is, that "the court erred in overruling the motion for a new trial," and as said in *Thrailkill v. Daily*, 16 Neb., 115, "It may be considered, therefore, that the case is before this court rather on general principles."

There are two principal questions in the case, which are: *First.* That a partnership existed between plaintiff in error and defendant in error; and *Second.* That the set-off pleaded by defendant in error was barred by the statute of limitations at the time the answer containing it was filed. Both of these questions were presented to the jury by the instructions of the court, and as no complaint is made as

to them, it must be taken for granted that they stated the law correctly.

The testimony of the witnesses upon the subject of the terms of the contract was conflicting, defendant in error testifying that plaintiff in error said to him that he, plaintiff in error, had purchased forty acres of timbered land for \$530.00, and proposed that if defendant in error would oversee and attend to the cutting, hauling, and marketing the wood, that after all expenses were paid, including what he paid for the land, he would give defendant in error one-half of the balance, which defendant in error agreed to do. Plaintiff in error testified that he and defendant in error undertook the cutting of the wood off and marketing it, and divide whatever was made out of it.

The court instructed the jury, in substance, that if they found that plaintiff in error was the owner of the timber, and employed defendant in error to superintend the cutting, hauling, and marketing of the same, and agreed to pay him for his services in that behalf one-half of the proceeds of the wood which should remain after all the disbursements and expenses incurred in such cutting, hauling, and marketing were paid, such facts would not constitute a partnership between the parties.

Assuming that the facts as testified to by plaintiff in error would constitute a partnership, it must be conceded that the facts as testified to by defendant in error would not.

The question of fact, as to which of the witnesses was correct, was a question which it was the peculiar province of the jury to determine, and with their finding we must be content.

It appears that as the work was being done, and the wood sold, the parties would pay to each other certain sums of money as a part of the proceeds, but without much formality in the way of keeping books of account, and at the close there was some wood, posts, etc., left on

hand. It was testified by defendant in error that in the spring of 1880, and within four years prior to the filing of the answer, plaintiff in error sold some of the wood, and paid defendant in error one-half of the proceeds. This is not denied by plaintiff in error, but he testified that it was likely true that there were some "little odds and ends around" owing to them for wood, and that as it was collected he would pay to defendant in error. If there was no partnership, and if, as testified by defendant in error, there was a large amount of money due him for his services in handling and disposing of the wood, then it is clear that the statute of limitations did not commence to run until his services were rendered, and the wood disposed of. This being true, the jury were justified in finding the set-off not to be barred by the statute. Many cases occur where the verdict of a jury on questions of fact are not entirely satisfactory to the court, and this seems to be such an one, but the courts must not invade nor intrude upon the domain of juries as triers of facts submitted to them, unless the verdict is clearly and manifestly wrong. Such being the law, the verdict must stand.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

J. H. McMURTRY, PLAINTIFF IN ERROR, v. J. T. MADISON, DEFENDANT IN ERROR.

18 291
58 284

1. **Sale of Real Estate: COMMISSION TO AGENT.** In an action to recover for the value of services as agent in selling real estate, and there is testimony tending to show that the plaintiff rendered some service, but did not effect a sale, an instruction that if the jury believe that he rendered some service he is entitled to recover on a *quantum meruit* is not improper.
2. ———: ———. Where there was evidence tending to show that the plaintiff rendered no services whatever in effecting a sale of real estate, an instruction to the effect that if the jury should so find the plaintiff would not be entitled to recover is based upon evidence in the case, and is not inconsistent with the first instruction.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

J. A. Marshall, for plaintiff in error.

Snelling & Talbot, for defendant in error.

MAXWELL, J.

This is an action brought by the plaintiff against the defendant to recover certain commissions for the alleged sale of 207 acres of land near Lincoln, in the spring of 1883. The answer of the defendant admits that he was the owner of the land in question at the time stated, and admits the employment of the plaintiff, but denies all the other facts stated in the petition. On the trial of the cause in the court below the jury returned a verdict for \$10.00 in favor of the plaintiff, upon which judgment was rendered. From this judgment the cause comes to this court on the plaintiff's behalf upon a petition in error.

The testimony tends to show that in February, 1883,

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the defendant being the owner of 207 acres of land a few miles from Lincoln, authorized the plaintiff to sell the same for \$6,000, but at the same time reserved the right to sell the land himself if an opportunity offered. That about the 1st of March, 1883, the defendant being at the coal office of Hutchins & Hyatt, in Lincoln, informed one McRoberts, an employe of Hutchins & Co., that he desired to rent or sell his land, and promised to compensate him if he would find a purchaser. A few days after this conversation McRoberts and a Mr. Parker, the father-in-law of Mr. Hutchins, drove out to the farm of the defendant, and there seems to have been some conversation about renting the farm, but the defendant stated that he did not want to rent it, but preferred to sell. These persons informed Mr. Hutchins that the land was for sale, and seem to have induced him to examine the farm with a view to purchasing the same. When Hutchins was ready to drive out to the defendant's farm he called at the plaintiff's office and inquired for land for sale in the direction in which he was going. The plaintiff informed him that the defendant's land was for sale, also a farm near Raymond, and perhaps other lands. Hutchins, after several visits to the farm, completed the purchase with the defendant for the sum of \$5,500. There is some testimony of not a very satisfactory character that the plaintiff was the means of inducing the defendant to abate the price asked for the land somewhat, and of persuading Hutchins to pay a greater price than he at first offered, thereby effecting a sale. But this is denied. The testimony of Mr. Hutchins upon that point is as follows:

Q. What did McMurtry do on that occasion? Did he simply give you the numbers of the farms around there?

A. Yes, I think probably he gave me the numbers. I remember that he gave me the numbers of the lands.

COURT. Did he give you the price on this Madison county farm?

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A. Yes, with other farms also. Yes.

Q. Do you remember what the price was that he gave you?

A. He told me it could be bought for twenty-five dollars an acre.

Q. Did you consummate the trade this time that you went up there, or subsequently?

A. After.

Q. You did not trade with him at that time?

A. No, sir.

Q. After you had looked at the farm and it suited you, then you began to negotiate with Madison for the sale of it?

A. Yes.

Q. When did you finally complete this sale, do you remember?

A. Along in March some time.

Q. Was that all that McMurtry did, simply gave you the numbers of this land and the price, when you went over to ask him about other lands?

A. That is all that I recollect of. I do not remember all of the conversation. I did not stop but a moment.

On cross examination, in answer to a question in regard to a telephone message to the plaintiff, he stated: "I asked him if I was right in the price he gave me on that place." That was my object in telephoning him.

The testimony clearly shows that the plaintiff did not procure the purchaser, and that he did not effect a sale. The most that can be claimed is, that he acted as intermediary in carrying propositions from one to the other. The plaintiff, therefore, in no event, would be entitled to full commissions for the sale.

It is claimed that the court confused the jury by the following instructions, which it is claimed are inconsistent:

"*Second.* If you shall find that defendant employed plaintiff to assist in the sale of defendant's farm, and plain-

McMurtry v. Madison.

tiff did assist in the sale, even though plaintiff did not wholly procure the purchaser, still, if plaintiff, at request of defendant, assisted in procuring the sale, he is entitled to what his services are reasonably worth, and your verdict must be in favor of the plaintiff."

This is conceded by the plaintiff to be correct if the jury should find that the plaintiff was entitled to recover on a *quantum meruit*. And under the evidence he is entitled to recover, if at all, only for the actual services rendered by him. It is alleged that the next instruction given is wholly inconsistent with the above. It is as follows: "The jury are instructed that if you believe from the evidence that the defendant employed the plaintiff to sell his farm and to procure a purchaser thereof, and if you further believe from the evidence that the purchaser, Hutchins, received his information which led to the purchase of said farm from other parties than the plaintiff, and that plaintiff did not procure the purchaser of said farm and the sale thereof, than plaintiff cannot recover and you will find for defendant." The defendant in his evidence denies that the plaintiff performed any services for him whatever in selling the farm, and in this he is corroborated to some extent by the testimony of other witnesses. If the jury believed this evidence and not that on the part of the plaintiff, then the plaintiff would not be entitled to recover. The instruction, therefore, was proper and the plaintiff has no cause of complaint. It is apparent that substantial justice has been done and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SAMUEL McCLAY, PLAINTIFF IN ERROR, V. CHARLES
H. FOXWORTHY, DEFENDANT IN ERROR.

18	295
34	840
18	295
39	140

1. **Administration of Estates: SALE BY ADMINISTRATOR:** BOND. An administrator who has not previously given a sufficient bond, upon obtaining a license for the sale of real estate must execute a bond to the judge of the district court, with sufficient sureties, to account for all the proceeds of the sale, etc.
2. ———: ———: **PRACTICE.** When such bond was not given before the sale, *Held*, That the administrator be required to execute a bond with sufficient sureties in double the amount of money to be derived from the sale, within twenty days, or in case of default that the sale be set aside.
3. ———: ———: **GUARDIAN AD LITEM NOT NECESSARY.** The failure to appoint a guardian *ad litem* for minor heirs of an estate will not affect the validity of a sale of real estate by an administrator for the payment of debts of the estate.

ERROR to the district court for Lancaster county. Heard below before POUND, J.

Charles L. Hall, for plaintiff in error.

Foxworthy & Son, for defendant in error.

MAXWELL, J.

In February, 1885, the defendant in error filed a petition in the district court of Lancaster county, wherein he alleges that on the 6th day of September, 1884, he was duly appointed administrator of the estate of Warren B. Dunlap, deceased, in Lancaster county, in this state, and that he is now duly and legally qualified as such administrator; that on the 8th day of April, 1883, Warren B. Dunlap died intestate in Lancaster county, in this state, "leaving surviving him as heirs of his estate, Mary E. Dunlap, his widow, and three children, as follows: Mabel Dunlap, aged 5

years; Iris Dunlap, aged 4 years; and Maudé Dunlap, aged 1 year;" that the "deceased died seized in fee of the following real estate, to-wit: The north half of the south-east quarter of section five (5), township nine (9), range seven (7) east, containing eighty acres, in Lancaster county, Nebraska, and of the value of about \$3,000, and also a house and lot in Adams county, Illinois, of the value of about \$400; also two notes and a mortgage in Adams county, Illinois, worth \$500, and personal property of the value of about \$459.10, making the total value of the real and personal estate at the time of his death, about the sum of \$4,359.10;" that "said deceased at the time of his death was indebted as follows: To E. T. Hartley, as deferred payment on the eighty acres of land herein described, \$1,700, \$600 of which was due March 27th, 1884, and \$1,100, which will be due March 27th, 1885; also other debts in the aggregate about the sum of \$966." There are other allegations as to the insufficiency of the personal assets to pay the debts, and the necessity for selling the land in question, which need not be noticed. The judge of the district court made an order that Mary B. Dunlap, the widow, and Mabel Dunlap, Iris Dunlap, Maude Dunlap, and all other persons interested in said estate, appear before him at a time and place stated, and show cause why a license to sell said real estate should not be issued. This order was duly published and proof of the publication filed, and at the time set for the hearing a license was duly issued under which the defendant in error sold the land to the plaintiff for the sum of \$3,200, the amount due on the incumbrance being the sum of \$1,861.50. The plaintiff thereupon filed objections to the confirmation of the sale, as follows:

"*First.* That the administrator has not given the bond to the judge of this court required to be given by section 75, chapter 23, entitled 'Decedents,' etc.

"*Second.* That no guardian *ad litem* has been appointed

in this case for the minor heirs of Walter B. Dunlap, deceased," etc.

The objections were overruled, and the sale confirmed.

Sec. 75 of the statute relating to decedents is as follows: "When the executor or administrator is authorized to sell more than is necessary for the payment of debts, he shall, before the sale, give bond to the judge of the district court, with sufficient sureties, to account for all the proceeds of the sale that shall remain after the payment of the debts and charges, and to dispose of the same according to law; and in all cases where license is granted for the sale of real estate the judge of the district court may require a further bond from the executor or administrator, when he shall deem it necessary." Comp. Stat., Ch. 23.

Sec. 119 provides that, "In case of any action relating to any estate sold by an executor, administrator, or guardian, in which an heir, or person claiming under him, shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear—*First*. That the executor, administrator, or guardian was licensed to make the sale by the district court having jurisdiction; *Second*. That he gave a bond, which was approved by the judge of the district court, in case a bond was required upon granting license; *Third*. That he took the oath prescribed in this subdivision; *Fourth*. That he gave the notice of the time and place of the sale, as in this subdivision prescribed; and *Fifth*. That the premises were sold accordingly, and the sale confirmed by the court, and that they were held by one who purchased them in good faith."

The testimony tends to show that the widow and minor heirs are residents of Illinois; that an administrator was appointed in that state; that the sum of \$800 of the personal property was awarded to the widow, presumably under the statute of Illinois, but that fact is not made to appear. It is proved, however, that \$800 was set apart for

her use, and that the remainder is entirely inadequate to pay the debts and costs of administration. This being the case, the necessity for a sale of the land in question is clearly established. The record, however, fails to show that Foxworthy has given a bond as administrator of said estate. It is admitted by implication that he has not. The bond of the administrator in Illinois is no security for the funds that may come into the hands of Foxworthy by virtue of this sale. Courts and judges should in all cases require adequate security for the funds derived from a sale of the property of a decedent, in order that such funds may be properly accounted for; and no license for the sale of real estate should be issued except upon condition that abundant security be given. The court therefore erred in not requiring Foxworthy to give a bond with sufficient sureties conditioned as required by statute.

Second. The failure to appoint a guardian *ad litem* for the minor heirs of said estate is not available as an objection. A proceeding under the statute to sell real estate of the deceased for the payment of debts against the estate is not, strictly speaking, an action. It is purely a proceeding *in rem*, where the principal questions involved are, the amount of debts outstanding against the estate, the amount of personal property available for the payment of the debts, and the necessity to sell the land for which license is sought for the payment of the same. The proceeding is not adversary in its character in the sense in which the term is used in an action, as only so much of the estate descends to the heirs as exists after the payment of the debts. The notice is to be given to the heirs and all persons interested in the estate. If the reasons assigned by the petitioner to obtain a license are unfounded, or insufficient, or untrue, it is presumed that some one interested in the estate will make these facts appear, or that the judge will refuse to grant the necessary authority. No guardian *ad litem*, however, is necessary.

Sapp v. Roberts.

In this case the land in question seems to have been sold for its full value, and the purchaser is entitled to protection. The defendant has leave within twenty days to file a bond in double the amount of money that will come into his hands, with sureties to be approved by the judge of the district court, and conditioned as required by law to account for the funds derived from said sale; and upon condition that such bond is given and approved within the time stated the sale is confirmed; otherwise the order confirming the sale will be reversed and the sale set aside.

JUDGMENT ACCORDINGLY.

THE other judges concur.

GEORGE W. SAPP, APPELLEE, V. MOSES ROBERTS, APPELLANT.

1. Injunction. Equity will interfere by injunction to prevent the destruction of an osage hedge fence by a stranger to the inheritance, as being such an injury to the realty as cannot be fully compensated by damages for the trespass.
2. Trial. Questions of fact and upon conflicting testimony are for the trial court to decide, and its decision will not be molested by the appellate court, unless clearly wrong.

APPEAL from the district court of Johnson county.
Heard below before BROADY, J.

T. Applegat & Son, for appellant.

Injunction will not be granted where the parties are in dispute concerning their legal rights until the right is established at law. *Mammouth, etc., Appeal*, 54 Pa. St., 183. *Minnig's Appeal*, 82 Pa. St., 373. *Corning v. Troy, etc.*,

40 N. Y., 191-207. The injury being completed, injunction will not lie. *Davis v. Londgreen*, 8 Neb., 47. *Coker v. Simpson*, 7 Cal., 340. And if the trespass be temporary or fugitive there is no ground for the granting of an injunction. *Minnig's Appeal*, 82 Penn. St., 373. *James v. Dixon*, 20 Mo., 79. *Hodgman v. Richards*, 45 N. H., 28. And where it does not appear that future waste is threatened the relief will be withheld. *Watson v. Hunter*, 5 Johns Ch., 169. And has not the plaintiff a statutory remedy for the injury complained of? See Comp. Statutes, page 48, §§ 11 and 17. If so, he is confined to the remedy provided by statute. *Hopkins v. Keller*, 16 Neb., 571.

Pinero & Chapman, for appellee.

Against the various authorities quoted by appellant, we interpose the case of *Grant v. Crow*, 47 Iowa, page 632, as laying down the present modern doctrine of injunction as a relief against trespassers. The appellant claiming to be a tenant in common in said hedge, gives the appellee the right to go into a court of equity to restrain appellant from committing waste. 2 American Dec., 625. 18 American Dec., 350. 1 Johns. Chan., 11. Civil Code, § 633. High Injunc., § 428. Freeman Co-tenantry, §§ 97, 323.

REESE, J.

An injunction was issued by the district court for the purpose of restraining defendant from cutting down a line of osage hedge fence between the farms of plaintiff and defendant. Upon final trial the district court found in favor of plaintiff generally, upon the facts, and rendered a decree making the injunction perpetual. Defendant appeals to this court.

The first question presented for decision is, whether or

not the plaintiff would be entitled to an injunction in the absence of proof of the insolvency of defendant, were it conceded that plaintiff was the owner of the hedge and that defendant was destroying it, there being a remedy for the damages.

We consider the rule well established as stated in *Tigard v. Moffitt*, 13 Neb., 565, that a court of equity will not interfere to prevent a mere trespass unless in cases where the plaintiff cannot obtain adequate relief at law. This rule being conceded, it remains to enquire whether or not an adequate remedy at law does exist for an injury of the kind spoken of.

Without entering into a discussion of the authorities at length, we will dispose of this question by saying that it now appears to be well settled that where the trees or shrubbery standing and growing on real estate are either fruit or ornamental trees, or shrubbery, injunction may be resorted to for the purpose of restraining their destruction. As said in *High on Injunctions*, second edition, § 724: Where "the trespass consists in the cutting of timber upon complainant's lands, going to the destruction of that which is essential to the value of the estate, and to the destruction of the estate itself in the character in which it has been enjoyed, a fitting case is presented for relief by injunction." See also *Fulton v. Harman*, 44 Md., 251.

A distinction seems to be clearly marked between what is known as waste by the destruction of timber which is valuable only as it is prepared for sale or use as lumber, wood, etc., and what is known as equitable waste or the destruction of such growth as was valuable only when standing and growing upon the land, such as ornamental trees and shrubbery, hedges, screens, young timber, and the like. 3d *Wait's Actions and Defenses*, 697, and cases there cited. An osage hedge fence is without value except as it is standing and answering the use for which it was intended. Its destruction would be of manifest injury

to the inheritance. 2d Story's Eq. Jur., § 915. The destruction of such property as a prudent man would not destroy in the management of his own affairs. *Turner v. Wright*, 2 De G., F. and J., 234. It is clear that in cases of this kind there is no adequate remedy at law. All persons are entitled to protection in the use, integrity, and value of their property, and where courts of law cannot give such protection by reason of the inability of plaintiff to prove his damages, equity will interfere. 3 Wait's Act. and Def., 700 and 701, and cases cited.

Another, and what must have been a far more difficult question for the trial court, is the question of fact involved in this case, both as to the ownership of, or rather the right of dominion over, the property and as to whether or not there was any actual injury to the hedge, it being claimed by defendant that the cutting was necessary for the development of the hedge as a fence. Upon these questions there was a marked and sharp conflict of testimony. But these questions of fact were decided by the trial court, and with that decision supported as it is by quite an amount of testimony which is unimpeached, save by the contradicting testimony of defendant and his witnesses, we must be content.

The decree of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, V. THE CHICAGO LUMBER COMPANY, DEFENDANT IN ERROR.

18	308
22	766
18	308
59	671

1. **Garnishment after Judgment.** In proceedings in garnishment after judgment, under section 249 of the Civil Code, if it is found that the garnishee is indebted to the execution defendant, the order of the court should be that the garnishee pay the amount found due. If the order is not complied with, it may be enforced by execution, as in cases where an ordinary judgment is rendered.
2. ———: **PRACTICE: GARNISHEE ESTOPPED.** When a garnishee, prior to the time when it is required to answer as to its indebtedness, files an answer as in an ordinary action, and issue being joined thereon a trial is had and other witnesses are examined, without objection to the course pursued, such garnishee will not be permitted to question the regularity of the proceedings in the appellate court.

REHEARING of case reported in 15 Neb., 392.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error.

John C. Watson, for defendant in error.

REESE, J.

A rehearing having been granted in this case, it has been re-submitted upon arguments and briefs of counsel. In the opinion, 15 Neb., 392, it is said: "Judgment was rendered against plaintiff in error and in favor of defendant in error for the sum of \$144.51." Attention having been called to this language—as well as other statements of substantially the same import—and it being apparent that the use of the language, although through inadvertence, might produce in the minds of some a wrong impression as to the holding of this court upon the question of the authority of the district court to render a general judgment

in proceedings in garnishment after judgment, a rehearing was ordered.

The record of the proceedings in the district court shows that no judgment was in fact entered, but that the garnishee, railroad company, was ordered to "pay over to said plaintiff herein, the Chicago Lumber Company, said sum of \$144.51, and upon failing to do so execution issue therefor."

This is in accordance with the provisions of the statute. Section 249 of the Civil Code provides that, "In cases where the garnishee in answering such interrogatories shall disclose that he is indebted to the defendant in execution, the court shall order the garnishee to pay over the amount found to be due from the said garnishee to the defendant in execution, which amount shall be collected by execution, as in other cases, as near as may be; and such amount, when paid or collected, shall be credited on the original judgment, and the garnishee shall be credited for the amount so paid or collected." As the proceedings in this case were instituted and carried through under the provisions of section 244, *et seq.*, of the Civil Code, and including the section above quoted, and not under section 221 as claimed by plaintiff in error, it will be seen that upon a finding against the garnishee the order may be enforced by execution in the same manner as judgments are enforced. As stated in *Hollingsworth v. Fitzgerald*, 16 Neb., 495, the order of the court is given all the force and effect of a judgment. But, as in this case, it must be an order and not a judgment. To this extent the original opinion in this case should be corrected.

Plaintiff in error seeks to object to the proceedings in the district court as improper and irregular, and claims that the answers of the garnishee through its agent "were full and complete to the effect that the company was not indebted to Babbitt," and "if those answers were not satisfactory, an action might have been brought against the

company, in which action the legality of the company's charges for freight and demurrage could have been investigated."

This question cannot properly arise in this case, for the reason that the full issue was tendered by plaintiff in error by an answer, in the usual form of answers filed in civil actions, before the answers of the agent were taken under the garnishee process. By the filing of this answer, irregular though it may have been, plaintiff in error virtually tendered to defendant in error an issue upon all the allegations of fact contained therein. To this answer defendant in error filed a reply, denying each and every allegation contained therein. Upon the issue thus joined a trial was had.

While these proceedings may have been unusual, yet no objection seems to have been made by plaintiff in error. Indeed, it seems to have first suggested this course by presenting its answer.

It is now claimed that no question was made upon the correctness of the charges made by plaintiff in error, and that nothing should have been considered by this court outside of the questions presented by the record, viz., "Whether the garnishee is indebted to the defendant in the garnishment proceedings." By reference to the answer we find that plaintiff in error alleged the following facts:

First. That it was in no way indebted to the judgment debtor, and had no property in its hands belonging to him.

Second. That it had in its possession 154 tons of coal worth \$4.00 per ton, shipped to the judgment debtor, amounting to \$616.00; subject to freight and back charges, \$666.63; demurrage on cars held by order of sheriff 675 days, \$830.00; unloading eleven cars of coal, \$33.00, making a total of \$1,029.63 charges against the coal. These allegations being denied, the issue was tried to the court, and a finding made upon each item. The parties having elected to try the cause as in an ordinary

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action, we do not see how they can now object to the proceedings adopted. While it is true, as claimed by plaintiff in error, that nothing could properly be considered beyond the simple question whether the garnishee was indebted to defendant in execution, yet it is equally true that all the questions discussed in the former opinion were presented upon the trial, and the district court, by reason of the issues formed, was required to pass upon the questions of fact thus presented, and those issues and findings were brought into this court by the record for review. According to the theory of plaintiff in error, as shown by its answer, all these questions were proper to be taken into consideration in arriving at a conclusion as to whether the garnishee was indebted to the execution defendant.

The other questions presented by the brief were considered in the former opinion, and as we are unable to see that we were in error then, they need not be further discussed now.

The decision of the district court will stand affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

TIMOTHY AUSTIN, APPELLANT, v. SABILLA F. AUSTIN,
APPELLEE.

1. **Husband and Wife: CONVEYANCE: TRUST.** Where an aged husband conveys certain property to his wife for the support of himself and family, and the trust was deliberately created, and is clearly established, it will not be set aside because of the disagreement and separation of the parties.
2. ———: ———: **APPOINTMENT OF TRUSTEE.** Where a hus-

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band conveys property to his wife for the support of himself and family, upon the disagreement and separation of the parties the court may, when it is deemed advisable to the due administration of the trust, appoint a new trustee.

APPEAL from the district court for Lancaster county.
Heard below before POUND, J.

Harwood, Ames & Kelly, for appellant.

Lamb, Ricketts & Wilson, for appellee.

MAXWELL, J.

The plaintiff brought this action in the district court of Lancaster county to recover certain real estate conveyed to the defendant, and for an accounting. On the trial of the cause the court found for the defendant and dismissed the action. The plaintiff appeals.

It appears from the record that the plaintiff and defendant were married in October, 1878, and thereafter cohabited together as husband and wife until March, 1883. That at the time of the marriage the plaintiff was about sixty-three years of age, and had several children by a former marriage, some of whom lived at Bennett, where the plaintiff and defendant resided. That at that time the plaintiff was possessed of a considerable amount of property, including B. & M. land contracts for land near the village of Bennett. The defendant, at the time of the marriage, was about four years younger than her husband, and had a number of children by a former marriage, some of whom resided at or near Bennett, and the youngest, a daughter, until the separation, resided with the plaintiff and defendant. The defendant was also possessed of considerable property, estimated by herself at \$6,000. It is pretty evident from the evidence that prior to his marriage with the defendant the plaintiff had given to each of his children a considerable amount of property. That

soon after the marriage one of the children obtained from him an assignment of the B. & M. land contracts, and perhaps of other things of value. That about that time, as the defendant alleges, and apparently with cause, the plaintiff placed all his remaining property in her hands to prevent his children from getting it. At the time of the transfer the defendant made a will, in which it was provided, in case of her death, the plaintiff should have a suitable maintenance out of her estate during his life-time. This will does not seem to have been satisfactory to some of the children, and was afterwards destroyed. A second will was made, to which it is unnecessary to refer. Some time during the month of March, 1883, the plaintiff ceased to live with the defendant, and assigns a number of reasons for his conduct which need not be here referred to. Probably but for the interference of his children the alleged causes for disturbance, if they really existed, would have been overcome. Be that as it may, the parties separated, and this action was brought to recover the property conveyed by the plaintiff to the defendant for his support. The defendant frankly admits in the answer that certain property named therein was transferred to her for the use and support of her husband and family. It would subserve no good purpose to review the evidence at length. Both the plaintiff and defendant, evidently, are worthy persons, and had they resided at a place remote from their children in all probability no differences would have arisen between them. The property was deliberately conveyed and transferred by the plaintiff to the defendant for the use of himself and wife. A considerable portion of the real estate has been conveyed to innocent third parties, who should be protected in their purchases. The trust is clearly established, and having been deliberately created by the plaintiff we see no sufficient reason for setting it aside.

A court of equity, however, when necessary to fully carry

out the trust, when the trustee has become incapable from any cause from performing the trust duties, will remove a trustee and appoint another. This power rests in the sound discretion of the court, to be exercised in such manner as to promote the due administration of the trust. *People v. Norton*, 9 N. Y., 176. *In re Cohn*, 78 Id., 248. *Preston v. Wilcox*, 38 Mich., 578. *In re Bernstein*, 3 Redf., 20. *North Car. R. R. v. Wilson*, 81 N. C., 223, *McPherson v. Cox*, 6 Otto, 404. *Satterfield v. John*, 53 Ala. 127. *Farmers Loan, etc., Co. v. Hughes*, 18 N. Y. Sup. Ct., 130. *Bloomer's Appeal*, 83 Pa. St., 45. *Sparhawk v. Sparhawk*, 114 Mass., 316. *Ketchum v. Mobile, etc., R. R.*, 2 Woods, 532. *Scott v. Rand*, 118 Mass., 215. *In re Adams' Trust*, L. R., 12 Ch. D., 634. *Ex parte Hopkins*, Id., 9 Ch., 506. *Wilkinson v. Parry*, 4 Russ., 272, 276. *Coventry v. Coventry*, 1 Keen, 758. *Greenwood v. Wakeford*, 1 Beav., 576, 581. *Forshaw v. Higginson*, 20 Id., 485. *In re Stokes' Trusts*, L. R., 13 Eq., 333. *Chalmer v. Bradley*, 1 J. & W., 51, 68. *Cruger v. Halliday*, 11 Paige, 314. *Shepherd v. McEvers*, 4 Johns. Ch., 136. *Diefendorf v. Spraker*, 10 N. Y., 246. *Forster v. Davies*, 4 De G., F. & J., 183. *In re Blanchard*, 3 Id., 131. *Paliaret v. Carew*, 32 Beav., 564, 567. *Crombes v. Brookes*, L. R., 12 Eq., 61. *In re Roche*, 2 Dr. & War., 287. *In re Watt's Settlement*, 9 Hare, 106. *Mennard v. Welford*, 1 Sm. & Gif., 426. *In re Bignold's Trusts*, L. R., 7 Ch., 223. *Withington v. Withington*, 16 Sim., 104. *Pomeroy Eq.*, § 1086. The parties have leave to agree, upon a suitable trustee. Failing to do so the court will appoint. The trustee thus appointed will give security to be approved by the clerk of this court in the sum of \$4,394, and within ninety days from the entry of the decree the defendant is required to pay to said trustee the sum of \$2,172, which she admits having received, which sum, subject to the defendant's rights therein, will be expended as may be necessary for the support of the plaintiff, and if

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need be the defendant. The judgment of the district court is reversed, and judgment will be entered in this court in conformity to this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

SAME V. SAME.

Husband and Wife: CONVEYANCE TO WIFE. Where a husband in advanced years conveys property to his wife for the purpose of having it held in trust for him, and the wife, contrary to the intention of the husband, and in violation of the trust, conveys it to third parties, and with the proceeds thereof or with the money or property of the husband purchases other property and receives the title in her own name, upon their separation equity may require an accounting, and make such decree as to the property owned at the time of the decree as will protect the interests of both the husband and wife.

REHEARING of foregoing case.

Harwood, Ames & Kelly, for appellant.

Lamb, Ricketts & Wilson, for appellee.

REESE, J.

On motion of appellee a rehearing was granted and the case has been re-submitted upon able printed briefs and arguments filed by the respective parties.

There appear to be two material questions in the case, and to the discussion of which counsel have principally devoted their attention: *First*, Was the conveyance of the property of plaintiff to defendant in trust for any purpose? and, *Second*. If so, what decree should be entered for the proper protection of the rights of the parties?

It is claimed by defendant that the conveyance to her was a full and absolute conveyance of the title in fee, and that she holds it free from any rights or claims of plaintiff. That it was a voluntary conveyance and transfer, from the effects of which plaintiff cannot now escape.

We think this is clearly at variance with the intention of both parties, and wholly inconsistent with the purposes for which the transfer was made and received. Taking the testimony of defendant alone it is shown that soon after their marriage plaintiff, through some cause or other, which is immaterial here, concluded that his children were seeking to circumvent him and procure all his property. He made known this fact to defendant, and declared his purpose of putting it into the hands of some one from whom they could not get it. She says his plea was, "They had his money, and were bound he should not get it, and he seemed much hurt; says he, 'I am going to put the property in somebody's hands where the children cannot get it; the children have got all, or nearly all.' He proposed first to put it in my crippled daughter's hands. I objected very positively. Said he, 'I will put it into yours instead.' I said 'I am step-mother and don't want it.'" This is a sufficient quotation to show that there was no purpose to convey, and no expectation of receiving an indefeasible title. If this is the true version of the case, plaintiff was fearful he would lose his property, and for the purpose of *saving* it desired the title to be held by another. It was not prompted by love and affection for the wife, for his first impulse was to convey it to another, and had it not been for the positive objection referred to he, perhaps, would have done so. It could not have been intended as an advancement to the wife, for, as we have seen, he proposed conveying it to her daughter; besides, it is shown that at the time of the marriage it was agreed that each should retain their property.

It is true plaintiff testifies to a different state of facts,

and if he is correct it was defendant who became alarmed lest the children of plaintiff should get his property. For the purposes of the question now under consideration it is wholly immaterial as to which is the correct theory of the case. Either one establishes the theory of plaintiff as to the purpose with which the conveyances were made. Plaintiff was old, hard of hearing, and evidently, to some extent at least, in his dotage. Defendant, though only four years younger, was in the enjoyment of all her faculties, and evidently much his superior in that respect. That she understood the purpose for which the conveyance was made to her cannot be questioned.

The second question involved in the case is one of some uncertainty. It is apparent that the property of defendant has not been impaired and but little of her funds were exhausted while they cohabited together. It is also apparent that plaintiff has but little if any property left. As stated in the former opinion, the purchasers of the real estate who have in good faith invested their money cannot be disturbed. And, as claimed by defendant, it would be unjust to require her to account for all the money and property placed in her hands by plaintiff, since she has contributed, in part at least, out of those funds toward the maintenance of plaintiff and defendant. While it would seem to the writer to be going beyond the proper bounds of the court to render a decree requiring the payment of a certain sum of money, or in the event of her failure to sell her property upon execution for that purpose, and thus strip her in part of the necessary means of support, yet we think the trust fund can be followed into the real estate now owned by her and purchased therewith. It is insisted that the family expenses were paid out of the money and proceeds of property placed in the hands of defendant, and that it has thus been more than exhausted. This proposition should be given such weight as it is entitled to, but it can hardly be said that during the five years of

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the married life of the parties their estates would so materially change in relative values by the proper use of the property of plaintiff in maintaining the husband and wife. The real estate owned by plaintiff and conveyed to defendant has been conveyed away by her, and other real estate purchased which appears to be of considerable value. It should not be required of defendant that she return to plaintiff all the property and money received, but common fairness and the principles of equity require that some return of this trust property be made. The testimony shows that lot No. four in block nine and the east half of block ten in Roggencamp's addition to Bennett are held by defendant, the title being in her name, but procured, in part at least, by the labor and money of plaintiff, and that there are three dwelling-houses thereon, but we are unable to determine the value of the several lots or to ascertain from the record upon which lots the buildings are located. If the parties can agree by stipulation as to the value of each lot with the improvements thereon, such decree will then be entered as will protect the rights of the parties, otherwise a reference will be ordered for the purpose of ascertaining the values.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN B. HOLMES, PLAINTIFF IN ERROR, V. ROBERT
IRWIN, DEFENDANT IN ERROR.

Damages by Stock: NEGLIGENCE OF OWNER. Where A purchased of B an enclosed pasture, paying therefor an extra price, the consideration for such extra price being that A might turn his stock into such pasture and thereby avoid the expense and trouble of having to herd his stock, which was fully understood

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by B, and where the stock were turned into the field and continued to run there until the pasturage was eaten up, B residing upon the premises and in a position where he could know of any damage being done by the stock, and where he had cribbed his corn on the premises and within the inclosure in which the stock were permitted to run, but A had no knowledge of the existence of the crib of corn, and where A's stock, without his knowledge, ate and destroyed the corn, *Held*, That A would not be liable for such damage and that there was no question of negligence on his part to submit to a trial jury.

ERROR to the district court for Cass county. Tried below before POUND, J.

Beeson & Sullivan, for plaintiff in error.

S. P. Vanatta, for defendant in error.

REESE, J.

One of the causes of action as stated in the petition of defendant in error—who was plaintiff in the district court—was, that in the year 1883 the cattle and stock of plaintiff in error broke into a house or crib where defendant in error had his corn stored, and ate up and destroyed one hundred bushels of the corn of the value of thirty-five dollars. To this part of the petition plaintiff in error answered that during the year 1883 he rented a stock field of defendant in error for pasture for his cattle. That by the terms of the contract the cattle of plaintiff in error were to run in the field, that he was not to herd them, but defendant in error was to take care of them. That the house in which the corn of defendant in error was stored was in the same inclosure, and whatever damage the cattle did to the corn was by reason of the carelessness of defendant in error in not keeping the cattle away from the cribs, and not by the fault or carelessness of plaintiff in error. A reply was filed by defendant in error denying the allegations of the answer.

There was but little conflict in the testimony upon the

material facts of the case, and they may be fairly stated as follows: In the fall of the year 1882, defendant in error had a field of stalks, from which the corn had been gathered. The field was enclosed. The house in which the corn was cribbed was within the field, but plaintiff had no knowledge of the corn being in it. He purchased the pasture of defendant in error, paying therefor fifty cents per acre. The price paid was more than was usually paid for such pasture, but he made the purchase because the field was fenced and he would not have to herd the cattle. This latter fact was the cause of the purchase. It was so understood by both, as testified to by defendant in error. It was mutually understood that plaintiff in error was to turn his cattle in the field, and they were to be unrestrained therein, except as defendant in error should keep them from about his dwelling house. The house in which the corn was stored was about eighty rods from the dwelling of defendant in error, but not in sight. Of evenings defendant in error would drive the cattle toward the house of plaintiff in error, which was upon adjoining land, and plaintiff in error would put them up until the next morning. Plaintiff in error had no knowledge that any damage was being done by the cattle during the time they were in the field, nor for some months thereafter. The house which contained the corn was in the corn stalks and had no fence around it. The building was an old one, and the cattle broke off the boards and ate and damaged the corn. The court instructed the jury orally as follows:

"If you find from the evidence that the defendant bought of the plaintiff corn stalks in a certain field, for the purpose of driving his stock into the field and feeding the stalks, and the plaintiff knew that fact, knew that was the purpose for which the stalks had been bought; and if you further find that defendant did turn his stock into the corn field, and while there they broke into the building or house in which the plaintiff had corn, and did damage to the corn,

then you will further inquire through the fault and negligence of which party this damage was done. If the plaintiff had the corn in this building or house, and had properly protected it, properly boarded up the doors and windows of the building in which the corn was housed, and through the fault or negligence of the defendant in not properly looking after his stock and they did damage to this corn he would be liable for it. The degree of care and diligence which the defendant ought to exercise would be measured somewhat by the knowledge of what he knew or ought to have known by the exercise of proper care as to what was in the field, and as to what his stock were doing; and you should inquire, finding out, ascertaining what he did know, or might, or ought to have known, by the exercise of proper diligence. Of course you should inquire as to his means and opportunity of knowing where his stock was, what they were doing, and what was in the field in which he turned the stock; finding out how near he lived to it, and his opportunities for seeing and knowing. I hardly think he would be liable unless he was guilty of some fault or negligence. To ascertain whether he was or not, it is right to consider all the circumstances as they appeared. If you find they did damage, and the defendant is liable for the corn, you must be governed by the amount as to the corn actually damaged, and as to the extent of the damage. Of course he must only be liable for the actual damage done, if for anything." To the giving of which plaintiff in error duly excepted. The trial resulted in a judgment in favor of defendant in error. Plaintiff in error alleges error in giving the foregoing instruction and brings the cause into this court for review by proceedings in error.

As the judgment was for a very small amount (\$1 exclusive of costs) we are loth to disturb it, and thus remand the cause for a large increase of the costs, which are already somewhat heavy. But as we view the foregoing instruction the judgment cannot be rightfully sustained. The in-

struction above quoted is not only quite ambiguous, but it in some respects misstates the law and must have misled the jury. The suggestion by the court that he "hardly" thought plaintiff in error would be liable unless he was guilty of some fault or negligence, would not be sufficient under the proofs upon that question. If there was any question of negligence to submit to the jury they should have been instructed that plaintiff in error would not be liable, unless he was guilty of negligence. The cattle were rightfully in the field. How could it be possible for plaintiff in error to be liable without negligence on his part? But we think there was no question of negligence to submit to the jury. Plaintiff in error was not expected to look after his cattle. It was the very thing he had paid an extra price to avoid. It was the mutual agreement of the parties that he should not be required to "look after his stock" or to know "what his stock were doing." He was under no obligations to know "where his stock were, what they were doing, and what was in the field in which he turned the stock." He had paid an extra price to be relieved of that duty. The cattle were not trespassers, they were lawfully there. To be guilty of negligence is to fail to discharge a duty. What duty did plaintiff in error owe to defendant in error in the way of finding out or ascertaining "as to what was in the field?" Clearly none. We know of no law which would inject into a contract and force upon the parties to it an element as between them which they contracted it should not contain. Plaintiff in error had no knowledge of the existence of the corn. Defendant in error had; he had put it there, yet he failed to give any notice either of its existence or of the damage done until months after the cattle were removed from the field.

It is apparent that the learned judge who presided in the trial court, annoyed, perhaps, and impatient over being compelled to devote valuable time to a suit involving so small an amount, was not as careful in the use of language

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in giving the instruction as is usual for him, and through inadvertence gave the instruction. But, as we view it, it should not have been given, and in doing so there was error. For that reason the judgment must be reversed.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

18	318
46	190
18	318
51	664
54	290
55	712

**JOHN S. AND E. MARY GREGORY, APPELLANTS, AND
J. H. MCMURTRY, PLAINTIFF IN ERROR, V. REUBEN
R. TINGLEY, JOSEPH W. HARTLEY, AND S. M.
MELICK, SHERIFF, APPELLEES AND DEFENDANTS
IN ERROR.**

- 1. Amendment of Pleadings and Judgment.** Where real estate in an addition to a city was described as lots 11 and 12 in block 10 of L's addition to Lincoln, the block not being platted, and a further description by metes and bounds, in which the property is not accurately described, it is not error for the court to permit the petition to be amended to contain a correct description of the property, and amend the decree accordingly.
- 2. Judicial Sale: PURCHASER MUST PAY PRICE BID.** A party by purchasing real estate at a judicial sale subjects himself to the jurisdiction of the court. *Phillips v. Dawley*, 1 Neb., 320. And the court in a proper case may compel him to complete his purchase by the payment of the money. *Lansdown v. Eldon*, 14 Vesey, 512. *Exrs. of Brashear v. Cortlandt*, 2 Johns. Ch., 505.
- 3. ———: ———: JURISDICTION OF PURCHASER.** A purchaser had given his check on a particular bank, payable on the confirmation of the sale, and after the sale was confirmed stopped payment on the check and refused to receive the deed and pay the purchase price; thereupon a motion supported by affidavits was filed to require the purchaser to pay the money, and an order, after due notice, was entered thereon, requiring him to pay

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the money in thirty days; *Held*, Proper practice. The court may proceed summarily against the purchaser, and the officer is not required to bring an action, although he may do so.

APPEAL AND ERROR from district court of Lancaster county. Tried below before MITCHELL, J.

John S. Gregory, pro se, and J R. Webster, for McMurry.

Ryan Bros., for Tingley, and W. J. Lamb, for Hartley.

MAXWELL, J.

In November, 1882, a decree of foreclosure and sale was rendered in the district court of Lancaster county against lots 11 and 12 in block 10 in Lavender's addition to Lincoln, the plaintiffs and others having an interest in said lots being made parties. That part of Lavender's addition was not platted, and after the description by lots was a further description by boundaries in the decree, as follows: "Beginning at a point 300 feet east of the south-east corner of block (94) ninety-four in the city of Lincoln, and running thence east 100 feet, thence south 142 feet, thence west 100 feet, thence north 142 feet to the place of beginning." The decree was rendered on the 11th of November, 1882. On the 15th of that month, Tingley and Hartley, two of the lien holders, filed a motion to amend the petition by correcting the description above given by inserting the word "north" where the word "south" occurs, and the word "south" where the word "north" occurs, a correct description being set out. The motion was sustained, and on the 18th of that month an amended petition was filed, in which the description is correctly given. To this amended petition Gregory and wife filed a plea in abatement. The case was then appealed to this court, the opinion being reported in 15th Nebraska, 256. After the cause was remanded to the district court the decree was

amended to conform to the petition. No objection seems to have been made to this modification of the decree, but a sale being about to take place under the decree the plaintiffs brought an action to enjoin the sale, the principal ground for relief being that the court had no authority to amend the decree, and therefore the sale was unauthorized. The court below found the issues in favor of the defendants and dismissed the action.

From the facts above stated it will be seen that there is no equity in the bill. Lots 11 and 12 in block 10 in Lavender's addition to Lincoln were the property upon which Kellogg had his lien, and the mistake in the additional description seems to have misled no one. It certainly was the right of the lien holders to have the description corrected to conform to the facts, so that there would be no impediment to a sale of the property for the highest price possible to be obtained; and a party who, like the plaintiffs, purchased with notice of the facts has no cause of complaint on that ground. The injunction, therefore, was properly dissolved.

Upon the dissolution of the injunction the real estate in question was sold under the decree. The plaintiffs filed objections to the confirmation of the sale which were overruled. These objections are substantially the same as those upon which the injunction was sought, and were properly overruled. Valid objections to the sale did exist, such as the failure to advertise said property at least thirty days before the day of sale. *Lawson v. Gibson*, ante p. 137. But they were not made in the court below and cannot be considered here. The objections, therefore, were properly overruled.

The real estate in controversy was sold under the order of sale to J. H. McMurtry for the sum of \$3,250. McMurtry gave the sheriff a check on the Capital National Bank of Lincoln, payable, as sworn to by the sheriff, on the confirmation of the sale. The attorney for McMurtry,

however, files an affidavit that "the check was not payable until it should be determined that good title would be assured to him as the result of such sale." Upon the confirmation of the sale the sheriff deposited the check in the First National Bank of Lincoln, and afterwards paid Tingley and Hartley the amount due on their respective decrees out of the funds so received. Afterwards McMurtry stopped payment on the check. The attorneys for the sheriff thereupon filed a motion supported by affidavits to require McMurtry to pay the amount of said bid into court. Certain counter affidavits were filed, which need not be here considered. On the hearing of the motion the court made an order that said purchaser pay the sum of \$3,250 into court within thirty days. This order is now assigned for error.

The power of a court of equity to compel a purchaser to complete his purchase was frequently exercised under the former chancery practice. Thus in executors of *Brasher v. Cortlandt*, 2 Johns. Ch., 505, a tract of land was sold under a decree to one Clay for the sum of \$16,000, who paid \$50 as a deposit. The sale was confirmed and the master directed to make a deed to the purchaser and receive the purchase money. The master thereupon tendered a deed to the purchaser, who refused to pay the purchase price and receive the deed. An order was thereupon entered requiring him to complete his purchase by the payment of the purchase money with interest, or show cause by a day named why an attachment should not issue against him. The principal ground of defense was, that an appeal had been taken which would arrest all the proceedings. In delivering the opinion the chancellor said: "The purchaser ought in this case to be compelled to complete his purchase. Such an order was made in the case of *Lansdown v. Eldon*, 14 Vesey, 512, and several cases of the like kind in the court of exchequer were there referred to. The Lord Chancellor in that case ordered the purchaser to pay his purchase money within a fortnight or stand com-

mitted; and he observed that a purchaser could not be permitted to baffle the court. * * * I do not mean at present to lay down any general rule on the subject of coercing a purchaser by attachment; but I ought not to hesitate under the circumstances of the case; and I have no doubt the court in its discretion may do it in every case where the previous conditions of the sale have not given the purchaser an alternative. Here it has become necessary in order to give due effect to the authority and process of the court, and to preserve them from being treated with contempt."

In *Jackson v. Edwards*, 7 Paige, 387, it was held that the court will not give a purchaser at a master's sale the benefit of his purchase where he neglects to comply with the terms of sale in a reasonable time, if a resale is deemed more beneficial to the parties. These powers are retained under the code. A party by purchasing at a judicial sale subjects himself to the jurisdiction of the court. *Phillips v. Dawley*, 1 Neb., 320. And he may appear before the court at any time before the confirmation of the sale and ask to be discharged from the same, as where there is a fatal defect in the title or proceedings which cannot be cured by amendment, the court may discharge him and order return of the deposit or purchase money. *Owen v. Foulder*, 9 Ves., 348. *Morris v. Mowatt*, 2 Paige, 586. The objections, however, must be made before the confirmation of the sale. There may be special circumstances, as in *Fraser v. Ingham*, 4 Neb., 531, where a sale may be set aside after confirmation, but the question does not arise in this case, and need not be considered. The purchaser in this case knew substantially all the facts relating to the title of the property at the time of the sale. His check was drawn to be paid on the confirmation of the sale, thus giving him the use of the money until that time. This provision was in his favor, and upon the confirmation being made the officer was entitled to the amount of the check. The fact

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that a purchaser makes no objection to the sale, as in this case, until after it is confirmed, and then refuses to pay the purchase price because the officer will not guarantee a good title to the property, indicates bad faith on his part and an effort to impede the administration of the law. The court requires good faith on the part of bidders, and in a proper case will require the purchaser to complete his purchase by the payment of the money. This may be done by action, as all the remedies known to the law are open to the officer; but the summary remedy is by motion on notice to the purchaser, and that was the course pursued in this case.

The court will protect its officers as far as possible from loss or damage in the faithful performance of their duties; and as the officer in this case, after the confirmation of the sale, without objection and relying upon the purchaser's check, paid the amounts due to Tingley and Hartley, justice requires that he be protected. It is very clear that justice has been done, and the judgment of the court below is in all things affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**LOUIS METTE AND GEORGE KANNE, PLAINTIFFS IN
ERROR, V. DANIEL L. MCGUCKIN, DEFENDANT IN
ERROR.**

Constitutional Law: LIQUOR LAW CONSTITUTIONAL. The act of the legislature approved February 28, 1881, commonly known as the Slocumb Liquor Law, is not unconstitutional as being in violation of the provisions of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens

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in the several states," it being the exercise of the police power of the state for the protection of its citizens, and not for the purpose of revenue or the regulation of commerce. In the exercise of such power, it is competent for the legislature to require that the licensee shall be a resident of the state, and subject to its laws and to the processes of its courts.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Warren Switzler, for plaintiffs in error.

W. J. Connell, for defendant in error.

REESE, J.

There is but one question involved in this case, to-wit, the constitutionality of chapter fifty of the Compiled Statutes of 1885, commonly known as the "Slocumb Liquor Law." The constitutionality of the act in question was presented to this court and passed upon in *Pleuler v. The State*, 11 Neb., 547, but the point now presented was not then considered. But the general proposition advanced in that case is applicable to this; which is, that "to justify a court in pronouncing an act of the legislature unconstitutional, it must be clear and free from reasonable doubt that it is so, not a doubtful and argumentative implication. Or, in other words, a statute should not be held invalid unless it is clearly forbidden by the paramount law. Such, substantially, has been the holding of all courts speaking upon this subject." See cases there cited.

The grounds upon which plaintiffs in error base their attack upon the law in question is, that no license can be issued to any person to sell liquor unless he be a resident of this state, and hence the law is absolute prohibition so far as it affects persons who are not residents; that it thus becomes prohibitory to non-residents and a license law to the citizen, and that this is in violation of article four of

the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" that it is also in violation of the fourteenth amendment to the same constitution, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

As we view the question here presented, it could serve no good purpose to enter into a lengthy discussion of the provisions of the constitution above cited. It is enough to say that we think they have no application to the case at bar. While it is true that every person, unless prohibited by some statute or other municipal enactment, has the legal right to sell intoxicating liquors, and to that extent may be denominated a "natural right," as insisted by plaintiff in error, yet it is not, perhaps, one of the *inalienable* rights of the citizen which are so sedulously guarded by the constitution and laws of our common country. From the earliest stages of our present civilization the sale of intoxicating liquors has been looked upon as a species of trade which was, or might be, injurious to the public weal; and hence it has been at all times considered a proper subject of police regulation, not as affecting the questions of the commercial interests of the country, but as affecting directly the welfare of the citizen and public morals. It has been held by this court and declared in the very able opinion written by Judge Lake in *Pleuler v. The State*, *supra*, that the act under consideration was not intended as a tax upon the traffic in intoxicating liquors, nor for the purpose of raising revenue, but was an exercise of the ample police power of the state for the purpose of *regulation*. In that case he says: "To our minds it is clear that the restriction (of the constitution) relied on has no proper application to this case, and that the authority given by the act regulating the sale of spirituous liquors is but a proper exercise of the police power of the state, of which, by the

constitution, the legislature is made the sole custodian and dispenser, and not an exercise of the power of taxation. That regulation of a traffic believed by the legislature to be pernicious in its effects upon society, and not the raising of revenue merely, is the chief design of the act, it would seem no man of intelligence can doubt who reads it."

In *Jones v. The People*, 14 Ill., 196, in speaking of the exercise of this power, Judge Trumbull, in writing the opinion, says: "By virtue of its police power every state must have the right to enact such laws as may be necessary for the restraint and punishment of crime, and for the preservation of the public peace, health, and morals of its citizens. It is upon this principle that the sale of lottery tickets and of cards and other instruments for gaming is prohibited, and whoever questioned the constitutionality or validity of such laws? A government that did not possess the power to protect itself against such and similar evils would scarcely be worth preserving."

We may be pardoned if we transfer to this page a part of section 995 of Mr. Bishop's excellent work upon the subject of statutory crimes. In discussing the general question now under consideration, he says: "The doctrine governing this whole subject may be summed up thus: The state, in the enactment of its laws, must exercise its judgment concerning what acts tend to corrupt the public morals, impoverish the community, disturb the public repose, injure the other public interests, or even impair the comfort of individual members, over whom its protecting watch and care are required. And the power to judge of this question is necessarily reposed alone in the legislature, from whose decision no appeal can be taken, directly or indirectly, to any other department of the government. When, therefore, the legislature with this exclusive authority has exercised its right of judging concerning this legislative question, by the enactment of prohibitions like those discussed in this chapter, all other departments of

the government are bound by the decision which no court has a jurisdiction to review."

Finding the police power of the state being thus plenary and complete, and that so long as the enactment is within the exercise of this power, we are relieved from any serious trouble arising out of the question here presented.

It is conceded that the legislature has power to regulate the sale of intoxicating liquors by a license to be issued before the sale can be lawfully made, or that it might, if it saw fit, prohibit the sale altogether. We think it must also be conceded that this would be an exercise of the police power. It must also be conceded that it has the right to require the execution of and delivery to the officers of the state the bond required by law in order that the community may be protected from the results of an improper use or abuse of the license. Why then has it not the power to say that the person to whom the license is issued, and who gives the bond shall be such an one as is subject to the laws of the state, and to the jurisdiction of her courts, and liable to their processes? Any other view would completely destroy the efficacy of the law, and deprive the people of the protection which the law is intended to give. x

Numerous instances might be cited where the legislatures, in the exercise of this power, have required that such persons, including corporations, as may have placed themselves within its provisions shall be citizens and subject to its jurisdiction, but is thought unnecessary to do so.

The act in question being the exercise of the police power of the state, and not for the purpose of revenue or of regulating commerce, it follows that it is not in violation of the constitutional provisions referred to, and the decision of the district court was correct. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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44 116

N. G. O. CODE, PLAINTIFF IN ERROR, v. WM. R. CARLTON, JOHN FITZGERALD, AND ALBRO J. AMES, DEFENDANTS IN ERROR.

Lien of Laborer on Railroad: ATTACHMENT. A. J. A. was a subcontractor under J. F. to build certain sections of a railroad, which work he again sublet to H., L. and L., who were performing said work. Upon the completion of said contract said J. F. would be indebted to A. J. A. \$2,413.27. H., L. and L. filed a statutory lien on said railroad for their work and labor in building said sections thereof. W. R. C., in the presence of A. J. A., presented for acceptance and payment to J. F. a draft or order drawn by A. J. A. on J. F. in favor of and payable to W. R. C. for the sum of \$1,041.50 in full of all claims. Whereupon J. F. stated to A. J. A., in the presence of W. R. C., that he would not pay it until all of the liens for labor on said sections were settled and paid off. N. G. O. C. sued out an attachment against A. J. A., and garnished J. F.; *Held*, That there was an equitable assignment and appropriation of the money payable from J. F. to A. J. A. to W. R. C. to the amount called for in said draft or order subject to the said statutory liens.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Field & Harrison, for plaintiff in error.

Harwood, Ames & Kelly, for defendant in error Carlton.

COBB, CH. J.

It appears from the record that on the 5th day of February, 1884, Wm. R. Carlton commenced an action in the district court of Lancaster county against John Fitzgerald and Albro J. Ames. In his petition the said Carlton alleged that on or before the 3d day of January, 1883, and ever since said time the said Fitzgerald had been and still was, but for the facts and circumstances thereafter set

Code v. Carlton.

forth, justly indebted to the said Ames in a sum exceeding the sum of one thousand and forty-one dollars and fifty cents, and that on said 3d day of January, 1883, and before that time the said Ames was, and still is, justly indebted to the said Carlton in said sum of one thousand and forty-one dollars and fifty cents, and that on said last named date, in consideration of the said indebtedness, the said Ames made, executed, and delivered to the said Carlton his certain order or bill of exchange in writing in the words and figures following:

“CHESTER, NEB., Jan. 3, 1883.

“John Fitzgerald, please pay W. R. Carlton ten hundred and forty-one and $\frac{50}{100}$ dollars (\$1,041.50) as payment in full for all claims to date.

“(Signed)

A. J. AMES.”

That afterwards, and on or about the 21st day of January, 1884, the said Carlton presented said order to Fitzgerald, and requested him to accept the same, and that thereupon said Fitzgerald, in the presence of said Ames, told the plaintiff that he, said Fitzgerald, was owing said Ames several hundred dollars in addition to the amount of said order, but that said Ames had been a subcontractor under said Fitzgerald for the building of a certain line of railroad, and had in the prosecution thereof relet certain portions of said work to Higgins, Little, and Love, and that they had filed liens on said road for the certain amounts claimed to be due them by virtue of their respective contracts with said Ames, as aforesaid, and that he, said Fitzgerald, was unable to determine for what amount said claims and liens would be established, or were valid, nor how much, therefore, would remain in his hands due to said Ames after their satisfaction, and that he declined, therefore, to accept said order. But then and there, with the present consent of said Ames, agreed with and promised the plaintiff that whatever amount should remain

payable by him, Fitzgerald, to Ames, after the satisfaction of said liens, he would pay the plaintiff by reason of said order to the full amount thereof. Also that afterwards and on or about the 30th day of January, 1884, the plaintiff again presented said order to said Fitzgerald, and again requested him to pay or unconditionally accept the same, which said Fitzgerald again refused to do, using substantially the same language as hereinbefore recited, and saying to the plaintiff, in the presence and with the express assent of said Ames, that he, plaintiff, might rest perfectly easy, that whatever remained of the moneys in his hands due said Ames over and above the amount of said liens, he, said Fitzgerald, would pay the plaintiff to the full amount of said order, and that he would fully protect the plaintiff in the premises. It was further alleged in and by said petition that at all the times thereinbefore stated said Fitzgerald was owing and that he was still owing to said Ames a greater sum than ten hundred and forty-one dollars and fifty cents over and above all claims, liens, and demands, of whatever description, which the said Higgins, Little, and Love, all or any of them have, or at any time or now claim to have against the said Ames, or against or upon said line of railroad. That the said Ames is insolvent, and is a non-resident of this state, and has no property or effects whatever, except said moneys in the hands of said Fitzgerald, applicable to the payment of said demand.

With prayer for judgment, etc.

On the 12th day of June, 1884, N. G. O. Code applied for and obtained leave of court to intervene and answer in said cause, and on the 16th day of June following, filed his answer and cross-bill therein. In and by said answer he alleged that on the 30th day of January, 1884, he, the said Code, commenced an action in the district court of Lancaster county against the said Albro J. Ames, and caused an attachment to issue in said cause, and notice in

garnishment was served upon said Fitzgerald, defendant herein, and such further proceedings were had in said action that at the February term of said court, to-wit, March 24th, 1884, the said Code obtained a judgment against said Ames for the sum of \$2,455.94, debt and costs. The said Fitzgerald as garnishee in said cause appeared and answered, and from said answer the court found in the possession of said Fitzgerald property of said Ames in the sum of \$2,413.27, and on said 27th day of March the court ordered the said Fitzgerald to hold the same, subject to the order of the court.

Further, that at the time of the giving of the order mentioned in the plaintiff's petition by the said Ames to this plaintiff, the said Ames had no funds whatever in the hands of the said Fitzgerald.

That at the time of the commencement of this action, and of the service of garnishment on said Fitzgerald, said Fitzgerald had not accepted said draft and had refused to accept the same. That by virtue of said garnishment proceeding the said Code is entitled to receive or hold all of the said \$2,413.27, by this court found in the possession of said Fitzgerald belonging to said Ames; that no part of the above mentioned judgment obtained by him against said Ames has been paid.

Also denies that the plaintiff herein ever had or acquired any lien or claim whatever, by virtue of said alleged draft, upon the money in hands of Fitzgerald belonging to the said Ames, and denies each and every allegation in his petition contained, except as may be admitted herein.

With demand for judgment, etc.

On the 24th day of June, 1884, the defendant, John Fitzgerald, made and filed his answer in said action, wherein and whereby he admitted all the facts stated in said the plaintiff's petition, except what were therein denied or modified; said defendant averred that since the giving of the order by him referred to in plaintiff's petition,

he was garnished in the case of *N. G. O. Code v. Albro J. Ames*, and made his answer thereto in said court, which answer in garnishment he made a part of his answer herein. Defendant admitted that he had in his possession moneys belonging to one Albro J. Ames amounting to \$1,006.31, subject, however, to the order of Albro J. Ames on John Fitzgerald, in favor of said Carlton, and also subject to the said garnishment proceeding of *N. G. O. Code*.

That defendant did not know to whom said money belongs, and asks that the said court make such order in regard to the disposition of the money as should protect him, the said defendant, and prevent him from having to pay said money twice.

It also appears that on the 23d day of June, 1884, the said plaintiff Carlton made and filed his reply to the answer and cross-bill of the said Code, in and by which he denied each and every allegation of new matter in said answer and cross-bill contained.

Upon the trial to the court the answer of John Fitzgerald in garnishment in the case of *N. G. O. Code v. Albro J. Ames*, with exhibits thereto attached, was admitted in evidence, and constitutes the entire evidence in the case. Upon it the district court found for the plaintiff, and that there was due him from the defendant John Fitzgerald on the order set out in the petition the sum of one thousand dollars. And the court further found that there was due to defendant *N. G. O. Code* from said defendant John Fitzgerald the sum of fourteen dollars and eighty-one cents, upon his answer and cross-petition in said action, not including the amount, if any, that may be owing by said Fitzgerald after satisfying contested liens mentioned in his answer in garnishment introduced in evidence in said action. And thereupon the court rendered judgment in favor of William R. Carlton against John Fitzgerald for the said sum of one thousand dollars, and in favor of *N. G. O. Code* and against John Fitzgerald for the said sum of fourteen dollars and eighty-one cents.

The cause is brought to this court on error by N. G. O. Code. There is but one error assigned, although the same is stated in three different forms all amounting to the same proposition, to-wit: "That the findings and judgment are not sustained by the evidence."

In my view the evidence as contained in the bill of exceptions establishes the facts set out in the petition, and but for the peculiar attitude of the parties the sole question governing the case might as well have been presented by a demurrer to the petition.

I think that the facts set out in the petition and established by the evidence constituted an equitable assignment of whatever funds might prove to be in Fitzgerald's hands belonging or coming to Ames upon the completion of the work and the adjustment of the statutory liens thereon. By the drawing and delivery of the draft or order Ames agreed to such assignment; by its receipt and presentation to Fitzgerald, Carlton agreed to the same, and the verbal conditional acceptance by Fitzgerald was clearly binding on him within the terms of the limitations embraced in such acceptance. While it is true that it is not stated in the draft or order mentioned in the petition and referred to in the bill of exceptions that the same was drawn upon the fund in Fitzgerald's hands payable to Ames upon the completion of his sub-contract on the railroad, yet it was certainly so expressed, understood, and intended by Carlton, Ames, and Fitzgerald at the time of the presentation of said order to Fitzgerald and its qualified acceptance by him. While it may be granted that the making and delivery of the draft or order by Ames to Carlton did not amount to a legal appropriation of any particular fund to its payment, yet I think that those facts, taken in connection with the qualified verbal acceptance of the draft or order by Fitzgerald in the manner set out in the petition and bill of exceptions, and in the presence of both the drawer and holder thereof, did, upon the princi-

ples of all the authorities cited, amount to an equitable and irrevocable appropriation of this particular fund to the extent of the amount stated in said draft or order.

It is not contended, nor do I think it could be successfully, that Ames, after the facts and circumstances above referred to, could have maintained an action against Fitzgerald for the said moneys. If Fitzgerald could not have been sued by Ames then it is clear, both upon principle and authority, that he cannot be garnished by Ames' creditor. "A fundamental doctrine of garnishment is, that the plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses. When, therefore, the attachment plaintiff seeks to avail himself of the rights of the defendant against the garnishee his recourse against the latter must of necessity be limited by the extent of the garnishee's liability to the defendant." Drake on Att., § 458. The exception to the above principle need not be here referred to, as there was not even a suggestion of fraud in the case at bar.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHICAGO LUMBER COMPANY, PLAINTIFF IN ERROR, v.
GEORGE E. FISHER, DEFENDANT IN ERROR.

1. **Chattel Mortgage:** TRANSFER OF PART OF PROPERTY BY CONSENT OF MORTGAGEE. Where a debtor executed to his creditor a chattel mortgage upon a stock of goods, and retained possession of the goods, there being no agreement by which the mortgagor was to sell any part of the goods in the usual course of trade nor permission given him by the mortgagee so to do, the fact that a small part of the mortgaged property was, by

18	334
34	446
18	334
39	250
18	334
45	128
18	334
51	622
54	474

the consent of the mortgagee, transferred to a third party in payment of a debt, would not of itself render the mortgage fraudulent and void as against creditors.

2. ———: PROPERTY NOT SUBJECT TO SALE ON EXECUTION AGAINST MORTGAGOR. Where a chattel mortgage is given to secure a *bona fide* debt, and the mortgagee has taken possession of the mortgaged property, or has the right to do so under the provisions of the mortgage, a judgment creditor of the mortgagor cannot, without the consent of the mortgagee, levy upon the mortgaged property, and sell it under execution. And especially would this be the case if the mortgaged property consisted of a number of articles such as a stock of goods. The remedy would be by garnishee process or such other proper proceeding as would reach the interest of the mortgagor after the debt due the mortgagee was paid.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Charles E. Magoon, for plaintiff in error.

R. D. Stearns, for defendant in error.

REESE, J.

This was an action in replevin by which defendant in error procured the possession of certain property on which he held a chattel mortgage.

Defendant in that action, plaintiff in error here, seeks a review by proceedings in error. The property, described in the mortgage at length, consisted of a stock of furniture, upholstering goods, etc. The mortgage was given for the purpose of securing the payment of a promissory note for the sum of one hundred and fifty dollars, which was given to cover rent due and to become due for the store building in which the furniture was kept. Plaintiff in error is creditor of the mortgagors and caused an execution to be levied upon the property, when this action was instituted for its possession.

The first contention of plaintiff in error is, that at the

time of the execution of the mortgage it was agreed that the mortgagors might continue to sell, in the usual course of trade, the mortgaged property, and that therefore the mortgage was fraudulent and void as to creditors.

The mortgage itself contains no provision giving this right, and we think the testimony fails to show any agreement of the kind at the time of the execution and delivery of the instrument. However that may be, the most that can be said as to such an agreement being made is, that there was a conflict in the testimony upon that point and the question was one for the jury to decide. *Johnson v. Phifer*, 6 Neb., 401.

The trial court instructed the jury that "a chattel mortgage of a stock of goods used in the way of retail trade, and where the mortgagor is allowed to continue in the possession of the property and to sell the goods in the usual course of trade, is in law fraudulent and void, as against the creditors of the mortgagor, no matter whether the parties intended any actual fraud or not." By this and other instructions the question here presented was fully submitted to the jury and they must have found that no such an agreement was made.

The testimony upon the question as to whether the mortgagors continued selling the goods after the execution of the mortgage is very meager, with the exception that a few articles of no great value were by the consent of the mortgagee transferred to some one in payment of a debt.

The court, among other instructions gave the following: "You are instructed that the mere fact (if such it be) that Fisher left the goods in the possession of the firm and knew that they were selling small parts of the same, will not of itself render the mortgage fraudulent and void as to defendants, but if you find that there was an agreement between the firm and plaintiff that they were to sell the goods the same as before and apply the proceeds to their own use this would render the mortgage void." The giving of this instruction is alleged as error.

In view of the testimony in the case we cannot say there was error in giving it. It is not the specific sale of a few articles of inconsiderable value, with the consent of the mortgagee, that makes a mortgage fraudulent, but where such sales are made in the usual course of trade, where there is a "floating mortgage which attaches, swells, and contracts as the stock in trade changes, increases, or diminishes, or may wholly expire by entire sale and disposition, at the will of the mortgagor. Such is no certain security upon specific property. * * * In such a case the whole right to dispose of the property to pay a debt depends on the will of the debtor." *Collins & McElroy v. Myers*, 16 Ohio, 554. The jury might well find that the sales made, if any, were not such as would disturb the lien of the mortgage, and that finding could not, under the rule stated in *Johnson v. Phifer*, be molested.

It is claimed that there is an irreconcilable conflict between instruction number four, given upon the request of defendant in error, and that numbered eight of those given upon the request of plaintiff in error. They are as follows:

"4. If you find that Fisher, the plaintiff, had actually taken possession of the goods at or before the time when the execution was levied (if you find that there was a levy) or that he had a right of possession under his mortgage, you are instructed that this would cut off any rights of the defendant under such execution and there would be no leviable interest in such goods, unless the mortgage was void as to creditors."

"8. The jury are instructed that the interest which a mortgagor possesses in and to the property mortgaged by him, is such an interest as may be seized and levied upon by execution while in his possession."

The objection to the first instruction and the support of the last seem to be based principally upon *Burnham v. Doolittle*, 14 Neb., 214. It may be observed that there was some testimony in this case tending to prove that defend-

ant in error had taken possession of the mortgaged goods prior to the levy by the officer. If that were true (and of which the jury were the sole judges), then, according to the decision in *Burnham v. Doolittle*, the proper remedy was by garnishment. But suppose he had not taken actual possession, but had the right to do so at any time, what condition would he then be in? To our mind that must depend to a great extent upon the character of the mortgaged property. In case that property consisted of a single or but few articles which might be followed into the hands of the purchaser and the lien of the mortgage be perpetuated, the mortgagee's interest might be protected and the *interest* of the mortgagor sold. But suppose the property consisted of a stock of groceries, as in the case of *Hedman v. Anderson*, 6 Neb., 392; or of a lot of upholstering goods, moulding, bureau handles, castors, etc., as in this case, how could such property be sold and delivered to purchasers without destroying the lien of the mortgagee? Most clearly it could not be done, and we do not think *Burnham v. Doolittle* so holds. In that case the then chief justice, Lake, in writing the opinion, says: "Having arrived at the conclusion that *an equity of redemption* is such an *interest* as may be reached by the process of attachment or garnishment before judgment, it only remains for us to determine whether the remedy afforded by the statute, giving the right of garnishment after judgment in aid of execution, was intended to be any less effective and complete in this respect." That case being a proceeding in garnishment, the court held that "whatever interest the judgment debtor had at the date of the service of the summons in garnishment in the two notes held as collateral security, which seems to be merely the equity of redemption, or whatever may remain of the proceeds thereof after paying the secured debt, the garnishee is answerable for." In this opinion it is said, and partly quoted in the brief of plaintiff in error, "But in view of our attachment law, and the ruling of the

supreme court of Ohio on a statute from which ours is copied, and upon more mature reflection, we are now satisfied that whatever interest a mortgagor of chattels may have in them, in this state, may be reached by seizure under a writ of attachment at any time while in his possession, and by means of the process of garnishment if they have passed into the hands of the mortgagee." If by this language the learned judge intended to say that, under all circumstances, where property is in the possession of the mortgagor, an execution or order of attachment may be levied upon the *property itself*, and the property sold, the mortgagee being thus in many instances wholly deprived of his security, we cannot agree with him. But if he intended to say that the interest—*i.e.*, the equity of redemption—might be seized upon as an *interest*, then we should not differ, perhaps. And this, we think, is in the line of reasoning adopted by the writer of that opinion, for he says, after citing *Carty v. Festemaker*, 14 Ohio State, 457: "The seizure of the property under the order of attachment, it was said, 'creates a lien in favor of the attaching creditor upon the interest of such mortgagor.' Now the interest of a mortgagor in property thus circumstanced, as to the mortgagee, is but the equity of redemption, or what may remain after the mortgage debt is paid. And if this interest be liable to attachment, as there held, it seems to follow necessarily that where property covered by a mortgage has passed into the hands of the mortgagee, the equity of redemption may be reached by garnishment, which is nothing but a species of attachment whereby property rights which the officer holding the order cannot 'come at' and take into his possession, may be brought within the jurisdiction of the court, and by its judgment subjected to the payment of the owner's debts."

But if we are wrong in this conclusion, it still remains that the case of *Burnham v. Doolittle* was one where it was sought to reach property of a judgment debtor in the hands

of a pledgee by garnishee process, and not by a direct levy of the execution on the thing pledged. And the question before the court was not whether the execution creditor could levy upon the pledge and deprive the pledgee of its possession. To that extent the decision is not authority in this case, except in so far as the reasoning employed may commend itself as sound.

If our view is correct, it follows that there is no such contradiction in the instructions as could mislead the jury to the prejudice of plaintiff in error.

As the other questions presented were principally questions of fact, upon which the jury were required to pass, and as they seem to have been fairly submitted, we will give them no further consideration.

As it does not affirmatively appear that the verdict was erroneous the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18 840
43 189

IN RE BOARD OF PUBLIC LANDS AND BUILDINGS.

Officers of State Institutions: APPOINTMENT AND REMOVAL.

The act defining the powers and duties of the board of public lands and buildings does not confer upon the board the authority to appoint and remove officers of state institutions of which they have supervision. Such appointments are to be made by the governor. *State v. Bacon*, 6 Neb., 286. *State v. Board of Public Lands and Buildings*, 7 Neb., 42.

THIS was a matter coming before the court upon the following letter:

OFFICE OF THE BOARD OF PUBLIC
LANDS AND BUILDINGS,
LINCOLN, NEB., Oct. 5, 1885.

To the Supreme Court of the State of Nebraska:

We, the undersigned members of the board of public

lands and buildings, would respectfully represent that a doubt exists in regard to the construction of section 10 of article V., entitled "Executive," and section 1, article XVI., entitled "Schedule" of the Constitution of the state of Nebraska, and sections 6 and 10 of chapter 40, of the Compiled Statutes of the state of Nebraska for 1885, entitled "Insane," and if not inconsistent with the duties of your honorable court, in order to further the proper execution of the law and the promotion of public service in this state, we would respectfully solicit an opinion from you upon the following question:

Does the appointment of the matron of the hospital for the insane lie in the governor or in the board of public lands and buildings, upon the nomination of the superintendent of the hospital for the insane?

Respectfully submitted,

E. P. ROGGEN,
Secretary of State.

C. H. WILLARD,
State Treasurer.

JOSEPH SCOTT,
Com. Public Lands and Buildings.

To this letter the judges replied as follows:

To the Honorable Board of Public Lands and Buildings:

GENTLEMEN—Deeming an answer to your communication of the 5th instant not inconsistent with our duties, we submit the following:

The powers of the board are defined by statute as follows: "They shall have general supervision and control of all the public lands, lots, and grounds, and all institutions, buildings, and the grounds thereto, now owned or that may hereafter be acquired by the state, including the saline lands, together with all salt springs, penitentiary lands, internal improvement lands and lots, as well as the state capitol building and grounds, the state penitentiary and grounds, the state hospital for the insane and grounds,

the asylum for the deaf and dumb and grounds, the asylum for the blind and grounds, and all other lands, lots, grounds, and buildings, now belonging or hereafter acquired by the state. *Provided, however,* That all lands, lots, grounds, and buildings or institutions set aside for and devoted to educational purposes be and hereby are excepted from the provisions of this act.

"Sec. 2. The board of public lands and buildings shall have the power to make general directions, according to law, for the sale, leasing, or other disposition of the lands, lots, and grounds belonging to the state as aforesaid, and shall give warrant by their proceedings as such board to the commissioner of public lands and buildings for his action in the sale and leasing of such lands, lots, and grounds, and shall require of the said commissioner a full and detailed report of all such sales, leases, and the funds thereby acquired as hereinafter directed.

"Sec. 3. The board shall have general custody and charge of all buildings and institutions, and the grounds thereto coming under the provisions of this act, and shall be responsible for the proper keeping and repair of the same, and shall require from the commissioner of public lands and buildings, who shall be the direct custodian of such institutions, buildings, and grounds, a report at least one in every three months, as to the condition of the same. *Provided,* That no additions shall be made to any public buildings without special appropriation of the legislature.

"Sec. 4. The board shall have power, under the restrictions of this act, to direct the general management of all the said institutions, and be responsible for the proper disbursement of the funds appropriated for their maintenance, and shall have reviewing power over the acts of the officers of such institutions, and shall, on the part of the state, at regular meetings, as hereinafter directed, audit all accounts of such officers, including the accounts of the commissioner of public lands and buildings, except his salary.

The 5th and 6th sections relate to the mode of auditing and approving accounts.

Sec. 7. is as follows: "It shall be the duty of the board to take cognizance of all charges or complaints made against the said public officers, and at a regular meeting to give an impartial hearing to such charges and the defense against them, if any, and report the charges, evidence, and their conclusion in the matter to the governor within six days after the determination of such investigation." Comp. St., Ch. 83, Art. VII. These sections of the statute are all that relate to power of the board except in relation to the penitentiary, and it will be seen that the authority to appoint officers of state institutions is not given, while section 7 requires the board after examining charges against public officers to report the charges, evidence, and their conclusion in the matter, to the governor within six days. The object of this report evidently is to apprise the governor of the nature of the charges, the opinion of the board as to their truth or falsity, and to enable him to review the evidence and determine whether the conclusion of the board is justified or sustained by the evidence. If the board could remove an officer why should this report be required? Why bring to the attention of the governor charges if the board could act upon them and remove an officer? This provision repels the implication of any such authority in the board. *State v. Bacon*, 6 Neb., 289.

Our attention is called to section 6, Chap. 40, of Comp. St., which is as follows: "The board of trustees shall appoint, upon the nomination of the superintendent, a steward and matron, who, together with the superintendent and assistant physician, shall be styled the resident officers of the hospital, and shall reside in the same, and be governed by all the laws and by-laws established for the government of the hospital." This section was passed in 1873, and before the adoption of our present constitution. The act of 1873 vested the government of the hospital for the insane

Osborne & Co. v. Kline.

in a board of trustees, who had authority as provided in section 6 above quoted. The constitution of 1875, however, abolished the board of trustees and vested the government of the hospital in the board of public lands and buildings, and, as we have seen, this board possesses no power to remove or appoint officers. This question was fully considered in *State v. Bacon*, 6 Neb., 286, and *State v. Board of Public Lands and Buildings*, 7 Id., 42, in which it was held that the board possessed no power to appoint or remove officers. These decisions were rendered after exhaustive arguments and careful examination of the subject, and as there has been no material change in the statute since that time, will be adhered to. The provision of section 10, that the governor shall appoint the superintendent and two assistant physicians, does not even by implication confer authority on the board to appoint the other officers. There being no authority in the board to appoint, that duty devolves on the governor as provided in the constitution.

AMASA COBB, *Chief Justice.*SAMUEL MAXWELL, } *Judges.*
M. B. REESE, }

D. M. OSBORNE & Co., PLAINTIFFS IN ERROR, v. JACOB
KLINE, DEFENDANT IN ERROR.

1. **Answer:** NO EVIDENCE TO ESTABLISH DEFENCE: VERDICT.
Where the plaintiff's cause of action is admitted by the defendant in his answer, and the defense of payment is made thereto, but there is no evidence on the trial tending to establish such defense, the court should direct the jury to bring in a verdict in favor of the plaintiff.
2. **Argument:** OPENING AND CLOSING. That party against whom judgment would be rendered in case no evidence was given by either side, has the right (and it is his duty) to open the testimony, and also the right to open and close the argument.

25-360

18	344
30	436
32	317
18	344
35	374
18	344
47	184
18	344
52	715
18	344
56	363

ERROR to the district court for Lancaster county. Tried below before POUND, J.

L. C. Burr, for plaintiffs in error.

J. C. Johnston and *J. C. Crooker*, for defendant in error.

COBB, CH. J.

This action was originally brought by D. M. Osborne & Co., plaintiffs, against Jacob Kline, defendant, on one promissory note for the sum of \$54 alleged to be due and payable on the first day of January, 1882. The action was brought by appeal to the district court of Lancaster county on the 5th day of February, 1883, and petition filed in said court describing the note as above. And on the 25th day of February, 1884, plaintiffs filed in said court, in said action, a supplemental petition on another note for the sum of \$53, due the first day of October, 1883.

The defendant made answer alleging payment of the said notes. For further defense he also set up in his answer that said notes were given for, and the sole consideration therefor was, the sale by the plaintiffs to the defendant of one Wheeler machine, an agricultural implement to use on his farm, for which defendant gave to plaintiffs the sum of \$160, evidenced by three several notes, the second and third of which are the notes described in the petition and supplemental petition in the said cause, and all of a like description, and made payable at different times. That the first thereof was paid by said defendant, and that on or about November 10, 1880, defendant sold said machine, by and with the consent and agreement of the plaintiffs, to one William Kappa, for the same sum he had paid for it by his notes aforesaid, and that the said William Kappa thereupon made his notes for the amount due on said machine payable to the order of the plaintiffs, and delivered

the same to plaintiffs, and the plaintiffs then and there promised and agreed to deliver his said notes of July 7, 1880, to the said defendant, and discharge him therefrom in full, with allegations that said plaintiffs, taking advantage of defendant's ignorance of the English language and way of doing business, only gave him one of said notes, but retained the other two, although often requested by the defendant to deliver the same to him, yet the plaintiffs have retained said notes, etc.

The case was tried to a jury, who found and rendered their verdict in favor of the defendant. The plaintiffs bring the cause to this court on error.

The following are the errors assigned:

"1. The verdict is contrary to the instruction of the court.

"2. The verdict is not sustained by the evidence.

"3. The verdict and judgment are contrary to law.

"4. The court erred in refusing to give instructions 1, 3, 4, and 5, as requested on the part of the plaintiffs.

"5. The court erred in allowing the defendant the opening and closing of the argument.

"6. The court erred in giving instructions No. 1 and 2, as given by the court on its own motion."

In examining these assignments of error we will take them up in the order in which they should have been, not that in which they are presented.

The instructions, the refusal to give which constitute the fourth ground of error, are in the following words:

"1. The jury are instructed that under the contract of agency between the plaintiffs and Henry Keefer, Mr. Keefer was not authorized to make an exchange of notes, and take the notes of said Kappa in the place of defendant's notes, and I instruct the jury that Mr. Keefer had no authority to make a novation of parties to said notes, and your verdict must be for the plaintiffs.

"3. The jury is instructed that in this case there is no

evidence that Henry Keefer was an agent of the plaintiffs to receive the money claimed to have been paid by the defendant to him, nor was he the agent of the plaintiffs, to receive payment of said notes, or either of them, and your verdict must be for the plaintiffs for the amount of the said notes and the interest thereon.

"4. The jury is instructed that there is no evidence that Henry Keefer was the agent of the plaintiffs to the novation of the payors to the notes sued in this action, and claimed to have taken place on the 10th day of November, 1880, in the answer of said defendant, and your verdict must be for the plaintiffs.

"5. The jury is instructed that you must find a verdict for the plaintiffs in the amount set forth in the supplemental petition."

The following instructions were given by the court on its own motion:

"1. The court instructs the jury that Henry Keefer had no authority to take the notes of one Kappa in exchange for the notes which had been given to the plaintiffs, D. M. Osborne & Co., by defendant, Jacob Kline, and if you find from the evidence that said Keefer made such exchange the plaintiffs are not bound thereby, and you will find for the plaintiffs for the full amount of the notes sued with interest according to the terms thereof, unless you further find from the evidence that the plaintiffs have ratified the acts of said Keefer in making such exchange.

"2. If you find from the evidence that said Keefer took the notes of said Kappa in exchange for the notes given to the plaintiffs by said Kline, including the notes sued on in this action, and that said Kappa paid to said Keefer the notes which he had given to him, and the plaintiffs with full knowledge that said Keefer had made such exchange received the money which Kappa had paid to Keefer, that would be a ratification of said Keefer's acts, and the plaintiffs are bound thereby, and cannot re-

cover, and you will find for the defendant. But in order to constitute such ratification the plaintiffs must have received such money, if they did receive it from said Keefer with full knowledge of all the facts."

It appears from the pleadings that on the 7th day of July, 1880, the defendant bought of the plaintiffs, through one Henry Keefer, their local agent at Lincoln, one harvesting machine, at the price of \$160, and gave therefor his three promissory notes, one for fifty-three dollars, due October 1, 1880; one for fifty-four dollars, due Jan. 1, 1882, and one for fifty-three dollars, due Jan. 1, 1883, payable to the order of D. M. Osborne & Co., at the First National Bank of Lincoln.

This suit was brought on the two last described of said notes.

There was evidence introduced on the part of the defendant tending to prove that some time in the fall of 1880 the witness Kappa agreed with the defendant Kline to take the said machine off of his hands, and settle or pay to the holders of Kline's notes a balance remaining due on the first to fall due of said notes, and the whole of the other two, and that on the 10th day of November of said year Kline and Kappa went to the office of Henry Keefer for the purpose of consummating said arrangement. Upon stating their object to Keefer he informed them that the notes had been sent to the bank, or to the company, and so he could not give Kline his notes back, but that he would take Kappa's notes, and give Kline a receipt for his notes. That thereupon Kappa executed and delivered to Keefer his note, payable to Keefer, for \$24.68, the supposed balance remaining unpaid on the first note, and his note for \$110, the supposed amount of the two other notes and interest, and also delivered to him as collateral security for said last mentioned note the note of one Jonathan Krug for the same amount. That thereupon Keefer, or some one in his office, executed and delivered to Kline his

individual receipt. This receipt having been put in evidence on the trial, I copy it here:

"LINCOLN, NEB., Nov. 10, 1880.

"Received of Jacob Kline one hundred and sixty dollars, amt. in full due for Wheeler machine, for two notes given, one due Jan. 1, 1882, for \$54.00, and one due Jan. 1, 1883, for \$53.00 payable to D. M. Osborne & Co.

"\$160.00.

HENRY KEEFER."

Kappa, who was sworn and examined as a witness on the part of the defendant, testified that he had paid both of his said notes to Henry Keefer. He produced the note for \$25.68, and filed it as an exhibit in the case, but he did not produce the note for \$110, nor was there any reason given or suggested for its non-production. But whether the said note was paid to Henry Keefer or not there was no evidence tending to prove authority, on the part of Keefer, to make the exchange of the said notes, nor to receive the money called for by the two original notes. And if he did receive it there was not a particle of evidence that he ever paid it or any part of it over to the plaintiffs, or that they ever received a dollar of it knowingly or unknowingly.

There can be no doubt then that the district court erred in giving the two instructions, one and two, because, there being no evidence of ratification before the jury, to instruct them upon that branch of law, however correctly as abstract propositions of law, was only to call the attention of the jury from the evidence to that which was not in evidence nor proper for their consideration.

As to the 4th point of error, the refusal of the court to give the instructions prayed by plaintiffs: While the said instructions were not as carefully or accurately drawn as they might have been they were substantially correct.

There was no evidence tending to prove that Keefer ever had authority to accept payment of either one of the

said three original notes. But on the contrary there was evidence that he ceased to be the agent of the plaintiffs for any purpose, more than two months before the change of notes as testified to by Mr. Kappa.

At the consultation by the judges it was suggested that possibly the verdict might be sustained on the ground that Keefer having the first note in his possession and accepting of two partial payments on it from Kline, and finally exchanging the note itself with Kappa for his note for the amount of the balance remaining unpaid, would be taken as evidence of his authority to collect that note, and that his authority to collect it might be deemed as some evidence of his authority to collect or exchange the other two notes taken at the same time, and for the same consideration. But upon thorough examination of the evidence it does not appear that Keefer ever had either of the three notes in his possession after the time of taking them from Kline. He testified to sending them to the plaintiff company after taking them, and supposed that they sent them to the First National Bank for collection when they approached maturity, as was their custom. There were two payments endorsed on the first note before the transaction of the 10th of November, but Keefer swears that neither was made to him, nor that either of the endorsements are in his handwriting. It appears that the first of these three notes to fall due was in the hands of defendant's attorneys, and offered in evidence on the trial, but there was no evidence as to how they or the defendant obtained possession of it. In the absence of such proof certainly no presumption of authority on the part of Keefer to control the other notes could possibly arise.

From the above considerations it follows that there was no evidence before the jury even tending to establish a defense to either of the two notes sued on. It was therefore the duty of the district court to direct a verdict for the plaintiffs.

It was never doubted that when plaintiff upon a trial fails to prove a point absolutely indispensable to his right to recover that the court should either grant a non-suit or direct a verdict for the defendant. And this rule of law is equally applicable to a case where the plaintiff's right to recover *prima facie* is established, as in the case at bar, by undisputed and indisputable evidence, and there is an entire want of evidence to sustain the defense. In such cases it is equally the duty of the court to direct a verdict for the plaintiff.

When it is clear that a finding of the jury for a certain one of the parties would be set aside for the want of evidence to sustain it, then it is trifling with the time as well as the rights of the parties, on the part of the court, to submit the case to the jury.

As to the fifth assignment, there was no error in the court's allowing the defendant's counsel to open and close the argument. Doubtless that party against whom judgment would be rendered if no evidence were introduced on either side had the right, and it was his duty, to open the testimony; and I think there can be no doubt of the rule that the party entitled to open the testimony has also the right to open and close the argument. Now in the case at bar the defendant, by his answer, admitted everything that was alleged by the plaintiffs in their petition, but plead payment. Accordingly, it was altogether unnecessary on the part of the plaintiffs to introduce the notes sued on in evidence, and their doing so could not change the *status* or rights of the parties in court.

The judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

18	352
19	355
18	352
49	402

O. O. WELLS AND J. C. FLETCHER, PLAINTIFFS IN ERROR, v. WILLIAM LAMB, ASSIGNEE, ETC., DEFENDANT IN ERROR.

Assignment for Creditors: ATTACHMENT BY CREDITORS. A firm being in embarrassed circumstances prepared an assignment of their property for the benefit of their creditors, and held the same ready to be delivered to the sheriff. The assignment was prepared about one o'clock A.M., on Monday, and about five o'clock P.M. of said day the deputy sheriff appeared, apparently for the purpose of levying certain attachments on the assigned property. Before any attempt was made to levy the attachments, the assignment was delivered to and accepted by him, and on the next day transmitted to the sheriff, who had the same recorded immediately, the goods being in possession of the deputy sheriff. Three days afterwards other writs of attachment were issued and levied on the property. An assignee having been chosen by the creditors, who brought an action of replevin and obtained possession of the property, *Held*, That the assignee was entitled to the possession of the property.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Griggs & Rinaker, for plaintiffs in error, contended that the record showed the assignment was made Sept. 10, at 1 A.M., that it was handed to deputy sheriff about 4 P.M., Sept. 11, transmitted to the sheriff Sept. 12, and filed same day at 12:12 P.M. Hence, after the signing and acknowledging of said assignment thirty-nine hours elapsed before it was delivered to the deputy sheriff, and fifty-seven before it was filed for record. Therefore the assignee is not entitled to hold the property in controversy as against attaching creditors under the provisions of section 6, Ch. 6, Comp. Stat. Execution of the instrument does not include "delivery." The assignment was not filed for record within twenty-four hours after its execution. The defendant seeks to avoid this objection by urging that the instru-

Wells v. Lamb.

ment was not *executed* until it was delivered, and hence, as it was filed within twenty-four hours after it was handed to the deputy sheriff, it is valid. There are in the act itself two distinct declarations that *execution* does not include *delivery*, and in the absence of express words to the contrary a like meaning will be given to said word wherever it occurs in the act. *Pitte v. Shipley*, 46 Cal., 154. *Hoag v. Howard*, 55 Id., 564.

J. E. Cobbey, for defendant in error.

The word *executed*, as used in this act, was intended to have its ordinary legal meaning, and as counsel admit that *execute* ordinarily includes delivery, their argument must fall, and it is unnecessary to cite authority on this point. Plaintiffs in error participated in the assignment, and are now estopped from impeaching it. *Burrill on Assignment*, 747, and cases cited.

MAXWELL, J.

In September, 1883, Postlewait & Co. were doing business at Odell, Diller, and Reynolds, in this state, the firm at that time consisting of J. W. Bowen and John Postlewait. Being in failing circumstances, on the 11th day of September, 1883, they made an assignment under the statute to the sheriff of Gage county. Comp. Stat., Ch. 6. This assignment was duly recorded by the sheriff of said county on the 12th of that month, and possession taken by him of the property so assigned. Afterwards the defendant in error was duly chosen assignee by the creditors of said firm, and accepted the trust and qualified as required by law.

On the 14th of September, 1883, the property in question was taken from the possession of the sheriff of said county by Wells, who was the coroner thereof, and Fletcher, who was a constable, at the suits of a number of persons

who were creditors of Postlewait & Co. The assignee, on or about the 9th of October, 1883, demanded the goods in question from the plaintiffs in error, and upon their refusal to deliver them up brought an action of replevin and obtained possession of the property. On the trial of the cause the court found in favor of the assignee, and rendered judgment accordingly.

It appears from the evidence that the assignment was prepared about one o'clock on Monday morning of the 11th day of September, 1882, and was held by one of the partners, ready to be delivered to the sheriff. That about 5 o'clock in the afternoon of that day one Barnett, a deputy sheriff of that county, went to Odell for the purpose, apparently, of levying certain writs of attachment on the property in question; that soon after his arrival there, and before he had made his business known, one of the partners delivered the assignment to him and requested him to take possession of the property under the assignment, which he did. The assignment was sent the next day to Herron, the sheriff, who immediately had the same recorded. Other writs of attachment seem to have been issued on the 14th of that month and delivered to the plaintiffs in error, who levied upon the goods under the writs. The question involved is the right to the possession of the property.

Sec. 212 of the code provides that "An order of attachment binds the property attached from the time of service."

Sec. 205 provides that the "order of attachment shall be executed by the sheriff without delay. He shall go to the place where the defendant's property may be found, and there, in the presence of two residents of the county, declare that by virtue of said order he attaches said property at the suit of such plaintiff," etc. It will thus be seen that the sheriff had acquired no lien by the levy of the attachment at the time of the assignment, and that the attach-

Brown v. Merrick County.

ment was not levied until three days after the assignment was made, and two after it was filed and recorded. The assignment was made under the act of 1883, and no reason has been given why it should be declared invalid. We must hold, therefore, that the right of the assignee is superior to the attachments, and the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**EUGENE BROWN, APPELLEE, V. COUNTY COMMISSIONERS
OF MERRICK COUNTY AND JOHN L. MEANS, AP-
PELLANTS.**

1. **Counties: ADVERTISEMENT FOR BIDS FOR BRIDGES.** Where a county board advertise for bids for the erection of a public bridge which will cost to exceed \$500, in a newspaper printed and of general circulation in the county, and also with a considerable circulation throughout the state, but one advertisement continued for four consecutive weeks is necessary.
2. ———: **SELECTION OF PAPER TO ADVERTISE IN.** Where the county board act in good faith, their decision as to the selection of a paper in which to advertise cannot be attached in a collateral proceeding.
3. **Bridges Between Adjoining Counties.** Sections 87 and 88 of the road law merely authorize the county boards of counties separated by a stream to meet and confer together in regard to the erection, jointly, of a bridge across such stream, and to enter into a joint contract for that purpose, but in the absence of a contract there is no power in one board to erect or repair a bridge across such stream, and compel the other board to pay part of the cost.
4. **Counties: ERECTION AND REPAIR OF BRIDGES.** The court will not control the discretion of the county board as to what bridges they shall erect or repair, unless there is a clear abuse

18	855
26	186
28	432
18	355
29	286

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of the trust, even where there are not sufficient funds available to erect or repair all necessary bridges. So long as such board act within the scope of their authority, an injunction will not lie to restrain them.

5. ———: BRIDGES BETWEEN ADJOINING COUNTIES: PRECINCT BONDS. Where the middle of a stream is the dividing line between two counties, and a bridge is erected across said stream by the county board of one of such counties, without the co-operation of the county board of the other, the county erecting the bridge may use precinct bonds, voted for that purpose to complete the bridge in the county not co-operating in the erection of the bridge.
6. **Bridges:** INJUNCTION DOES NOT LIE TO RESTRAIN PAYMENT TO CONTRACTOR. A tax payer who seeks to enjoin the payment of money for the erection of a public bridge which he claims is being constructed in violation of law, must act with reasonable promptness. If he is guilty of gross laches, and knowingly permits the contractor to incur liabilities in good faith in the construction of the greater portion of the work, an injunction will be denied.

APPEAL from Merrick county. Heard below before Post, J.

John Patterson, for appellant commissioners. *O. A. Abbott*, for appellant Means.

A. Ewing and *M. Whitmoyer*, for appellee.

MAXWELL, J.

This action was brought in the district court of Merrick county to enjoin the county commissioners of said county from issuing the warrants of Merrick county to John L. Means for building a public bridge across the Platte river south of the village of Clarks in said county, and the treasurer from paying or registering the same, and to have a contract entered into by said commissioners with said John L. Means on or about the 20th of September, 1884, for the erection of said bridge, declared null and void. On

the trial of the cause the court below found the issues in favor of the plaintiff, and made the injunction perpetual.

It appears from the record that on the 19th day of August, 1884, the county commissioners of Merrick county issued a proclamation for a special election in Clarksville precinct, to vote on a proposition to issue the bonds of said precinct to the amount of \$3,000, to aid in building a bridge over the Platte river south of the village of Clarks; that at the time this proposition was submitted there was a public bridge over the river near the point where it was proposed to erect the new one; that this bridge had been erected largely with funds provided by the precinct, but the bridge was then a public thoroughfare under the control of the county commissioners; that by reason of the high water in 1884 and decay, the bridge had become unsafe for travel, and it was necessary either to make expensive repairs thereon or rebuild it. At the time the county commissioners submitted the proposition for bonds in Clarksville precinct they caused an advertisement to be published in the *Nonpareil*, a newspaper published at Central City, in said county, for proposals to erect the bridge in question, and use such materials in the old bridge as were suitable for that purpose. In pursuance of such notice, the proposition for bonds having carried in Clarksville precinct, the commissioners on the 20th day of September, 1884, let the contract for the bridge in question to John L. Means, one of the defendants, for the sum of \$3.25 per lineal foot. Mr. Means commenced work at once, and on the 7th day of December, 1884, when this suit was commenced had performed about three-fourths of the labor in building the bridge. It also appears that at the letting of the contract there were a number of other bidders and that Mr. Means was the lowest bidder. The Platte river at the point where the bridge is located has a number of channels, the widest one being on the south side, and the boundary line between Polk and Merrick

counties is the middle of the south channel. There is testimony in the record from which it may be inferred that the county commissioners of Polk county refused to join with the commissioners of Merrick county in erecting the bridge. It also appears that the cost of repairing the old bridge would have been, as Mr. Means testifies, about \$7,000. The plaintiff is a resident and tax payer of Merrick county, and has resided there for several years. In his direct examination he states that he was not aware of the building of the bridge until the 6th day of December, 1884. On cross-examination, however, he states he took and read the county newspapers, including the *Non-pariel*, in which the notice was published; that he saw the advertisement for the letting of the contract; that he knew of the letting of the contract for the construction of the same. He had formerly been one of the county commissioners of Merrick county and evidently is a man of at least ordinary intelligence. His statement, therefore, on his direct examination, unless the result of oversight, is somewhat remarkable.

The first ground in the petition upon which an injunction is claimed is, in substance, that the bridge is about 2,500 feet in length, and will call for the expenditure of \$8,325, and no advertisement was published in any newspaper published outside of Merrick county asking for bids for the building of said bridge, prior to the letting of said contract; nor did said county commissioners of record at any time prior to the letting of said contract, in their public proceedings whilst sitting as a board for the transaction of the business of said county, direct any advertisement to be published in any newspaper published in said county, asking for bids for the building of said bridge. 2d, Because the Platte river separates Merrick from Polk county, and the whole expense is to be borne by Merrick county; 3d, The amount of road and bridge fund in Merrick county in the treasury at that time did not exceed the sum of

\$2,389.69, and that the amount of the levy for those funds for 1884 did not exceed the sum of \$6,241.83, and no distinct road fund, and that but two-thirds of the levy is available for the current year, etc., the amount to be expended on said bridge being in excess of the funds available for that purpose. It is also alleged that on the 7th day of October, 1884, the commissioners delivered to Means a warrant on the bridge fund of said county for the sum of \$1,200, and on the 11th day of November of that year a warrant for \$1,800 on said fund, "thus anticipating and undertaking to prevent and make useless the taking appeal on the part of any tax payer of said Merrick county who might desire to appeal to the district court from their order allowing said warrants within ninety days from the making of the same," etc. These grounds will be considered in their order.

First, The advertisement.

Sec. 84 of the act in relation to roads (Comp. St., 7, Ch. 78,) provides that, "Before any contracts as aforesaid shall be let, the county commissioners shall advertise for bids therefor, and shall require bidders to accompany their bids with plans and specifications of the work, and they may accept the most suitable plan and award the contract accordingly, or may reject any or all bids."

"Sec. 85. Such advertisement shall state the general character of the work, and shall be published four consecutive weeks in some newspaper printed and of general circulation in the county; and where the cost of the work exceeds five hundred dollars such advertisement shall also be published in some newspaper printed in and of general circulation throughout the state."

The amount required to construct this bridge clearly brings it within that class of cases where the advertisement must be published four consecutive weeks in a newspaper printed and of general circulation in the county, and also in a newspaper printed in and of general circulation

throughout the state. A newspaper may have so general a circulation as to embody both of these conditions. In such case it would not seem to be necessary to insert the advertisement in two papers, as the advertisement in one would accomplish all that was desired, viz., publicity, in order that competition in bidding may be induced and contracts let for the lowest price possible. The county board, however, are to determine in the first instance the paper or papers in which the advertisements are to be inserted, and if they act in good faith, although erroneously, in carrying out the law, their acts in that regard are not open to collateral attack. *Com. of Knox County v. Aspinwall*, 21 How., 539. *Brown v. Otoe County*, 6 Neb., 115. *Ellis v. Karl*, 7 Neb., 382. There is no charge of bad faith on the part of the commissioners or of fraud or corruption. The testimony shows that from seventy-five to eighty copies of the *Nonpareil* circulated in nearly all parts of the state outside of Merrick county. Other papers in the state no doubt have a much greater general circulation in the state, but in the absence of fraud, corruption, or bad faith on the part of the county board, or of injury to the plaintiff, which is not claimed, this cannot be inquired into in this collateral proceeding. Their first ground for injunction, therefore, is not well taken.

Second, Because the Platte river separates Merrick from Polk county, and the expense should be borne equally by those counties.

Sec. 87 of the act relating to roads provides that "bridges over streams which divide counties, and bridges over streams on roads on county lines shall be built and repaired at the equal expense of such counties," etc.

Sec. 88 provides the mode in which counties may enter into joint contracts for the erection and repair of such bridges. The provisions of the statute apply only to cases where adjoining counties have jointly constructed a bridge or bridges over a stream which separates them, or to joint

contracts of such counties for the erection of such bridges. There is no provision in the statute in the absence of an agreement by which one county may compel an adjoining one to join in the erection or repair of a bridge across a stream separating one county from the other. This question was before the supreme court of Illinois under a similar statute. *Com's of Highways v. Com's of Highways*, 100 Ill., 631. After copying the sections of the statute, it is said: "Neither of these sections directly or indirectly confers authority upon the commissioners of one town to compel the commissioners of an adjoining town to repair or erect a bridge on a town line, or pay one-half of the cost of such bridge after it may be erected or repaired." *The State v. Kearney County*, 12 Neb., 6. The second ground, therefore, is insufficient.

Third. That the amount of road and bridge fund on hand at the time the contract was let did not exceed \$2,089.69, while levy for those funds for that year was the sum of \$6,241.83, but two-thirds of which was available. This would place at the disposal of the commissioners more than \$6,000 of the road and bridge fund, to which should be added the Clarksville precinct bonds, making more than \$9,000 in all. The exact length of the bridge does not appear, being estimated at from 2,100 to 2,500 feet. This at \$3.25 per lineal foot, even if we take the greatest length shown, would amount to but little more than \$8,000. Mr. Kramer, one of the county commissioners, states that before letting the contract the commissioners measured the river by tying a band around the felloe of a wagon wheel, and counting the revolutions, and that the width of the river was about 2,100 feet. He also testifies, in substance, that in the opinion of the commissioners, upon actual view, the best interests of the county required the construction of a new bridge.

In *State v. Kearney County*, 12 Neb., 6, it was held that where there are not sufficient funds in the county

• Brown v. Merrick County.

treasury to repair all the bridges in a county, the court will not control the discretion of the county board as to what bridges they shall erect or repair unless there is a clear abuse of the trust. The erection and repair of bridges in a county are specially committed to the county board of each county. Such board are presumed, from personal inspection or otherwise, to know what bridges should be erected or repaired. So long, therefore, as such board act within the scope of their authority an injunction will not lie to restrain their action. But it is said that even if the board had authority to construct that portion of the bridge in Merrick county it had no power to cross the line into Polk county and erect a bridge in that county. This, if applied to a stream wholly in Polk county, doubtless is true; but when applied to a stream partly in both counties is not so clear. Nor is the question presented in this case. The statute provides that the southern boundary of Merrick county shall be the middle of the south channel of the Platte river. (Comp. Stat., Ch. 17.) The width of the south channel of the river is shown to be about 1,300 or 1,400 feet.

The right of the county board to use the bonds donated by Clarksville precinct for the completion of that portion of the bridge in Polk county is unquestioned. *Railroad Company v. Otoe County*, 16 Wall., 667. *Walker v. City of Cincinnati*, 21 O. S., 14. *Sharpless v. Mayor*, 21 Penn. St., 147. *Goddin v. Crump*, 8 Leigh, 120. If this was not so the right to make donations to railways as public highways could not be maintained. In *Railroad v. Otoe County* a donation to a railway company in Iowa which proposed to run its road to the east bank of the Missouri river opposite or near Nebraska City was sustained. While in *Walker v. Cincinnati* the power of the city to issue its bonds for the purpose of constructing a railroad from Cincinnati south through one or more states was confirmed. The testimony shows that there are less than 700 feet of

the bridge in Polk county, the cost of which was less than \$2,000, leaving probably not less than \$1,000 derived from bonds to be expended on other parts of the bridge. The county board, therefore, need not, and probably did not, expend any part of the road and bridge fund in Polk county. The third cause, therefore, is untenable.

Fourth. But even if the county board had exceeded its powers somewhat, a tax payer could not wait until the contractor had performed a considerable portion of the work of which the public would have the benefit, and which would be lost to the contractor, and then enjoin the payment of the work. *Whitney Arms Co. v. Barlow*, 63 N. Y., 63. *City of East St. Louis v. The E. St. L. G. L. Co.*, 98 Ill., 415. *Bradley v. Ballard*, 55 Id., 413. *The Rider L. R. Co. v. Roach*, 97 N. Y., 378. *Tash v. Adams*, 10 Cush., 252. In the last case cited the inhabitants of the town of Natick appropriated \$500 for the celebration of the second centennial anniversary of the settlement of the town, and authorized the committee appointed for that purpose to draw from the town treasury an amount not exceeding the sum named. The committee acting under this vote proceeded to make contracts on behalf of the town for the purpose named and expended thereby the sum of \$463.00. The celebration took place on the 8th of October, 1851, under the sanction of the town, and all the expenditures were made prior to that time. On the 18th of October, 1851, the action was brought to enjoin the payment of the money. The court say (page 253), "It is a well established rule in equity that if a party is guilty of laches or unreasonable delay in the enforcement of his rights he thereby forfeits his claim to equitable relief. This rule is more especially applicable to cases where a party being cognizable of his rights does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character." In *East St. Louis*

v. *East St. Louis G. L. Co.* the defense was placed solely on the ground that the city had no power to make the contract. It was held even if there was a defect of power in the corporation to make a contract, yet if the contract was not in violation of its charter, or of any statute prohibiting the contract, and the corporation had induced a party who relied on the contract to expend money in the performance of the same on his part, the corporation would be liable.

In *Hitchcock v. Galveston*, 96 U. S., 341, the city council of Galveston had contracted with Hitchcock and others for the construction of sidewalks, to be paid for by the issue of city bonds. After the work was partly performed the city council stopped the work and prevented its completion. In an action for breach of the contract it was contended that for want of power to issue the bonds the entire contract was void, and no action could be maintained for a breach thereof. But the court held the city liable. *State Board of Agriculture v. The Citizens Street Railway*, 47 Ind., 407. And this was the rule adopted by this court in *Clark v. Dayton*, 6 Neb., 192.

The plaintiff in this case permitted Means to expend his money without objection, in the erection, or rather reconstruction, of the bridge, although he knew, or at least had the means of knowing, that the contract had been let and the bridge was then being constructed. Yet he waited before bringing this action until the work was so far completed that in order to preserve what had been done it was necessary to complete the bridge. It is but justice, therefore, that the contractor should be paid for his work.

There is no equity in the bill. The judgment of the court below is reversed and the action dismissed.

REESE, J., concurs.

COBB, CH. J., concurs in the judgment on the ground last stated.

A. L. STRANG, PLAINTIFF IN ERROR, V. C. KRICKBAUM,
DEFENDANT IN ERROR.

Jurisdiction of Justice. A justice of the peace has jurisdiction to the extent of two hundred dollars in an action founded on a bond, bill, promissory note, or other instrument in writing, for the payment of a sum of money certain. *Bullock v. Jordan*, 15 Neb., 665. *Burton v. Manning*, Id., 669.

ERROR to the district court for York county. Heard below before NORVAL, J.

A. C. *Montgomery and Groff & Montgomery*, for plaintiff in error.

Scott & Gilbert, for defendant in error.

MAXWELL, J.

In December, 1882, the plaintiff brought an action against the defendant before a justice of the peace upon two promissory notes, dated December 23, 1879, each for the sum of \$50.00, with interest at ten per cent. The defendant set up a counter-claim for \$50.00, and on the trial of the cause the jury returned a verdict in his favor for the sum of \$15.00. The plaintiff then appealed the cause to the district court, where the *defendant* filed a motion as follows: "Comes now the defendant and moves the court to dismiss the cause, for the reason that the justice had no jurisdiction of the subject matter." The motion was sustained and the action dismissed. The defendant has failed to furnish a brief, and we are left entirely to conjecture as to the grounds upon which the want of jurisdiction was predicated. It was probably based upon section 1100 of the Code, which requires the justice, upon entering judgment upon a bond, bill, promissory note, or other instrument of writing for the payment of a sum of money cer-

tain, to endorse thereon the sum for which he shall have entered judgment, "provided the same shall not exceed one hundred dollars," etc.

This question was before this court in *Bullock v. Jordan*, 15 Neb., 665, in which it was held that section 1103 as amended in 1881, whereby the jurisdiction of justices of the peace was extended to \$200, controlled section 1100, and that therefore the apparent limitation in section 1100 to \$100 was repealed. The same ruling was had in *Burton v. Manning*, 15 Id., 669. These cases are decisive of this. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HENRY KELLER, PLAINTIFF IN ERROR, v. JOHN
KELLER, DEFENDANT IN ERROR.

1. **Account Stated.** The *prima facie* presumption is in favor of an account which has been stated by the parties, and as a general rule it will not be disturbed unless there was fraud or mistake in the settlement which is established by clear proof.
2. ———: **EVIDENCE.** Where there has been a settlement of accounts between parties, and a promissory note given by one of them for the amount found due, the burden of proof is on the maker of the note to show that the settlement did not include debts owing to him from the adverse party.

ERROR to the district court for Clay county. Tried before WEAVER, J.

Hayes & Taggart and *W. P. Shockey*, for plaintiff in error.

Hurd & Matfers, for defendant in error.

18	866
55	930
18	866
61	662

MAXWELL, J.

This is an action upon a stated account, and the defense a denial and plea of set-off. On the trial of the cause the jury returned a verdict in favor of the defendant. The principal error relied upon is, that the verdict is against the weight of evidence and law of the case.

It appears from the evidence that the parties are brothers; that they settled in Clay county in 1873, the plaintiff at least taking a homestead. Another brother named Gotfried had settled in that county also, and the three seem to have assisted each other in the cultivation of their land, and had mutual dealings. In 1878 a settlement was had, and a balance found due the plaintiff from the defendant, who, it is claimed, thereupon executed a note to the plaintiff for the sum of \$317.59, due in four years, without interest. The plaintiff claims that this note was surrendered to the defendant a few days after its execution, upon his promise to pay one-half of the face value thereof out of his share of an estate that he was about to receive. All the testimony tends to show that there was a settlement between the parties as claimed by the plaintiff, and the execution of the note by the defendant to the plaintiff. There is also testimony which tends to show that this note was given for the balance due the plaintiff. The defendant in his evidence admits the execution and delivery of the note, but claims that it was given without consideration. All the charges in the alleged set-off, except \$10.50 for three sacks of flour, are for matters existing prior to the settlement.

The *prima facie* presumption is in favor of an account which has been stated by the parties, and the general rule is that it will not be disturbed except for fraud or mistake in the settlement which is established by clear proof. *Valentine v. Valentine*, 2 Barb. Ch. R., 430. *Stenton v. Jerome*, 54 N. Y., 480. *Lookwood v. Thorne*, 11 N. Y.,

Keller v. Keller.

170. And the burden of proof is upon the party denying the correctness of the account. *Chappedelaine v. Dechenaux*, 4 Cranch, 306. *Kennedy v. Goodman*, 14 Neb., 585. Where, however, fraud or mistake is shown, the settlement will to that extent be considered as having been made upon mistake or imposition, and the omissions or mistakes will be corrected.

In this case there is no allegation in the answer of fraud or mistake in the settlement. It is denied that there was a settlement, but in this it is clearly proved to be untrue. The burden of proof is upon the defendant, therefore, to show that his account then due was not taken into consideration in the settlement. If the plaintiff had been indebted to the defendant at that time, as he claims, it is not very probable that he would have executed a promissory note to the plaintiff for the amount found due to him. The issues seem to have been made up by the parties under a misapprehension as to the evidence, hence the real questions in the case—those relating to the stated account—were not fairly submitted to the jury. This may be remedied in another trial. As the verdict is against the clear weight of evidence a new trial must be awarded.

REVERSED AND REMANDED.

THE other judges concur.

18 389
251 481

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, V.
CHRISTIAN C. SHOEMAKER, DEFENDANT IN ER-
ROR.

1. **Railroads: DAMAGE TO STOCK.** Under the provisions of sections one and two of Chap. 72, of Comp. Statutes, where a party's horse gets on the railroad track for the want of a fence, such as the law requires the company to erect and maintain to enclose its track, and while on or near the track is frightened by a passing train, and in its flight is injured by falling through a bridge on the line of the railroad, and no negligence or willful misconduct is chargeable to the agents of the company in charge of the train at the time, and where no injury is done to the horse by any actual collision or contact with the engine or cars of the train, the railroad company will not be liable to the owner of the horse for such injury. See *Schurtz v. I. B. & W. R. R. Co.*, 107 Ill. R., 577.
2. ———: ———: **STATUTE CONSTRUED.** The true meaning of sections one and two of Chap. 72, Comp. Stat., is, that the injury to stock must be caused by actual collision; that is, it must be done by the agents, engineers, or cars of the company, or the locomotives, engines, or trains of any other corporation permitted and running over or upon the said road, or the willful misconduct of the train men in the course of their employment to make the company liable. *Id.*
3. ———: ———. Consequential damages resulting from fright to animals, not caused by actual collision, or any negligence or willful misconduct on the part of the servants of the company, are not embraced in the statute. *Id.*

ERROR to the district court for Otoe county. Tried below before POUND, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error, cited: 1 Rorer on Railroads, 641. 2 *Id.*, 1579. *Hadden v. Rust*, 39 Ill., 194. *R. R. Co. v. Hasket*, 10 Ind., 409. *R. R. Co. v. Thomas*, 60 *Id.*, 107.

C. M. West and *F. M. Fee*, for defendant in error.

COBB, CH. J.

This action was brought in the district court of Otoe county by Christian C. Shoemaker against the B. & M. R. R. Co. in Nebraska. Said plaintiff, by his petition, after alleging that the defendant is a corporation, etc., states as his cause of action:

"That on the evening of the fourth day of June, or the morning of the fifth day of June, 1883, said defendant was operating its railroad in Otoe county, Nebraska, said road had been open for more than six months for use in said county. While so operating the same at the time above stated, at a place on said road where it was required by law to fence its track, but had failed to do so, said defendant, by its agents and employes, ran an engine and train of cars over and against one gray mare, being the property of plaintiff, and of the value of \$175, by reason of which said mare was injured, from which injuries she died. Wherefore plaintiff claims a judgment against said defendant for the sum of \$175 and costs."

The defendant's answer consists of a general denial. The case was tried to a jury, who found and rendered their verdict for the plaintiff, and assessed his damages at \$137.75.

The defendant's motion for a new trial having been overruled, it brings the cause to this court on error; there are but two substantial errors assigned.

"*First.* The court erred in refusing to give the first instruction requested by the plaintiff herein marked '1st.'

"*Second.* The court erred in giving the third instruction, marked '3,' on its own motion."

The instruction No. 1 requested by defendant is as follows:

"1. The jury are instructed that the evidence in the case will not warrant you in finding a verdict against the defendant. You will therefore decide for the defendant."

Instruction No. 3, by the court on its own motion, is as follows:

"3. If the place where said accident to plaintiff's mare happened was not within the limits of any town, city, or village, it was the duty of the defendant to erect and maintain fences on the sides of the railroad on the part thereof open for use, suitable and amply sufficient to prevent cattle and horses, etc., from getting on such railroad."

It appears from the evidence as set out in the bill of exceptions that the plaintiff was the owner of a certain gray mare, which, on the day of the night in question, was lariatied by him out on the prairie, and it is supposed that she got loose from the lariat "and happened down on the railroad for some cause, where McKee had a pasture fenced, and wanted to go there I suppose."

That on the following morning she was found in McKee's pasture near the railroad, with her leg broken. There were animal's tracks on the side of the railroad passing along on the south side of the track for nearly an eighth of a mile to near a bridge across a considerable creek. Upon the bridge there were hairs and other signs indicating that a gray animal had fallen from the bridge into the creek. There were also signs on the margin of the creek below showing where it had fallen; and by following the tracks out of the creek and through a cornfield and pasture, the owner was enabled to find the mare in her crippled condition. The owner, as well as another witness, testified to hearing a train, and only one, pass during the night. On the other hand, two witnesses on the part of the defendant, to-wit, the conductor of the said train and another person who was on the caboose of a train which passed that point between twelve and one o'clock that night, testified that that was the only train which passed there that night; that said train consisted of nineteen freight cars and a caboose, going east; that between twelve and one o'clock, about a mile and a half west of Syracuse, the train being running at about the rate of fifteen miles per hour, the witness (one of them) standing

looking out of the south door of the caboose with his conductor's lantern in his hand, the train passed two animals, one dark and one gray, the gray one ran a hundred yards by the side of the freight cars and as the way car passed her she jumped right in the center of the track; that that was the last the witness saw of her; that the train passed the bridge very shortly after passing the animals and where the gray mare jumped on to the track; that neither the engine nor any part of the train struck either of the animals or any animal on that night; that the animals seemed greatly frightened and ran for a considerable distance along and near the track before the train passed them.

There was thus not only no evidence of the train having struck the animal, but the evidence of two witnesses that the train passed her without striking her.

Our statute, sections one and two of chapter 72, Comp. Stat., after providing that railroads shall be fenced, etc., proceeds as follows: "And so long as such fences and cattle guards shall not be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same as herein prescribed is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engineers, or trains of any such corporation, or by the locomotives, engines, or trains of any other corporation permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon."

Again, "Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof against all live stock running at large, at all points, shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employes, or engineers, or by the agents, employes, or engines belong-

ing to any other railroad company running over and upon such road or there being."

The statutes of Illinois, Indiana, and Missouri on the subject of the liability of railroad companies, whose tracks are suffered to remain unfenced, for live stock killed by their trains, are substantially the same as those of our own state above quoted, and the supreme courts of each of those states in the cases cited in the brief of counsel have, upon facts quite similar to those of the case at bar, held, that an actual and direct collision by the engine or train, or some portion of it, with the animal killed or injured is indispensable to a holding of liability on the part of the company. The reasoning of these cases rests chiefly upon the meaning of the words of the statute. That the language of the statute making the company "liable for all damage which may be done by the 'agents, engines, or cars' of such corporations to cattle, horses, or other stock" could not be extended to embrace damages done to themselves by such stock in consequence of fright, although such fright might be caused by the sight or sound of passing trains on such unfenced railroad. The opinion in the Missouri case is predicated, in part, also, upon the object of the act declaring the liability in cases of damage to stock by the "agents, engines, or cars" of railroad companies whose tracks remain unfenced. Such object being declared to have been "not exclusively for the benefit and protection of the owners of stock who were liable to suffer loss and damage, but also as a public regulation for the safety of passengers, and the traveling public, who are exposed to danger and peril in case of collision." To these considerations the following may be added: One object which the legislature had in view in the passing of these provisions was to induce the railroad companies to fence their tracks, and keep them fenced. It therefore sought to hold the owners of unfenced railroads absolutely liable for such damage to live stock as only might proximately result

from the *unfenced* condition of the railroad, and not for such as might be common to all railroads fenced as well as unfenced. The statute of no state, to my knowledge, has prescribed the distance which the fence shall be from the track over which the trains pass. And in point of fact, in the case of some of the best fenced railroads they are at some points very near. And any person of experience knows that it often occurs that horses and teams driven on the highway near a railroad track, but outside of the fence, become frightened at the sight and sound of passing trains, and by reason of such fright damage themselves, their drivers, and the vehicles to which they are attached. The liability of such animals to become thus frightened, and to become thus damaged, depends in no degree upon the fenced or unfenced condition of the railroad. Hence it is obvious that in declaring an absolute liability for damage to live stock by trains in cases where the railroad should be suffered to remain unfenced as an inducement and incentive to railroad companies to fence their tracks, and thus protect the lives of the traveling public, as well as the property of the citizens of the country through which the railroad passes, from loss by collisions, the legislature only had in view such damages to live stock as were practically confined to unfenced railroads, and not such as were common to all railroads fenced as well as unfenced.

Therefore, upon reason as well as upon authority, the case made by the plaintiff in the court below failed to establish a liability upon the railroad company for the damage to the gray mare, and the district court should have told the jury so.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

JOHN KING, PLAINTIFF IN ERROR, V. STATE OF NE-
BRASKA, DEFENDANT IN ERROR.

18	375
18	540
18	375
40	527
18	375
51	37

1. A Recognizance for the appearance of a person charged with an offense is an obligation of record, and becomes such when taken and filed in the court to which it is returnable.
2. ———. By the provisions of the Criminal Code a recognizance taken by a justice of the peace acting as an examining magistrate becomes an obligation of record when returned by the justice of the peace to the clerk of the district court, and is by him entered of record as required by section 383 of the Criminal Code.
3. ———. A recognizance proper, unless when taken out of court, should not be signed; but when it is properly taken and certified the signatures of the recognizers may be treated as surplusage and the instrument held valid. *Irwin v. The State*, 10 Neb., 325.
4. ———. The Criminal Code does not require a recognizance taken by a justice of the peace when sitting as an examining magistrate to be entered upon his docket.
5. ———. Where a person was charged with the commission of an offense, and upon being held to bail by the examining magistrate, entered into a recognizance with sureties for his appearance at the next term of the district court, and subsequently left the state, and committed a crime in another state where he was arrested and imprisoned, and thus by his own voluntary act rendered it out of his power to appear in this state to answer to the crime with which he was charged; *Held*, That these facts would constitute no defense to an action against his sureties upon his recognizance.
6. ———. Where a recognizance was given for the appearance of a defendant to answer a "charge against him for larceny," *Held*, That the fact that the complaint was defective could not be asserted as a defense to an action upon such recognizance after forfeiture.

ERROR to the district court for Cass county. Tried below before POUND, J.

Cries & Ramsey, for plaintiff in error.

J. B. Strode, District Attorney, for defendant in error.

REESE, J.

This action was brought in the district court of Cass county upon the following instrument :

"THE STATE OF NEBRASKA, } ss.
 ".....COUNTY.

" Be it remembered, that on the 27th day of December, A.D. 1882, Wm. Greek and John King personally appeared before me, G. C. Cleghorn, one of the justices of the peace within and for the said county of Cass, and jointly and severally acknowledged themselves to owe the state of Nebraska the sum of two hundred and fifty dollars, to be levied of their goods, chattels, lands, and tenements, if default be made in the following condition, to-wit :

"The condition of this recognizance is such that if the above bounden William Greek shall personally be and appear before the district court of second judicial district of Nebraska, held within and for the county of Cass, on the first day of the term thereof next to be holden in and for the county aforesaid, then and there to answer a charge of grand larceny and abide the judgment of the court, and not depart without leave, then this recognizance shall be void ; otherwise it shall be and remain in full force and virtue in law.

" WM. GREEK,

" JOHN KING.

"Taken and acknowledged before me on the day and year first above written.

" G. C. CLEGHORN,

"Justice of the Peace."

The indorsements upon the back of the instrument are as follows :

King v. State.

"BAIL BOND.

"The State of Nebraska }
v. }
"Wm. Greek. }

"Filed this 27th of December, 1882,

"G. C. CLEGHORN,

"*Justice of the Peace.*

"I hereby certify on oath that I am worth over and above all debts and incumbrances and exemptions \$250.

"JOHN KING.

"Subscribed and sworn to before me this 27th day of December, A.D. 1882.

"G. C. CLEGHORN, J. P."

Upon the trial all the signatures to and endorsements upon this instrument were admitted to be genuine, but plaintiff in error objected to its introduction in evidence, and assigned the following grounds of objection (quoting from the record):

"It is a bond and not a recognizance. It is not a record, of any court. It is not entered on the docket of said justice of the peace. It is a loose piece of paper which was not entered on the said docket. It has never been certified to this court by said justice. It has never been entered on the appearance docket of this court with the date and amount thereof and the names of the sureties. That there is no such record. That the same is incompetent evidence."

These objections were overruled, and upon the exceptions of plaintiff in error being entered, he prosecutes error in this court, assigning said ruling for error.

The testimony shows that a criminal charge was made against the principal, Greek, and upon his being held to answer to the action of the next grand jury by the justice he, with his surety, King, plaintiff in error, entered into the obligation above quoted. It is also shown that a tran-

script of the docket of the justice of the peace was properly certified to the district court accompanied by the complaint, warrant, and recognizance, and the proper entries made upon the district court records, including the appearance docket.

The principal question here presented is, whether the instrument declared on is or is not a recognizance, and whether it has any binding force, it being taken upon a separate piece of paper by the justice and not copied into his docket, a simple recital being made therein showing the fact of the taking of the recognizance with the names of the surety. This question is an important one, for if it is not a valid recognizance the effect of so holding would be to render void nearly if not quite all of the recognizances taken by the inferior courts of the state, as it has been to some extent the practice, so far as we know, to use the blank and form used in this case. But while this is true, it is equally true that the judgment of the district court should not be upheld on that ground alone. Therefore, if the instrument sued on is not a recognizance under the statutes of this state and the decisions of the courts of the country, it is the duty of this court to so declare.

From a careful examination of the question here presented, we are led to the conclusion that the writing sued on is such a recognizance as is contemplated by our statute, and as such is valid. We do not hold that one taken in the form contended for by plaintiff in error would be void, but, upon the contrary, we think it would be good; but that question is not before us.

In Chitty's Criminal Law, 90, it is said: "A recognizance is an obligation of record entered into before a magistrate duly authorized for that purpose, with condition to appear at the sessions or assizes. The party need not sign this recognizance, but the record is afterwards made out on parchment, and is subscribed by the justice before whom it is taken."

Blackstone defines a recognizance to be, "An obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law, which is therein specified." 2d Black. Com., 341. See also 2 Bouv. Law Dic. (Recognizance).

In *State v. Crippen*, 1 O. S., 401, Bartley, Judge, says: "A recognizance is an obligation of record entered into before some court of record or magistrate duly authorized, conditioned for the performance of some particular act. It is equal in solemnity to and in some respects, at common law, takes priority over an ordinary bond. A recognizance differs from a bond in this: That while the latter, which is attested by the signature and seal of the obligor, creates a fresh or new obligation, the former is an acknowledgment of record of an already existing debt. * * * To be a recognizance it is essential not only that the instrument be in writing, but also that it be a matter of record."

It then becomes necessary to inquire whether the recognizance in this case is of record. We are unable to find anything in the statutes of this state requiring a justice of the peace to enter a recognizance upon his docket. If such a provision does not exist then we should be content with the law as it is, as we have no authority to inject into a statute words which the law maker has omitted and which are not "understood" or clearly implied by the law. *State, ex rel. McBride, v. Long*, 17 Neb., 502.

Turning our attention to the statutes of this state upon the matter of recognizances, we find by reference to the law of examinations before magistrates the following provisions:

Section 298 of the Criminal Code provides in substance that, when for any reason it shall become necessary to adjourn a trial to another day, "the person accused may enter into a recognizance before the magistrate with good and sufficient security, to be approved by the magistrate, in

such amount as he shall deem reasonable, conditioned for the appearance of such person before such magistrate at a place and day and hour in said recognizance specified," etc.

By sec. 299, it is provided that, "If any person recognized agreeably to the last preceding section shall fail to appear at the time appointed, or shall otherwise fail to comply with the conditions of the recognizance, the magistrate shall declare the same forfeited, and transmit a transcript of his proceedings, together with the recognizance, to the clerk of the proper court," etc.

Another fundamental rule for the construction of statutes may be here invoked, and that is, in such construction all words and phrases should be given some use and meaning, if possible, consistent with the purposes of the act. This being true, we might well pause here and ask what meaning can be given to the words, "together with the recognizance," in the foregoing section, if the recognizance must be entered upon the docket of the justice? If it is entered upon the docket it would be included in the transcript sent to the clerk, and there would be no recognizance to send along.

Sec. 303 provides, if the magistrate finds that "an offense has been committed and there is probable cause to believe the prisoner guilty, the magistrate shall bind by recognizance such witnesses against the prisoner as he shall deem necessary, to appear and testify before the court having cognizance of the case.

Sec. 307 provides that, "If an offense for which the prisoner is held to answer be bailable, and the prisoner offers sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable," etc.

Sec. 306 is as follows: "It shall be the duty of every magistrate in criminal proceedings to keep a docket thereof as in civil cases. All recognizances taken under this title, together with a transcript of the proceedings where the

defendant is held to answer, shall be certified and returned forthwith to the clerk of the court at which the prisoner is to appear. The transcript shall contain an accurate bill of all the costs that have accrued and the items composing the same."

This section is directly applicable to the case at bar. By it we find not only that recognizances are not required to be written in the docket, but it is fairly implied that they shall not be. "All recognizances taken under this title, together with transcript of the proceedings (which evidently means a transcript of the docket) * * * shall be certified and returned," etc. Nothing can be plainer than that the transcript and the recognizance are contemplated here as in section 299 above referred to, as separate and distinct instruments.

As the word "recognizance," as used in the Criminal Code, must have substantially the same meaning wherever used, some additional light may be had by reference to its use in other parts of the code.

Sec. 324 provides for appeals to be taken by a defendant from a judgment of conviction rendered by a magistrate, and in this section the following occurs: "No appeal shall be granted or proceedings stayed unless the appellant shall, within twenty-four hours after the rendition of such judgment, enter into a recognizance to the people of the state of Nebraska in a sum not less than one hundred dollars, and with sureties to be fixed and approved by the magistrate before whom said proceedings were had, conditioned for his appearance at the district court of the county at the next term thereof, to answer the complaint against him. The magistrate from whose judgment the appeal is taken shall make return of the proceedings had before him, and shall certify the complaint and warrant, together with all recognizances, to the said district court on or before the first day of the next term thereof," etc.

This section, like those heretofore examined, clearly im-

plies a recognizance separate and distinct from the transcript of the proceedings as shown by the docket.

Sec. 383, which provides for the filing and record of recognizances, is as follows: "Whenever a transcript or recognizance shall be returned to the clerk it shall be his duty to enter the same upon the appearance docket of the court, together with the date of the filing of the transcript and recognizance, the date and amount of the recognizance, the names of the sureties, and the costs; whereupon the same shall be considered as of record in such court, and proceeded on by process issuing out of said court in the same manner as if such recognizance had been entered into before such court; and when any court having cognizance of a crime shall take a recognizance it shall be a sufficient record thereof on the journal of such court to enter upon the journal the title of the cause, the crime charged, the name of the party, and his sureties thereto, the amount of such recognizance, and the time therein required for the appearance of the accused; and the same shall be considered as of record in such court, but in making up the complete record in any case where one is required to be made, all recognizances, whether returned to or taken in such court, shall be recorded in full if required by the prosecuting attorney or the accused."

We have copied this section at length for two purposes, one of which we will notice hereafter; the other is to show that here as elsewhere the law-maker has kept up the distinction between the transcript and the recognizance. We find no warrant anywhere for saying that the recognizance when taken by a justice of the peace must be entered on his docket.

The recognizance in this case complies with the requirements of the common law without reference to our statutes. Suppose no signatures were appended to it we have every element of the common law recognizance. It has been held by this court that the signatures of the parties ac-

knowledging it cannot affect its validity. *Irwin v. The State*, 10 Neb., 329. We then have the certificate of the magistrate that the parties to it personally appeared before him and severally acknowledged themselves to owe the State of Nebraska the sum specified, to be levied of their goods, chattels, lands, and tenements, if default be made in the conditions named.

By some writers it is said that a recognizance differs from a bond in this: That while the latter, which is attested by the signature and seal of the obligors, creates a fresh or new obligation, the former is an acknowledgment on record of an already pre-existing debt. This formality is observed in the recognizance in the case at bar. They acknowledge that they owe, etc., thereby acknowledging a pre-existing debt. The instrument possesses all the requirements of the oldest and most technical common law recognizance, providing it is found to be an obligation of record.

Upon this branch of the case it becomes material to inquire what is meant by the words, "of record." We think this phrase had its origin in the customs of times somewhat ancient, when such recognizances were taken in what were termed courts of record, that is, having a seal; and that such recognizances being entered and recorded in these courts, they were said to be obligations of record; but it has been so modified and changed by statutes as to allow inferior tribunals to take recognizances, not as courts of record, but as magistrates, and when so taken and certified to the clerk of a court of record, and by him recorded, they become "of record" in this technical sense, and that is one of the purposes of section 383 of the Criminal Code, above quoted: "Whereupon the same shall be considered as of record in such court." This language is twice used in the section, evidently for the purpose of showing that where the recognizances were filed, recorded, etc., as required, they should be "of record" within the definitions above referred to.

Again, no objection is made to the form of this recognizance. It sufficiently appears "at what court the party * * * * was bound to appear, and the court or officer before whom it was taken was authorized by law to require and take such recognizances." This, by section 388 of the Criminal Code, is all that is required, and it should be sufficient.

In *People v. Kane*, 4 Denio, 535, Beardsley, Judge, in writing the opinion, says: "The definition of a recognizance would seem to import that it is necessarily of record as soon as entered into, but strictly speaking this is incorrect, for a recognizance is not a record until duly enrolled and filed. This rule is universal, for no proceeding can be regarded as matter of record before it has been enrolled and filed in a court of record." Again he says: "And the same principle applies to recognizances taken by a court or magistrate for the appearance of a party charged with a criminal offense. The recognizance, although complete, is not in strictness a record until made out in form and filed with a court of record."

In *People v. Van Eps*, 4 Wend., 393, the action was upon a recognizance taken before the first judge of the common pleas court for the appearance of the recognizor at the next court of oyer and terminer. In discussing the subject of recognizances, Judge Sutherland, in writing the opinion of the court, said: "It does not, strictly speaking, become a recognizance or debt of record until it is filed or recorded in the court in which it is returnable." See also *State v. Walker*, 56 N. H., 176.

The People v. Huggins, 10 Wend., 464, was an action upon a recognizance taken before two justices of the peace for the appearance of the recognizor at the next court of general sessions of the county. Judge Sutherland, in writing the opinion, says: "It is undoubtedly necessary that it should appear that the recognizance was filed or made a record of in the court to which it is returnable."

King v. State.

The case of *Bridge v. Ford*, 4 Mass., 641, was an action on a recognizance taken before a justice of the peace, conditioned for the prosecution of an appeal to the court of common pleas. Chief Justice Parsons, in writing the opinion, says: "A recognizance does not appear to have been delivered to and entered of record in the common pleas. Debt as well as *scire facias* will lie on a recognizance to a party, but this recognizance must be matter of record and in debt upon it, the defendant may plead *nul tiel record*. Whenever, therefore, a justice recognizes a party to appear at any court of record, it his duty to transmit the recognizance to that court that it may be entered of record."

The State v. Smith, 2 Green, 62, was a *scire facias* upon a recognizance entered into before a justice of the peace for the appearance of the recognizer at the court of common pleas. It was held that it must appear that the recognizance had been legally taken and "returned to the court where the party recognizing is bound to appear, and such proceedings of that court as form the basis of the suit."

Commonwealth v. Emery, 2 Binney, 431, was an action upon a recognizance taken before an alderman of Philadelphia upon a separate piece of paper, in the following form:

"Commonwealth v. "Stephen Austin and Eliza Burns.	}	<i>Sur charge</i> , founded on oath of of George Reinholdt, that they have entered into a conspiracy with the intention of extorting money from him, etc.
"Stephen Austin in 2,000 drs. "Samuel Emery in 2,000 drs.	}	On condition that Stephen Austin be and appear at the next mayor's court to answer.
"3 Nov., 1807.		
"(Signed) S. AUSTIN.		
"SAM'L EMERY."		

This was introduced in evidence upon the trial, and objected to for the reason that "it was not a recognizance, but only a loose note, by which it did not appear that the defendant was bound to the commonwealth or bound at all, and that it was not signed by the alderman." Chief Justice Tilghman, in writing the opinion, said: "I should not be for confirming any illegal practices of justices of the peace, or any practice not expressly sanctioned by law which might be attended with dangerous consequences; but I see nothing illegal or dangerous in their practice of taking and certifying recognizances by short minutes, or in permitting those minutes to be given in evidence to juries as often as questions arise on the recognizances. Whether they contain sufficient substance will always be open to inquiry. I think the papers offered in evidence do substantially support the issue joined on the part of the commonwealth," etc.

This minute, it will be observed, was taken upon a separate piece of paper, signed by the recognizor, certified, and returned to the court of record as in the case at bar.

Lawton v. The State, 5 Texas, 270, was an action upon a bond taken as a recognizance. As it was made payable to the governor of the state instead of to the state, it was held void for that reason, but it was decided that "a bond taken by an officer of the court by authority of law and required to be returned into court, when so taken and placed upon the files of the court as an obligation of record, is in effect a recognizance, and will support the *scire facias*." It is said, in the opinion by Judge Wheeler, that "it has the force and effect of an obligation entered into before a court of record."

Kearns v. The State, 3 Blackf., 334, was an action upon a recognizance taken by the sheriff. It was signed by the conusor and his surety. On the trial it was contended, as in this case, that the obligation was a penal bond and not a recognizance. Judge Blackford, in the opinion, says:

"The obligation before us is in a certain penal sum conditioned for Kearn's appearance at court. The only objection against its being a recognizance is, that it is signed and sealed by the party. We do not conceive that the signature and seal can of themselves prevent this instrument from being a recognizance. To determine its character we have only to inquire whether it has been duly acknowledged before the proper officer. The sheriff, who is authorized to take the recognizance, certifies on the face of the obligation that it was signed and sealed in his presence and approved by him. This certificate settles the question. The obligation was duly acknowledged before the proper officer, and it cannot be a substantial objection to its character as a recognizance that the acknowledgment was made under the hand and seal of the party instead of being only verbally made. The instrument was in substance a valid recognizance."

Vierling v. The State, 33 Ind., 218, was where a defendant, who had been convicted of a misdemeanor before a justice of the peace, appealed from the judgment of conviction to the common pleas court; instead of entering into a recognizance in form as required by the statutes of that state he gave an appeal bond. In the common pleas court the prosecution, for that reason, moved to strike the case from the docket. The motion was sustained and the defendant appealed to the supreme court. It was held that the bond was a substantial compliance with the law, and that the common pleas court erred in striking the case from the docket.

The State v. Grippin, 1 O. S., 399, cited by plaintiff in error, was a case where the clerk of the common pleas court, instead of taking a recognizance as required by law, made a memorandum upon a loose sheet of paper as follows:

Kling v. State.

The State of Ohio
v.
Edwin Harvey,

Indictment for passing counterfeit coin. Defendant's recognizance in \$500, with Stephen Griffin and Thomas Harvey as sureties, conditioned for the appearance of defendant at the next term of this court to answer the above indictment. Done in open court, September 20, 1850.

G. S. TOMBLIN,
Deputy Clerk.

This was held not to be a recognizance either in form or in substance, and we think correctly. Chief Justice Bentley, in writing the opinion of the court, says: "To be a recognizance it is essential not only that the instrument be in writing, but also that it be a matter of record. If not actually entered upon the journal or record books, it must be upon the files of the court. * * * What does the writing offered in evidence on behalf of the plaintiffs in this case as a recognizance amount to? It is a brief memorandum of the clerk relating to the subject matter of a recognizance. It contains neither the form or substance of a recognizance in itself; neither the name of the cognizee nor any acknowledgment of any obligation, promise, or undertaking on the part of the cognizors is set out. Upon the principle, therefore, that a recognizance must contain and express in the body of it the material parts of the obligation and the condition, this paper can have no validity as a recognizance."

In *The State v. Dailey*, 14 Ohio, 91, the only questions involved were as to the effect of certain pleas presented by the defendants in an action on a recognizance taken by a justice of the peace for the appearance of the defendant at the common pleas court. The only question discussed which we think could have had any bearing upon this case is as to the conclusiveness of the recognizance. Chief Justice Wood, in writing the opinion of the court, uses the

following language: "If it be said the recognizance is the ministerial act of the justice only and not of record, the answer is, the statute requires it to be returned to the clerk of the common pleas. A memorandum of it, made *to be considered as record in that court* and sued by *process out of that court*, in the same manner as if taken then, and it therefore becomes a record in that court." (The italics are his.)

In this connection it might be proper to notice that the forms and precedents for recognizances given by Judge Swan in his excellent treatise on Practice in Justices Courts in Ohio, on page 882, *et seq.*, clearly contemplate that it shall be substantially as the one in this case (except the signatures), and there is no hint anywhere that it should be entered in the docket of the justice. Upon the contrary the form of the docket entry given, page 885, shows very clearly that he understood it to be unnecessary, the recital simply being: "I therefore order him to enter into recognizance in the sum of dollars for his appearance at court, which was done," etc.

We therefore conclude that the Ohio case cited does not support the conclusion of plaintiff in error, but in the main supports the views here expressed.

As giving some information as to the practice in Ohio of justices of the peace, we observe in Wilson's Ohio Criminal Law, at page 326, the form to be adopted where a recognizance to appear on a day to which the examination is adjourned is forfeited: "The same to be written on the back of the recognizance, and a minute made of it upon the docket." The Ohio Criminal Code being similar to ours, this may be considered as indicating the practice in that state.

We therefore conclude that the recognizance declared on in this case is such an one as is contemplated by the Criminal Code of Nebraska, and that it is a valid recognizance. It follows, therefore, that the court did not err in overruling the objection to the admission of the recognizance in evidence.

It is next insisted that the surety was exonerated by operation of law by the imprisonment of Greek on a charge of felony in the state of Arkansas. The answer alleges and the proof tends to show that after the execution of the recognizance Greek went to the state of Arkansas, was there arrested upon a charge similar to the one for the commission of which he was arrested in this state, and upon trial was convicted and sentenced to the penitentiary, he being under arrest at the time of the forfeiture of the recognizance mentioned in the petition of the defendant in error. If the fact is as alleged and claimed by plaintiff in error, it is clear that the commission of the crime for which he was arrested in Arkansas was subsequent to the execution of the recognizance, and was of course the voluntary act of the accused.

It is not deemed necessary to enter into a discussion of the cases cited by plaintiff in error by which under certain instances it has been held that the surety was discharged. It is sufficient to say that it is no bar to a prosecution of this kind, and it cannot be plead as a defense, that the accused voluntarily left the state, violated the laws of the state to which he went, and for such violation was imprisoned. *State v. Scott*, 20 Iowa, 63. *Hartington v. Dennie*, 13 Mass., 92. *Taylor v. Taintor*, 16 Wal., 366.

It is insisted that the complaint upon which the warrant was issued under which Greek was arrested was defective and charged no offense, and that the order of the justice of the peace holding Greek for his appearance at the next term of court did not comply with the statutes, he failing to find that there was probable cause for believing Greek guilty of the crime charged. As to the first question, although the complaint was informal and inartistically drawn, yet it sufficiently charges the commission of an offense; but whether it does or not cannot be inquired into in this proceeding.

In *United States v. Evans et al.*, 2 Federal Reporter,

147, it was held that a fatal defect of an indictment was no defense to an action upon a recognizance given to answer a charge. The court says: "He was bound to appear to answer the charge, whether upon this indictment or some other indictment or information to be preferred against him. His appearance at court was the thing to be secured, and the further condition was that he should continue in attendance until discharged by the court. He cannot abscond, forfeit his bond, and on the *scire facias* try collaterally the merits of the case upon the sufficiency of the indictment or other matter of defense. The defendant and his sureties would by such practice be allowed to judge of the propriety and utility of his appearance, which cannot be permitted."

The same may be said as to the second proposition. By reference to the transcript of the justice, introduced in evidence, we find after the introduction of the testimony the following recital: "On consideration whereof I find that there is probable cause to believe that Adam Ingram committed the offense charged in the complaint, and that William Greek was knowing to the fact, or partially implicated therein. Adam Ingram is therefore required by me to enter into recognizance of good and sufficient surety in the sum of \$500, and William Greek in the sum of \$250, for their appearance before the district court of Cass county on the first day of the next term thereof, to answer said complaint. Whereupon Adam Ingram entered into a recognizance of \$500 with James Ingram as surety, who is approved by me, and William Greek entered into recognizance of \$250 with John King as surety, who is approved by me upon his oath thereto as to his property liability."

This is sufficient when collaterally assailed.

It follows that the decision of the district court is correct, and the same is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

H. C. PAULMAN, PLAINTIFF AND APPELLEE, V. PRENTISS D. CHENEY, DEFENDANT AND APPELLANT.

1. **Specific Performance: WAIVER.** Where there are conditions in a contract for the sale of real estate, making time the essence of the contract and providing for a forfeiture in case of default, an acceptance of part payment on the contract is a waiver of the condition as to all defaults then existing.
2. ———: **DECREE SUSTAINED.** Where a contract provided that upon the payment of one-half of the purchase money the vendor should execute a deed to the purchaser, and take a mortgage upon the land conveyed, to secure the unpaid purchase money, *Held*, That a decree that the vendee pay the entire purchase price at the time of the execution of the deed would not be set aside on behalf of the vendor, unless there are special reasons why he should not receive the money.

APPEAL from Johnson county. Heard below before BROADY, J.

L. W. Colby, for appellant, cited: *Morgan v. Bergen*, 3 Neb., 214. *Reynolds v. B. & M. R. R. Co.*, 11 Id., 186. *Lent v. Same*, Id., 203.

S. P. Davidson, for appellee, cited: *Laird v. Smith*, 44 New York, 618. *Hull v. Sturtevant*, 46 Maine, 34. *Bass v. Gilliland*, 5 Ala., 76. *King v. Ruckman*, 24 N. J. Equity, 356. *Guin v. Roath*, 37 Conn., 16. *Richmond v. Robinson*, 12 Mich., 200.

MAXWELL, J.

This an action to enforce specific performance of a contract for the sale of seventy-five acres of land off the south end of section 1 in township 5 north, range 10 east, which is described in the contract and petition by metes and bounds. The contract was entered into on the 29th day of March, 1879, by which the defendant sold to the plain-

tiff the land above described, for the sum of \$750, \$100 of which was paid at the date of the contract, the balance to be paid in ten annual payments at the times specified in twenty promissory notes then given. The notes were payable at the office of Russell & Holmes, Tecumseh, Neb., without interest before due, and with ten per cent per annum after maturity. The defendant was to pay the taxes on said land for the year 1879 and previous years, and the plaintiff to pay the taxes of 1880 and subsequent years. The contract is substantially in the same form as in *Robinson v. Cheney*, 17 Neb., 673, and the construction placed upon it, in that case, will be adhered to in this.

It appears from the evidence that the notes due March 29th, 1881, from the plaintiff to the defendant, were not paid until April 23d of that year; that the notes due March 29th, 1882, were not paid until May 5th, 1884. At this time the notes due March 29th, 1883, and March 29th, 1884, were unpaid. All the money so paid was accepted by the defendant. On the 17th of June, 1884, and without any further default being made by the plaintiff in his payments, the defendant returned all the notes to the plaintiff in a registered letter, and declared the contract forfeited. On the 30th of that month the plaintiff deposited the entire amount of the unpaid purchase money in the bank of Russell & Holmes, and demanded a deed of the defendant, which not being given, the plaintiff brought this action. The answer is a general denial. The court below found the issues in favor of the plaintiff and entered a decree enforcing the contract.

The only question that need be considered in this case is that of waiver.

In *Dumpor's Case*, 2 Coke, 119, it was held that a condition in a lease that the lessee or his assigns shall not alien without the special license of the lessor, is determined by an alienation by license, and no subsequent alienation is a breach of the condition, nor does it give a right of entry

to the lessor. The courts of this country have generally held that a waiver by acceptance of rent or the like is a waiver of the existing forfeiture, but leaves the condition effectual for the future, and the same rule seems now to prevail by statute in England. The common law put a rigorous interpretation upon all contracts, and held that unless the conditions thereof were performed at the time and in the manner therein set forth, the breach was complete and no subsequent performance possible. But even at common law the rule as stated by Coke was, that where "it appeareth that if the condition be broken for non-payment of rent, yet if the feoffer bringeth an assize for the rent due at that time, he shall never enter for the condition broken, because he affirmeth the rent to have a continuance, and thereby waiveth the condition," etc. Coke Lit., 211b. The distinction made in some of the cases—that to make a receipt of rent a waiver the rent must have accrued after the breach, *Jackson v. Allen*, 3 Cowen, 220, need not be considered, and it could not apply to this case. Here was a contract with conditions of forfeiture. The conditions, in no instance, so far as the payment of the purchase money was concerned, seem to have been strictly complied with, yet the defendant treated the contract as valid and continuing. The money received by him on May 5th, 1884, was paid under the contract and accepted by him as such. He then recognized the contract as then existing under which the plaintiff upon payment of the purchase price was entitled to a deed. This, therefore, was a waiver of the prior conditions of forfeiture; and the defendant could not by a mere return of the notes to the purchaser, where there had been no subsequent default, terminate the contract and deprive the plaintiff of the land. Whether he could have done so by a notice to pay the money in a reasonable time is not before the court. The defendant contends that he cannot be compelled to accept the amount of money due on the contract in place of a

 Tatro v. Tatro.

mortgage, as provided in the contract. This is true, and if an issue had been made upon that question it is possible that the court would have directed the execution of a mortgage. But the answer is a mere denial. We think the court was justified, from the conduct of the plaintiff, in believing that the purchase money for the land was at least of equal value to him as a mortgage on the land. There was therefore no error in decreeing its payment. In conclusion, as was said in *Robinson v. Cheney*, a court of equity will not declare a forfeiture unless compelled to do so. It violates every principle of justice to take the property of one man and give it to another without compensation upon a simple failure to pay at the day, where there has not been gross laches. While in particular cases such forfeitures will be sustained, yet they will be denied in all cases where the vendor has directly or indirectly waived the condition on which they depend. As the defendant waived the condition in this case it was his duty to accept the balance of the purchase money and execute a deed to the plaintiff, and having failed to do so, the decree of the court below enforcing the contract is right, and is affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

MARIA A. TATRO, APPELLANT, v. JOSEPH TATRO, APPELLEE. | 18 395
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1. **DIVORCE: DOWER OF WIFE.** Under section 23 of Chap. 25, Comp. St., entitled "Divorce and Alimony," a wife, upon obtaining a divorce for the cause of misconduct, etc., of the husband, is entitled to dower in his lands in the same manner as if he were dead.

2. ———: ———. If she make no demand for dower, and the court in making a division of the property of the husband, in the nature of permanent alimony, awards a sum in gross to her, it will be deemed to include all her interest in the husband's estate, and will bar her claim for dower, unless a contrary intent is shown in the decree.
3. ———: DECREE: ALIMONY. Upon a divorce being granted, a decree in favor of the wife for permanent alimony will bar her right to any further claims against the estate of the husband.

APPEAL from Fillmore county. Heard below before MORRIS, J.

John P. Maule, for appellant.

J. W. Eller and *F. I. Foss*, for appellee.

MAXWELL, J.

This action was brought by the plaintiff against the defendant in the district court of Fillmore county to obtain a divorce, upon the grounds of cruelty and failure to provide a suitable maintenance. The cause was referred to a referee, who made a report in favor of the plaintiff. The report was confirmed and a decree of divorce rendered, with permanent alimony to the amount of \$2,000, to be paid by installments. The defendant appealed to this court. The plaintiff also appealed from the decree for alimony. Before the hearing the defendant died, and the cause so far as it relates to alimony was revived. It is claimed on behalf of the plaintiff that the decree for alimony is not for a sufficient amount, and also that she is entitled to dower in the estate of the defendant; while on behalf of the defendant's estate it is alleged that the amount of alimony is excessive, and if, in addition to it, the plaintiff is entitled to dower in the estate, it will be impossible to raise the amount without her signature to the deeds, the property being exclusively real estate. A considerable amount of temporary alimony was

allowed the plaintiff and her attorneys during the pendency of the action, while the costs and expenses of the trial amount to a very large sum. The defendant's property consists entirely of real estate, which, as is well known, is liable to fluctuate in value, according as the demand may be brisk or dull. He is shown to have been in debt to a considerable amount, and after deducting the debts the alimony allowed is about equal to one-third the value of the estate; and therefore the court did not err in awarding the same. But it is claimed that notwithstanding the decree of divorce the plaintiff is still entitled under the statute to dower in the real estate of the defendant, and this is the principal question in the case. This is claimed under section 23 of chapter 25, Comp. Statutes of 1885, which is as follows: "When the marriage shall be dissolved by the husband being sentenced to imprisonment for life, and when a divorce shall be decreed for the cause of adultery committed by the husband, or misconduct or drunkenness of the husband, or on account of his being sentenced to imprisonment for a term of three years or more, the wife shall be entitled to dower in his lands in the same manner as if he were dead, but she shall not be entitled to dower in any other case of divorce."

Under a somewhat similar statute the court of appeals of New York held, in *Wait v. Wait*, 4 Comst., 95, that a divorce for adultery was prospective in its operation, and had no other effect on the marriage relation than such as was declared by statute, and hence that such divorce did not deprive the wife of her right of dower. *Burr v. Burr*, 10 Paige, 25-26. Under the New York statute, however, the defendant found guilty of adultery was prohibited from marrying again during the life-time of the plaintiff. 2 R. S., 146, § 49. This rule seems to have been extended by the courts to other cases of misconduct of the husband.

In this state an absolute decree of divorce, if unappealed from, is final as to the rights of the parties. Our statute

neither authorizes nor sanctions the practice of divorcing the plaintiff, and denying a divorce to the defendant. A decree *a vinculo matrimonii* dissolves the marriage and puts an end to the relation of husband and wife, and as a necessary consequence to the right of dower, upon the decease of the husband.

Dower in this state is only allowed to the widow who was the wife of the person dying at the time of his death. Kent says that the next species of life estates created by the act of the law is dower. It exists where a man is seized of an estate of inheritance, and dies in the life-time of his wife. 4 Kent Com., 35. Coke Litt., 30a. 2 Blacks. Com., 130. The effect of a divorce is to put an end to all rights of property depending upon the marriage, and not actually vested, such as the right of dower in the wife, etc. *Rice v. Lumley*, 10 O. S., 596. *Billan v. Hercklebrath*, 23 Ind., 71. *Given v. Marr*, 27 Me., 212. *Barbour v. Barbour*, 46 Id., 9. *Whitsell v. Mills*, 6 Ind., 229. *Burdick v. Briggs*, 11 Wis., 136. *Miltimore v. Miltimore*, 40 Penn. St., 151. *Stilphen v. Houdlette*, 60 Me., 447. It is presumed that the court in rendering a decree of divorce will award alimony in proportion to the property of the defendant. This must include all claims of the plaintiff upon the property of the defendant. If either party is dissatisfied with the decree the case may be brought into this court for review; but the final decree is conclusive upon the rights of the parties, and bars the rights of either party to any further claim upon the property of the other. The most that can be claimed for our statute is, that upon the decree of divorce being rendered for any of the causes above named the court may in the nature of alimony award the plaintiff dower in the lands of which her husband was seized at the date of the decree. In such case, however, the right to dower is not contingent upon the death of the husband, but accrues at once upon the rendition of the decree. Thus, in *Smith v. Smith*, 13

Mass., 230, upon a divorce *a vinculo* for the adultery of the husband, it was held that the wife was entitled to dower in the same manner as if the husband were dead, and the same ruling was had in *Merrill v. Shattuck*, 55 Me., 370. *Harding v. Alden*, 9 Id., 140. *Davol v. Howland*, 14 Mass., 219. The question of alimony does not seem to have been considered in these cases. At common law the relation of husband and wife must continue to exist to entitle the wife to alimony, and upon a decree of divorce *a vinculo* or sentence of nullity no alimony could be awarded. The statute, however, to protect the claims of the wife, preserves her right of dower in the lands of her husband in case she obtain a decree of divorce *a vinculo* from him for adultery, misconduct, etc. This right becomes operative at once upon a decree being rendered, and not upon the death of the defendant. It is evident, however, that the object of the statute is to enable the wife to obtain a fair division of the property of her husband, and to prevent the defendant from conveying his real estate in fraud of her rights. A married woman may bar her dower by joining in a deed of conveyance of the estate or by a separate deed. She may also be barred by a jointure settled on her with her consent before marriage, or by a pecuniary provision in lieu of dower, to which she has assented. She may also elect between her right to dower under the statute and a provision in the will of her husband, but she will not be entitled to claim under both unless that appears to have been the intention. Comp. St., Ch. 23, § 12, *et seq.* Where the wife accepts any of the pecuniary provisions named, in lieu of dower, she will be barred thereby. So, if upon rendering a decree of divorce the court in decreeing property to the wife in the nature of permanent alimony awards a gross sum, it will be held to include all the property of the husband, including the right of dower, to which the wife will be entitled. It is a fundamental principle of equity jurisprudence that where all parties in in-

terest are before the court in a case where its jurisdiction is established, it will determine the entire controversy, and award full and final relief. This principle has frequently been applied to causes of action which were purely legal in their nature, and where relief could have been granted by a court of law, and particularly is this true under the code, where the distinctions between actions at law and suits in equity are abolished. *Laub v. Buckmiller*, 17 N. Y., 620. *Lattin v. McCarty*, 41 Id., 107. *Davis v. Lambertson*, 56 Barb., 480. *Sternberger v. McGovern*, 56 N. Y., 12. *Story's Eq. Juris.*, §§ 64, 65. *Turner v. Pierce*, 34 Wis., 658. *McNeady v. Hyde*, 47 Cal., 481. The object is to prevent a multiplicity of suits. A court of equity, therefore, in awarding permanent alimony to the wife, must take into consideration all the circumstances, and decree such an amount to the wife as may seem just and proper. But the decree will be final, unless appealed from, and will determine the rights of the parties to the property in controversy. Where a decree of divorce is granted which is not sought to be reviewed on error or appeal, the parties after the lapse of six months may marry again; and the only purpose of this provision of the statute is to enable either party if aggrieved by the decree to have the cause reviewed in the supreme court. Comp. Stat. 1885, Ch. 25, § 45. Aside from this restriction it is not the policy of our law to impose restrictions upon the marriage of either of the parties. We therefore hold that a wife, on obtaining a divorce for the causes named, is entitled to dower in the lands of her husband if she so elect, and the same may be set off as a portion of the husband's estate to which she is entitled. But that if she do not demand her dower, and the court makes a division of the property of the husband in her favor in the nature of alimony, it will be held to include her dower right unless a contrary intention appears, and the decree will conclude the rights of the parties. As the decree for alimony in this case was for

a gross sum payable by installments, and seems to have been a fair division of the property of the husband; it must be held to include the plaintiff's right of dower in his lands. The decree of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

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FRANK JONES, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: PROSECUTION BY INFORMATION.** The act "to provide for prosecuting offenses on information and to dispense with the calling of grand juries, except by order of the district judges," which took effect June 10, 1885, applies to all cases where grand juries were required after the act took effect.
2. ———: **GRAND JURY NOT SUMMONED UNLESS JUDGE DIRECT.** The proceedings by information are exclusive, unless the judge, in a written order filed with the clerk of the court, shall require a grand jury, in which case it shall be drawn in the manner provided by law.
3. ———: ———. The authority to require a jury to be summoned from the bystanders is repealed by implication.

ERROR to the district court for Cuming county. Tried below before CRAWFORD, J.

Wilbur F. Bryant, for plaintiff in error.

William Leese, Attorney General, *Guy R. Wilbur*, District Attorney, and *T. M. Franse*, for defendant in error.

MAXWELL, J.

The plaintiff in error was convicted in the district court of Cuming county of shooting at another person with intent to kill, and was sentenced to imprisonment in the penitentiary for eight years. He now prosecutes error to this

court. It appears from the record that the March term, 1883, of the district court of Cuming county was adjourned till the 23d of June, the grand jury being discharged; that on the 23d of June 1885, an order was entered by said court requiring the sheriff to summon a grand jury from the bystanders. The sheriff thereupon summoned a grand jury from the bystanders as ordered, and such jury found the indictment against the plaintiff in error, upon which he was convicted. His attorneys thereupon filed a motion to quash the indictment, because the grand jury had not been legally drawn, which motion being overruled a plea in abatement upon the same ground was interposed, which was held insufficient. There are other questions in the case, but in the view we take of the indictment it will be unnecessary to consider them. At the last session of the legislature an act was passed "to provide for prosecuting offenses on information, and to dispense with the calling of grand juries except by order of the district judges." This act took effect on the 5th day of June, 1885. Comp. Stat. 1885, Crim. Code, Ch. LIV. Sec. 7 provides that "grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within this state, as provided by law, unless the judge shall so direct by writing, under his hand, and filed with the clerk of said court." At the same session of the legislature sections 660, 661, and 662 of the Code were amended to read as follows:

"Sec. 660. The clerk of the district court or his deputy and the sheriff or his deputy, or if there be no sheriff or deputy sheriff, the coroner of the county, shall, at least ten days before the first day of the session of the district court, meet together and draw by lot out of the box, a receptacle wherein shall be kept the tickets mentioned and referred to in section (659) six hundred fifty-nine of said title, twenty-four names, and the persons whose names are drawn shall be the petit jurors. And when a grand jury is ordered the clerk or deputy clerk and sheriff or deputy

sheriff, or coroner, if there be no sheriff or deputy sheriff, shall then draw (16) sixteen additional names, and the persons whose names are drawn shall be the grand jury."

"Sec. 661. The clerk shall, on the day of the drawing aforementioned, issue an order to the sheriff, deputy sheriff, or coroner, as the case may be, commanding him to summon the persons whose names are drawn as petit jurors to appear before the district court at or before the hour of eleven o'clock on the morning of the first day of the term, stating in the order the day of the week and month and the place of the sitting of the court, to serve as petit jurors; and a like order commanding the sheriff, deputy sheriff, or coroner to summon the grand jury, when a grand jury has been ordered and drawn."

"Sec. 662. The sheriff, deputy sheriff, or coroner having received the order, shall, at least five days before the first day of the session of the court, make service of said order upon each person whose name was selected and drawn as a petit juror, by reading or delivering a copy of the same to the person summoned, or by leaving a copy at his residence, except that the copy shall contain only the name of the person served and not the name of any other petit juror. And when a grand jury is ordered and summoned, service of said order shall be made on each person in the same manner as is provided for service on a petit juror in this section."

This act contains an emergency clause, and took effect on the 5th day of March, 1885. The act requiring prosecutions for crime to be instituted by information was intended to supersede prosecution by indictment. It is a new remedy, requiring the accuser and the accused to meet face to face when prosecutions for crime are instituted, as, with the exception of fugitives from justice, no information can be filed until there has been had a preliminary examination before a justice of the peace or other examining magistrate or officer. It will thus be known in advance of a term

of court what persons are charged with crime and the necessity, if any exists, for calling a grand jury. The legislature evidently supposed that ordinarily such jury would be unnecessary, and the power to call a grand jury was reserved to the judge, to be exercised by him only when in his opinion the demands of public justice required it. He must determine the necessity; but when in his opinion a jury is necessary, the statute has pointed out the procedure to be followed, viz., an order in "writing under his hand and filed with the clerk of the court." This is to be filed with the clerk "at least ten days before the first day of the session of the district court," and a jury will then be drawn from the receptacle, in which the names of sixty persons, selected for jurors by the county board, are kept. It will be observed that under the former statute the names of grand jurors were drawn before those of the petit jurors, while under our present law the names of the petit jurors are first drawn. This court, from its earliest organization, has required grand juries to be drawn in the manner provided by law. Thus, in *Burley v. The State*, 1 Neb., 397, it is said: "The grand jury must be selected in the manner prescribed by the law. There is no security to the citizen but in a rigid adherence to the legislative will as expressed in the statutes made for our guidance." This case was cited with approval in *Preuit v. The People*, 5 Neb., 377. *McElvoy v. The State*, 9 Neb., 158. *Clark v. Saline Co.*, Id., 516. *Priest v. The State*, 10 Neb., 393. And was followed in *Bohanan v. The State*, 15 Neb., 209, and some other cases, without being cited, and is the settled law of this state. The importance of securing fair-minded, impartial, intelligent men for jurors, who, without feeling or bias, will weigh the evidence and be governed by it alone, cannot be overestimated. To secure such jurors the statute requires the names of electors to be selected in due proportion from all parts of the county. Under the former statute, where after a grand jury was discharged

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it became necessary to summon another, the court could order it summoned from the bystanders. This power, perhaps, was necessary to prevent a failure in the administration of the law in some cases; but under the present statute this power is unnecessary, and the statute is repealed by implication. The court, therefore, had no power to order a grand jury summoned from the bystanders, and as proper objections were made to the jury by a plea in abatement, the jury should have been discharged. The indictment, therefore, is invalid, and must be quashed. The judgment of the district court is reversed, the indictment quashed, and the plaintiff in error remanded to the proper authorities of Cuming county to be dealt with according to law.

REVERSED AND REMANDED.

THE other judges concur.

HENRY PARRISH, PLAINTIFF IN ERROR, v. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **MURDER: EVIDENCE TENDING TO LOWER GRADE OF HOMICIDE SHOULD BE SUBMITTED TO JURY.** Upon a trial for murder an instruction to the jury which takes from their consideration, or which is susceptible of being understood by the jury to take from their consideration, certain evidence in the case tending to lower the grade of the homicide to manslaughter is erroneous, and in such case, the verdict being a general one and the sentence being for fifteen years in the penitentiary, the judgment will be reversed.
2. ———: **VERDICT: SENTENCE.** In a trial for murder a verdict of guilty which does not ascertain whether it be murder or manslaughter, as required by section 489 of the Criminal Code, confers no power on the court to pass sentence on the accused.

REHEARING of case 14 Neb., 60.

T. Appleget & Son, for plaintiff in error.

William Leese, Attorney General, for the State.

COBB, CH. J.

The plaintiff in error, together with five others, was, at the September term, 1880, of the district court of Johnson county, indicted for the murder of one Elmer E. Parker. The indictment was for murder "without deliberation and premeditation," and accordingly charged the crime of murder only in the second degree.

It appears from the supplemental record filed in this court, in pursuance to an order of the court made at the January term, 1885, that at the said September term of said district court, 1880, the plaintiff in error was placed upon his separate trial, tried, convicted, and sentenced to a term of fifteen years at hard labor in the penitentiary. Within the next ensuing year the cause was brought to this court on error. The cause was submitted to the court at the next term upon argument and brief of counsel for plaintiff in error, but went over to the next term to enable the attorney general to present a brief on the part of the state. When such brief was finally presented it called attention to the fact that the record contained no copy of either the indictment or the verdict. Yet this omission was not supplied and the opinion of the court was finally reached, affirming the judgment. The opinion is published in Vol. 14 of our reports, at pp. 60-67.

A motion for a rehearing was made and rehearing granted at the last term (Jan., 1885).

The ninth instruction given by the court on the part of the state was in the following words: "9. The jury are further instructed that if you should find from the evidence that Henry Parrish, the defendant, did kill and slay Elmer E. Parker, and no explanatory circumstances are

proven, the presumption of the law is that there was malice and that the crime is murder in the second degree."

Of this instruction the court in the opinion say: "The 9th instruction given on behalf of the prosecution was not strictly applicable, as there were explanatory circumstances respecting the killing before the jury, and had the conviction been of murder in the second degree it is possible that the giving of it would have been cause for a new trial. The error of this instruction was in its suggestion of the possible want of any circumstances, when in fact there were many of them as would lower the homicide to the grade of manslaughter. But the conviction being of manslaughter only, the error was not prejudicial and there was no cause for reversing the judgment."

It thus appears that it entirely escaped the attention of the court that the conviction of Parrish was understood and construed by the district court to be for murder in the second degree. Had reference been made to the sentence in this connection it would have been seen that the term of imprisonment imposed upon the plaintiff in error exceeded the maximum provided by law for manslaughter by five years. Section 5 of the Criminal Code provides as follows:

"Sec. 5. If any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter, and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year."

Upon the trial there were sworn and examined on the part of the state, besides the expert witnesses and the sheriff, sixteen witnesses, fourteen men and two women, all of whom had about equal opportunities of seeing and testifying to the fact and circumstances attending the homicide. It is quite within bounds to say that scarcely two

of them agree in the essential facts of the case. I transcribe the material part of the testimony of A. C. Cox, one of the said witnesses on the part of the state, given on his direct examination, as being the strongest evidence against the accused, and as illustrating the remarks of the court in that part of the opinion above quoted as "circumstances" "as would lower the homicide to the grade of manslaughter."

A. C. Cox called and sworn for the state:

Q. How long have you lived in Tecumseh?

A. It has been about fifteen years.

Q. Where were you on the 25th of June, 1880?

A. Out on the mail route during the day.

Q. What time did you get in town?

A. I don't know the exact time. I got here only by my regular time from about half-past four to five o'clock. I think about half-past four o'clock.

Q. State what you saw soon after you got back, in connection with Parker and his son?

A. The first thing I noticed of Parker he was sitting over in front of the Arcade saloon, or near there, on some rock; his son was standing near him, not far from him.

Q. Which building was that, what street was it on?

A. I cannot tell you the streets.

Q. On the west of South street?

A. It is over—

Q. How far from Blume's new building?

A. It is the one I believe that Dewey has, it was the next door from—I don't know; he was over near there.

Q. State what occurred there?

A. I saw nothing in connection that I know of, between Parker and the boy there. Then I saw a man come across the street and commence talking to Parker.

Q. Who commenced the conversation?

A. Blume.

Q. What did he say?

A. I did not hear the first words he used; I did not hear what they were, but I heard Parker tell him to go away and let him be. Then I heard Blume call him "a damned son of a bitch."

Q. Who was then with Blume, if anyone?

A. With Blume at that time?

Q. Yes.

A. I cannot say anyone was with him just then.

Q. Who was near him?

A. The crowd was gathering up all the time.

Q. Which way did Parker go?

A. Parker struck at Blume a lick with a cane, a walking cane, a heavy stick, and struck at him a very heavy lick, and Blume dodged it and ran into the saloon; the boy stepped up just before the lick was struck and said he wanted them to go away and let his father be; he came to take him home. Then this Blume called him this name, and Parker struck at him. Then I saw another man come rushing around, and the boy picked up a brickbat; I think one in each hand. There was another man came rushing round and had some words with the boy. I did not notice what Parker was doing, because I was noticing what the young man was doing.

Q. Where did they go from there?

A. They worked their way towards the Sherman House.

Q. Where did they go from there?

A. From there they worked towards the depot.

Q. Where was the crowd all this time?

A. The crowd was following them up tolerably close.

Q. Who do you mean by them?

A. I mean the crowd following Parker and his boy.

Q. And they were going which way?

A. They started east from where they first commenced, they started east toward the Sherman House and from there towards the depot, going backwards—Parker and the boy—until they got to the Sherman House, and then

the boy turned around. Parker had told him repeatedly to go home.

Q. What did the boy say to the old man?

A. The boy said to the old man—I started before them and got to the Sherman House as they first started—he said, “Father, let me alone, I can whip him.” The old man said, “Elmer, I tell you to go home,” and kept pushing him, for him to go home.

Q. Whereabouts did this last conversation occur?

A. What conversation do you mean?

Q. The last one, the last one you speak of between the old man and the boy.

A. When they first left the corner of the building going towards the Sherman House.

Q. Who of the crowd did you see or notice following after these parties?

A. Well, sir, I don’t know as I could name them at this time. I saw Parrish near Parker, and I seen Mr. Hill; I don’t know his given name, and I saw one man by the name of Jerry; I don’t know his other name, and a good many other men, I don’t recollect. May be more I could think of presently, but don’t know now.

Q. State to the jury what Parrish was doing.

A. Parrish, from what I could see, was trying his best to get at the boy.

Q. What was he saying to the boy, and what was he doing?

A. Parrish, when I noticed him first, came up when Blume ran into the saloon, and picked up a brick and was trying to get at the boy; when I seen the boy pick up a brick, Parrish was saying something in a loud tone of voice, and I don’t know whether I remember what he was saying. He was using some hard words, but I don’t remember what they were.

Q. Against whom was he using the words?

A. The boy.

Q. Can you state the words?

A. I don't think I can at this time, I might at that time.

Q. State what further was done.

A. I noticed every time Parrish would work his way around the crowd the old gentleman Parker was waving his cane, telling them he would kill the first man that laid a hand on the boy's head; telling them to keep back. I heard another man—that is all I remember of Parrish trying to get at the boy.

Q. What other man?

A. I heard another man halloo for him to go ahead and whip him and he would pay the fine.

Q. Who was that man?

A. Lee Woodruff.

Q. State what further occurred.

A. I noticed the boy then going backwards towards the Sherman House, and the old gentleman talking to the crowd, and finally the old gentleman looked over his shoulder and said, "Elmer, I tell you to go home," and then the boy walked very deliberately towards the depot.

Q. Where was Parrish at this time?

A. I could not say; he was first here and then there in the crowd.

Q. Who was in advance of the crowd?

A. As near as I recollect Parrish and this young man Hill, the first time, when the boy first started, and Jerry, I think, and I don't recollect who was in advance of the crowd; I recollect I was there myself a portion of the time, a good deal of the time.

Q. State what further you saw.

A. I noticed when the boy started on down the old gentleman kept going on, and when we got just below the Sherman House I heard Jerry, from just off the sidewalk below the Sherman House and on the street, say that "it was a damned shame for a mob like that to pitch on an old

man and a boy." Henry Parrish came rushing round to where Jerry was and made as though he was going to take hold of him, and he says to Jerry, "What have you got to do with this, and do you want to take the old man's part?" He remarked again it was a shame to pitch on an old man and a boy. Jerry was whittling, or had been. Parrish cracked his hands together and said, "Put up that knife and I will whip you." Jerry remarked, "I will put up no knife, and you take damned good care not to run against that knife." My attention was attracted to that, and I did not see Parker at that time.

Q. What was the next thing you noticed in connection with this?

A. The next thing I noticed a man came rushing into that crowd and grabbed Parrish by the arm, and said, "They have got him now," or something to that effect.

Q. Whom did they have reference to?

A. I judged they had reference to Parker.

Q. State what next you noticed.

A. At that time I whirled to look down that way as soon as I could, and I saw a man just coming up on the sidewalk like as though he was coming across the street, at least he came in that direction, was in the act of getting on the sidewalk.

Q. State what else occurred.

A. At that the crowd started, when this man came into the crowd and called the attention of myself and others turned to look, and Parrish at once tore himself out of the crowd and run down to where these men were, this man I first noticed run up and struck Parker.

Q. Struck Parker?

A. Yes, sir.

Q. What was the young man doing then?

A. Young Parker?

Q. Yes.

A. He was further down the sidewalk towards the depot at that time, on ahead of Mr. Parker.

Q. What did you further in connection with him?

A. With him?

Q. The young man.

A. I saw him after they commenced pounding the old man. I saw him come running back up the sidewalk.

Q. What else occurred?

A. I saw a man hit him.

Q. State all about it?

A. I saw Blume hit Parker in the back of the head. There was another man struck Parker a lick, and then Parrish was there at that moment and hit him another lick.

Q. That was the old man?

A. Yes, sir.

Q. What was the young man doing?

A. The young man? As Parrish struck the old man the young man started and run back up the sidewalk, as Parrish struck the old man, he turned partly round and struck the young man a lick, knocking him down towards the sidewalk.

Q. What else did you see?

A. I noticed the young man throw a brick at Parrish.

Q. What else did Parrish do?

A. I saw Parrish stoop towards the sidewalk, and as he looked down to the sidewalk he made a spring towards the old gentleman, and as he did so, he reached to the sidewalk.

Q. What did he do then?

A. He picked a rock from the sidewalk and threw it at the boy.

Q. What did the rock do?

A. The rock hit the boy on the head and the boy fell down.

Q. What sized rock was it?

A. I cannot say.

Q. Would you know the rock if you saw it?

Parrish v. State.

A. I think I would, sir.

Q. (Handing witness rock.) Is that the rock?

A. (Examining rock.) That looks very much like the rock, but in my mind I was thinking it was a little heavier, probably that may be the rock.

Q. How far were you from Parrish at the time he threw the rock?

A. I don't know the exact distance, but I would say somewhere—probably eight or ten feet, I don't know just exactly—probably not so far. I was standing by the fence holding to a board. I don't recollect how far they were from the corner.

* * * * *

An examination of the foregoing testimony, in connection with the instruction above quoted, cannot fail to show the inapplicability of the instruction to the facts of the case, nor that the jury in following the same may have rejected all of the accompanying or explanatory circumstances. And while it is no part of my purpose to say that the evidence in the case is not sufficient to support a finding for murder in the second degree, I do say that upon the whole evidence in the case the jury would have been justified in returning a verdict for manslaughter. And when the verdict upon such evidence, as in the case at bar, is a general one, although found on an indictment for murder in the second degree, it is doing no violence to presume that the jury intended by the same to find the lowest grade of homicide included in the charge of the indictment. The following is a copy of the verdict:

“State of Nebraska, plaintiff, v. Henry Parrish, defendant. We the jury in this case being duly impaneled and sworn do find and say that the said defendant Henry Parrish is guilty as he stands charged.

“ROBERT BRYSON,
“Foreman.”

Section 489 of the Criminal Code provides, "That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict, whether it be murder in the first or second degree or manslaughter; and if such person be convicted by confession, in open court, the court shall proceed by examination of witnesses in open court to determine the degree of the crime, and shall pronounce sentence accordingly."

This section of our statute was borrowed literally from the statutes of Ohio, p. 275, § 39, Swan's Rev. Stat. And before the settlement of this state the latter statute had received an interpretation by the courts of Ohio. In the case of *Dick v. The State of Ohio*, 3 O. S. R., 89, the court, in the opinion, say: "The true object of this statutory provision is apparent. As an indictment for murder in the first degree embraces each of the three degrees of criminal homicide, of either of which the accused may be convicted, and as the issue which the jury is sworn to try, involves a charge of each of these three crimes on a general verdict of guilty, which does not ascertain the degree of the homicide, the court could render no valid judgment, not knowing from the verdict for what degree of crime the judgment should be rendered." * * * "The supreme court of Ohio held on the circuit in the case of *The State v. Town*, Wright's Rep., 75, that if the jury, in case of a trial for murder, do not specify in their verdict whether they find the accused guilty of murder in the first or second degree, or manslaughter, the court will refuse to pass sentence, and award a new trial even without a motion on the part of the defendant. And this, I believe, has been in accordance with the uniform practice in this state."

The above case has been followed by the later ones of *Parks v. The State*, Id., 101. *Robbins v. The State*, 8 O. S. R., 131. *Schoonover v. The State*, 17 O. S. R., 299, and others. See also *People v. Baza*, 53 Cal., 690. *State v. Redman*, 17 Iowa, 329.

State v. Stevenson.

The language of the statute is mandatory and controls all trials for murder of any degree. Without its observance the verdict confers no power on the court to pass sentence on the accused.

If this view of the law be deemed too radical, then, the jury having failed to ascertain by their verdict the degree of the crime in accordance with the spirit of our criminal laws, they must be presumed to have intended to find the lowest grade of criminality which the evidence would justify. This, as we have seen, would be manslaughter.

In no view of the case can the sentence be sustained.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

MAXWELL, J., concurs.

REESE, J., dissents. (*See page 702.*)

18	416
18	507
21	668
18	416
35	371
18	416
46	84

THE STATE, EX REL. J. STERLING MORTON, V. WALLACE STEVENSON, COUNTY CLERK OF OTOE COUNTY.

1. **Constitutional Law: INCREASE OF NUMBER OF DISTRICT JUDGES.** Under the provisions of section 11 of article VI. of the constitution, the legislature of 1885 had the power to provide by law for the election of a second judge of the district court for the second judicial district, notwithstanding that the legislature of 1883 had provided by law for the election of an additional judge for the third judicial district, and for the creation of four new judicial districts and for the election of judges for each thereof.
2. ——. A court will not ordinarily listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not affect, and who has therefore no interest in defeating it. *Cooley's Con. Lim.*, 5 Ed, 197.

3. ———. There is a wide difference between the weight and authority to be accorded and given to an act which has passed the legislature by a constitutional majority and through all stages of legislation, and been approved by the executive, although it may be inimical to some provision of the constitution, and a paper which, without having passed the legislature, has, through accident or design, found its way to a place among the authenticated statutes. The former should be respected and obeyed until declared invalid by the judiciary in a proper legal proceeding, while the latter may be disregarded by all.

ORIGINAL application for mandamus to compel respondent to issue and deliver to the sheriff of Otoe county notices of the election to be held in said county Nov. 8, 1885, in which shall be named the office of judge of the district court for the second judicial district.

Charles W. Seymour, Frank P. Ireland, and Edwin F. Warren, for relator.

Frank T. Ransom and John C. Watson, for respondent.

Mason & Whedon, for J. L. Mitchell, intervenor.

COBB, CH. J.

The principal question raised by the motion and affidavit of the relator and the answer of the respondent in this case is, whether the act of February 24, 1885, entitled "An act to amend sections one and three of an act entitled 'An act to apportion the state into judicial districts, and for the appointment and election of officers thereof,' approved February 24, 1883," approved March 10, 1885, is in violation of any provision of the constitution of the state. Comp. Stat., Ch. 5, § 8.

I assume it to be universally conceded that all legislative power of the people of this state not granted to the United States or prohibited to the legislature, or reserved to the people themselves in the constitution of the state, either

expressly or by implication, resides in the legislature. It will not be contended that the passage of the act in question was not the exercise of legislative power, nor that it was the exercise or attempt to exercise any part of the legislative power granted to the congress of the United States. Was it the exercise of a power prohibited to the legislature or reserved to the people themselves in the constitution, either expressly or by implication?

Section 11 of article VI. of the constitution contains the provision of that instrument which is claimed to be violated by the passage of the act under consideration. It reads as follows: "The legislature, whenever two-thirds of the members elected to each house shall concur therein, may, in or after the year one thousand eight hundred and eighty, and not oftener than once in every four years, increase the number of judges of the district courts and the judicial districts of the state."

Although the language of this section is that of a grant of power, yet it being found in an instrument which deals in prohibitions, restrictions, and reservations, and not in grants of power, it must be construed to be a restriction upon the general power of legislation inhering in the people as represented in the legislature.

The power of legislation on the subject under consideration is, by the terms of the above section, restricted in more respects than one. It is not to be exercised at all until the lapse of four years after the general taking effect of the constitution, and then only by the concurrence of two-thirds of the members elect of each house of the legislature. To these restrictions it is claimed that the language of the section adds another, to-wit, that the power of legislating to effect the above objects becomes exhausted and lies dormant until the lapse of another term of four years. While it is not my present purpose to deny the above construction, I will say that if it is the true meaning of our constitution—if one legislature may pass an act which the next legisla-

ture may not amend or repeal, or if one legislature possesses a power which is denied to its successor, then I think that it presents an anomaly in fundamental law-making, and is an exception to an otherwise universal rule.

But in the view that I take of the section of the constitution now under consideration, the power granted to the legislature, "Whenever two-thirds of the members elected to each house shall concur therein," to, "in or after the year one thousand eight hundred and eighty, and not oftener than once in every four years, increase the number of judges of the district courts," was not only not exhausted by the passage of the act of February 24, 1883, but is not exhausted by that of 1885.

Section one of the article of the constitution under consideration provides that, "The judicial power of this state shall be vested in a supreme court, district courts," etc. Section nine provides that, "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide," etc. Section ten divides the state into six judicial districts, and provides that, "In each of which shall be elected by the electors thereof one judge, who shall be judge of the district court therein," etc. Then follows section eleven. That part of which is applicable to the question being examined is herein quoted.

It will thus be seen that the constitution provided for six district courts, and that until the year 1880, and until the legislature by a two-thirds vote of each house should otherwise provide, there should be but one judge to each of said courts. But that after the year 1880, and by the legislative majority therein specified, the number of such judges might be increased. The number of such judges had only been fixed by the language, "The state shall be divided into six judicial districts, in each of which shall be elected by the electors thereof one judge." It is also true that, by the terms of the eleventh section, in and after the

year 1880 the legislature in the manner stated may increase the number of the judicial districts, and that would indirectly increase the number of judges, by force of the language of the tenth section, authorizing the electors of each of the original districts to elect one judge. But the language of the section empowers the legislature to directly "increase the number of judges of the district courts," and surely when a power is granted to do a thing directly we need not justify the doing of it under another indirect and constructive grant of power. There being then one judge provided for each of the six district courts, the legislature may, in or after 1880, increase this number. May they increase it in one district, or in any or all of them? Obviously, not only from the language used but from the very nature of the subject matter, in any or all of the districts. But not in any oftener than once in four years. Under this power the legislature of 1883 increased the number of the judges of the district court of the third district. But did such action exhaust the power of that legislature or any of its successors to increase the number of such judges in any or all of the other judicial districts not oftener than once in four years? I think not.

If this construction and these conclusions are correct; then the act of 1885, under discussion, as well as the act of February 24, 1883, are fully warranted by the provision of the constitution above quoted. The writer is of the opinion that there are other grounds upon which such legislation may be justified and defended against the charge of being inimical to the constitution of the state, but having, to my own satisfaction at least, found in the above considerations ample authority under the constitution for the legislation under consideration, the discussion of this branch of the case will not be further pursued.

There seemed to be a general desire on the part of the bar, the press, and the people throughout the state, and especially of the second and third judicial districts, that the

question of the constitutionality of the act of March 10, 1885, should be examined and decided by this court. Otherwise I should not have deemed such examination and decision necessary for the purpose of ascertaining the duty of the respondent to obey the law as it came from the legislative and executive branches of the state government. While it will not be denied that any citizen may invoke the provisions of the constitution, state or federal, for the assertion or protection of any of his rights, either of person, family, or property, yet it may well be doubted that the incumbent of a ministerial office, created by and whose current duties rest solely upon legislative authority, may invoke the provisions of the constitution as a justification of his refusal to discharge a plain statutory duty. Under our present system, lawsuits may be prosecuted or defended only by a real party in interest. Such party only has the right to make a record which will render the question litigated *res adjudicata*. This proposition is clearly established by authorities cited by counsel for the intervenor. The respondent can have no interest greater or different from that of any other citizen in the constitutional question which he invokes. If he has, it is so small that it is sufficiently answered by the maxim "*De minimis non curat lex*."

In the case of *State, ex rel. Huff, v. McLelland*, ante p. 236, this court refused to issue a mandamus to compel the respondent, who is county clerk of Nance county, to insert in the notice of the annual election among the officers to be elected that of register of deeds, upon its being made to appear that the act of 1885, entitled "An act to provide for the election of register of deeds, and to define his duties and fix his compensation," etc., when introduced and passed both branches of the legislature, contained a provision for the election of a register of deeds only in counties having 15,000 inhabitants, but in the enrollment was so changed as to apply to "each county having a popula-

tion of 1,500 inhabitants or more;" the county of Nance having a population of more than 1,500 and less than 15,000 inhabitants.

The question presented in that case was not whether the law as printed in the statute book was inhibited by the terms of the constitution, but whether it had passed the legislature at all. And I think there is a wide difference between the weight, character, and consideration to be given to a paper which has passed through all the stages of legislation in due form, and been approved by the executive and placed in the proper custody, although it may be of a character inhibited by the terms of the constitution, and a paper which without having been considered or passed by the legislature has, through accident or design, found a place among the laws. The former should be respected and observed until declared invalid by the judiciary in a proper legal proceeding, while the latter may be disregarded by all.

A writ of mandamus will issue as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	422
20	253
18	422
33	769
18	422
46	788
18	422
45	330
18	422
59	686

THE STATE OF NEBRASKA, EX REL. TOBIAS CASTOR, v.
THE BOARD OF SUPERVISORS OF SALINE COUNTY
ET AL.

1. **Township Organization:** TRIAL OF COUNTY OFFICERS BY SUPERVISORS. In counties under township organization the board of supervisors have authority to hear and determine complaints against county officers under the provisions of article two, chapter 18 of the Compiled Statutes 1885.
2. ———: ———: COMPLAINT. When the board has assumed jurisdiction of such a cause, and has passed upon the sufficiency

- of the complaint, and afterwards refused to act in the case, and upon an application to the supreme court in the exercise of its original jurisdiction for a mandamus to compel action, the court will not inquire into the sufficiency of the complaint further than to ascertain if it is such a complaint. To that extent the complaint was examined, and *Held*, Sufficient.
3. **Mandamus:** JUDGMENT OF COUNTY BOARD CANNOT BE CONTROLLED. While the supreme court can by a mandamus compel a board of county supervisors to act upon a complaint against a county officer, yet it can in no way control its judgment or legal discretion.
 4. **Removal of County Officers:** TRIAL BEFORE COUNTY BOARD. A respondent, in a proceeding to remove him from a county office, has the right to present as many legal questions for decision by the county board as he may think necessary for his proper defense, but the board has the authority and right to decide such questions either with or without argument, as it may deem proper. It is not required to waste time in listening to unnecessary arguments.
 5. ———: UNNECESSARY COSTS TAXED TO PARTY MAKING THEM. Where a party to a proceeding before the county board causes the attendance of unnecessary witnesses, or in any other manner needlessly augments the costs and expenses of a trial, it is within the power of the board to tax such unnecessary costs to the party making them, and it should in all proper cases exercise such power.
 6. ———: QUORUM OF BOARD SUFFICIENT. In a proceeding before a board of supervisors to remove from office a county officer two-thirds of all the members elected constitute a quorum. It is not essential that all the members be present. But of a special meeting all must be notified.
 7. ———: DUTY OF COUNTY BOARD. When a complaint against a county officer is made and filed with the county clerk it is the duty of the county board to hear it. They have no authority to order its removal to the district court for trial.

ORIGINAL application for mandamus.

Griggs & Rinaker, for relator.

F. I. Foss, J. H. Grimm, Ryan Brothers, and Abbott & Abbott, for respondents.

REESE, J.

This is an application to this court, in the exercise of its original jurisdiction, for a writ of mandamus directed to the county board of supervisors of Saline county requiring it to proceed to the examination of certain charges preferred against Charles W. Meeker, the clerk of the district court, by the relator herein.

From the record before us it appears that on the fourth day of August, 1885, the relator filed in the office of the county clerk of Saline county a complaint against Meeker charging him with official misdemeanors as such officer, and that the county clerk issued a summons to him, as is provided by article two of chapter eighteen of the Compiled Statutes of 1885. The charges and specifications are quite lengthy, and will not be noticed in detail. On the 25th day of August the matter came up for hearing before the supervisors, when the respondent filed a plea to the jurisdiction of the board. In this it was contended that the statute not having conferred such powers upon the board of supervisors, they were without authority to act. The session continued from day to day, until the 29th. During this time a number of other pleas, motions, etc., were filed by the respondent, which were, briefly stated, as follows:

Denying the right of the board to proceed without all the members being present.

That the costs be taxed to complainant.

An objection to the board delegating any of its powers to the chairman, such as determining the order of argument upon interlocutory questions, etc.

A general demurrer to the complaint.

An objection to the jurisdiction of the board, for the reason that a member was acting without authority, he not being a legal member of the board.

Denying the jurisdiction of the board, for the reason that two townships of the county were without representation thereon.

A demand for a jury trial.

A demand or motion for permission to examine the members of the board as to their qualifications to sit in the case.

A motion for a change of venue.

These questions were disposed of in their order, and the case retained for hearing, until the board, apparently tired of the protracted proceedings, and perhaps uncertain as to their powers and duties, passed the following preamble and resolution :

“Whereas, Three days have already been used by this board in the consideration of the case of *The State, ex rel. Castor, v. Meeker* ; and

“Whereas, All of said time has been given to the consideration of motions made by defendant’s counsel ; and

“Whereas, Counsel for defendant have notified this board that they intend to file separate objections to each and every one of the thirty specifications in the complaint, and subpoena 1920 witnesses ; and

“Whereas, Owing to the dilatory motions made by defendant, and proposed to be made, and the length of time consumed by defendant in discussing said motions, it will be almost impossible to ever reach a final conclusion of said cause before this board ; and

“Whereas, Counsel for defendant not only refuse to obey the orders of this board, but often use insulting language toward the members thereof, and declare that said board has no power to punish for contempt, or to compel them to obey the orders of this board, nor authority to issue subpoenas, or compel the enforcement of its orders ; and

“Whereas, This board has no power to enforce its orders, and cannot compel the defendant to desist from filing motions, and to proceed with the trial of this cause ; and

“Whereas, It is held and ruled, on motion of defendant,

that all the twenty members of this board must be present in order to legally try this cause; and

"Whereas, It will scarcely be possible for all the members of this board to be present during the great length of time which will be required to complete the hearing of said cause; and

"Whereas, Counsel for defendant strenuously urge that the board may and should, under the law, direct the county attorney of this county to take this cause to the district court for trial; therefore, be it

"*Resolved*, By this board, that the county attorney of this county be and is hereby instructed to carry this case to the district court of this county for trial, and that this board refuses to proceed any further with the hearing of this cause, and the costs thus far made be and are hereby taxed to the complainant."

Another "motion" was filed by the respondent, but no further action was taken by the board. It is now sought to compel action. If this court has jurisdiction to issue the writ at all it can only be to require respondent to act, and exercise its judgment. It cannot control legal discretion. Sec. 645, Civil Code.

The first question presented by the respondents is as to the sufficiency of the charges and specifications. As the present jurisdiction of this court in this case is original and not appellate, we can have no occasion to pass upon this question. It appears from the record that the county board has held them to be sufficient. That must be final, so far as the action of the board is concerned, until reversed either by itself or by an appellate tribunal. It may be, and is perhaps, true that we may look into the record sufficiently to ascertain whether or not the paper styled "charges and specifications" contains enough to raise it to the dignity of what it purports to be, and for that purpose we have examined it and found it sufficient.

The next, and perhaps most important, question pre-

sented by this record is as to the jurisdiction and powers of a board of county supervisors to entertain charges of this kind, and remove county officers from office. The power of county commissioners to do so under the provisions of Art. 2 of chapter 18 of the Compiled Statutes of 1885 is conceded. But it is claimed by respondents that a board of supervisors has no such power. Section 2 of the act referred to provides that, "any person may make such charge, and the board of commissioners shall have exclusive original jurisdiction thereof by a summons." This act was passed by the territorial legislature, being found in chapter 45 of the Revised Statutes of 1866, and has remained upon our statute books ever since. At the time of its passage the laws of the territory provided for a system of county government only by a board of county commissioners. (See chapter 9, Revised Statutes, 1866.) This law remained in force until the act of February 27, 1873, took effect. (General Statutes, p. 241.) The new law continued in force the provisions of the old, so far as the board was concerned, and provided, Sec. 2, page 232, that "The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." On the first day of November, 1875, the present constitution became the supreme law of this state. Section five of the article (10) on counties requires the legislature to provide by general law for township organization, under which any county might organize when a majority of the legal voters should so decide. Under this provision of the constitution the present law was passed. Section 21 of chapter 18 of the Compiled Statutes of 1885 is as follows: "The powers of the county as a body corporate or politic shall be exercised by a county board, to-wit: In counties under township organization by a board of supervisors, which shall be composed of the town and such other supervisors as are or may be elected pursuant to law; in counties not under township organization, by the board of

county commissioners." From the legislation upon this subject it would seem that in so far as the authority of the counties as a body politic was concerned, it was the purpose of the legislature to make the board of county supervisors the successors in office of the commissioners upon the adoption of township organization, and *vice versa* upon its discontinuance, so far as their powers were concerned, which were not changed by law. It is provided that when township organization shall cease the offices of the county commissioners made vacant shall be restored as at the time of its adoption; that the commissioners shall be the legal successors of the supervisors, etc. Secs. 67, 68, and 69, Chap. 18, Compiled Statutes 1885.

In the *State, ex rel., v. Oleson*, 15 Neb., 247, it was held that, "The trial and ousting from office of a sheriff for corruption, under paragraph 5 of Sec. 1, Art. 2, Chapter 18, Compiled Statutes, by the board of county commissioners, is not the exercise of judicial power nor of the power of impeachment, but of a quasi political and administrative power not denied to such bodies by the constitution." This being true, and the board of supervisors being a substitution for the board of commissioners in the general exercise of this political power, it would seem to be clear that such board would succeed to the powers of the commissioners of that nature, except where otherwise provided by statute, or to be clearly inferred. As we have seen, at the time of the passage of the law for the removal of county officers the board of commissioners was the only administrative and political agency of the counties of the territory and state, and with that view the law was passed, not so much to confer the jurisdiction upon the commissioners, but upon the body exercising and enforcing this administrative and political power.

We therefore conclude that the county board of supervisors has all the jurisdiction and power under the law for the removal of county officers in counties under township

organization that the board of commissioners has in counties not under such organization, and that it is the duty of respondents to proceed with the trial of the charges preferred against the clerk. This of course is to be understood as not in any way interfering with their discretion or judgment in passing upon any legal questions arising in the case, either upon the sufficiency of the allegations of the complaint, the competency of testimony, or their final conclusion. Nor can it affect the rights of the parties as to the presentation of legal questions by motion or otherwise during the hearing, if one is had.

In view of the very remarkable preamble and resolutions adopted by the board, it is deemed proper to notice some of the recitals and declarations therein in order to furnish a guide for their future action upon the questions therein referred to.

It is said "counsel for defendant have notified this board that they intend to file separate objections to each and every one of the thirty specifications in the complaint, and subpoena 1920 witnesses."

The defendant, by his counsel, has the right to attack "each and every" of the charges and specifications contained in the complaint. But in this they must be governed by the usual rules of practice obtained in courts of justice, and all these objections would have to be in one paper filed at once and disposed of at once. If any of the charges or specifications should be found insufficient in law they can be so held, and the objection as to them sustained. As to the array of witnesses, it is clearly within the power of the board to tax the costs made by calling unnecessary witnesses to the party calling them; and this power should be freely exercised if necessary.

Another recital is to the effect that as defendant had filed and proposed filing dilatory motions, and the length of time occupied in discussing them, it would be impossible for the board to reach a final conclusion, etc. There

can be no doubt but that a respondent in such case has the right to present such legal questions for decision as he may think necessary to his proper defense. But it is equally clear that the board have the right to decide all such questions either with or without argument, as they may prefer, and where a question is presented upon which they feel ready to decide without argument they should do so. No time should be lost listening to unnecessary arguments.

It is recited further, that the defendant refuses to obey the orders of the board, uses insulting language toward the members, and that the board has no authority to enforce its orders, etc. Upon this part of the case the relator has cited no statute conferring this power upon the board. But if such power does not exist it does not deprive the board of the power to hear the case and decide upon the merits of the testimony adduced, and it can hardly be believed that a respondent in such a proceeding would be willing to mistreat or show disrespect for the tribunal whose duty it was to pass upon questions so directly affecting his interests. The suggestion that a respectable attorney would do so is not to be for a moment entertained.

The ruling of the board that "all the twenty members of the board must be present in order to legally try the cause" is most clearly wrong. "Two-thirds of all the supervisors elected in the county shall constitute a quorum," etc. Sec. 68, Ch. 18, Compiled Statutes 1885. But of a special meeting all must be notified.

The board had no authority to direct the county attorney to take the case to the district court or to any other court. It is their duty to hear it and decide it so long as the relator insists upon the same being done.

It is the duty of the board to act in the case. It having refused to do so the writ must be awarded as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. JOHN C. METCALF,
V. O. C. REYNOLDS ET AL.

18	431
19	169
18	431
34	443
18	431
37	662
18	431
49	755

1. **Liquors: LICENSE: REMONSTRANCE.** The provision of section three of chapter fifty of the Compiled Statutes of 1885, by which it is provided that upon an objection, protest, or remonstrance being filed against the issuance of a license to sell intoxicating liquors, the county board or city council shall appoint a day for hearing the case, is mandatory, and the board or council have no authority to proceed immediately to the investigation of the matters alleged in the remonstrance, and a mandamus will issue to compel the proper action of the board or council.
2. ———: ———: **HEARING.** The fact that a representative of the remonstrants was present and made no objection to the matter being investigated by the council, would not confer the right upon such council to issue the license without appointing a time for the hearing, neither would the board or council have the right to appoint the then present time for such hearing. The purpose of the law is that a *future* time must be appointed in order that all persons interested may be present with their witnesses.
3. ———: ———: **MANDAMUS.** Upon an application for a mandamus to compel the appointment of a time for the hearing of a remonstrance it is no defense to allege, nor will this court inquire as to, the falsity of the facts alleged in the remonstrance. It is sufficient if one is filed.

ORIGINAL application for mandamus.

Ada H. Bittenbender and *H. C. Bittenbender*, for relator.

D. C. McKillip, for respondent.

REESE, J.

On the first day of the present term of this court an application for a writ of mandamus was made, and upon hearing the same a peremptory writ was granted. On

that day court adjourned until the 11th of August, in accordance with an order at that time made, and of which notice had been previously given by the clerk. After the issuance and service of the writ the respondents appeared and moved to vacate it, and for leave to answer to the merits, alleging as ground therefor that they had been misled by the adjournment of the court, having been led to believe that no business would be transacted until the 11th of August. The motion contains other grounds which we will notice in their order.

The application for the writ alleged in substance that the respondents were the mayor and city council of the city of Seward; that prior to the 23d day of April, 1885, one Frederick Bick filed in the office of the city clerk of Seward his petition for a license to sell intoxicating liquors, due notice of which was given, and that on the date above named, and during a session of the city council, the relator, with others, filed with them a remonstrance in writing, objecting to and resisting the granting of the license; that the respondents instead of appointing a day for the hearing of said cause, as required by section three, chapter 50, Compiled Statutes of 1885, proceeded at once and on that day and at that session to grant the license, which was then done. A mandamus was prayed to compel a compliance with the law. The answer alleges that the city council did appoint a day for hearing the questions presented by the remonstrance, and that the day so appointed was the same day, to-wit, the 23d of April, at the meeting of the council then in session; and that the remonstrance was fully heard at that time and the objections found to be without merit, and it is sought to be shown by affidavits on file that the attorney for remonstrants was satisfied with the investigation and made no further objections to the granting of the license. The record of the proceedings of the council is as follows:

"Petition and bond of Frederick Bick to sell malt,

spirituous, and vinuous liquors in the first ward was accepted and license ordered by the following vote: Yeas, Sanders, Mulfinger, and Merriam. Nays, Welch.

"Messrs. Beaver, Chapin, Metcalf, and Hays remonstrated against issuing F. Bick license. Remonstrance overruled and license granted."

While it is perhaps true that the record of the council would be the only proper evidence of what was done, so far as the facts should properly appear of record, and that the record does not show the appointment of a time at which the remonstrance should be heard, yet we think the facts claimed, even if shown by the record, would be no defense to this proceeding.

The section of the law above referred to is as follows: "If there be any objection, protest, or remonstrance filed in the office where the application is made, against the issuance of said license, the county board (city council) shall appoint a day for hearing of said case, and if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license."

It will be seen that if there be any "objection, protest, or remonstrance," the board or council "shall appoint a day for hearing of said case." This language is imperative and mandatory. No further action toward granting the license can be taken. The power of the council to proceed further, except to appoint a day for hearing, is suspended. They have but one duty to perform and that is to "appoint a day for hearing." They could no more legally ascertain the truth or falsity of the allegations of the objection, protest, or remonstrance, than if they were formally adjourned and each man went upon the street as a committee of one, by his own appointment, and made inquiry therein. They

must sit as a board, upon the day fixed, for the purpose of deciding upon the merits of the allegations of the remonstrance. The spirit and purpose of this section of the law is, that a time shall be appointed for the hearing, of which the parties may take notice and at which they may appear with their witnesses. Guided by its provisions no one would think of appearing before the council with witnesses, taking the chance of being crowded out by other business and compelled to pay the costs of their attendance, but rather would he appear at the time to be appointed when the business before the council would be the hearing of that particular case. The law and reason both clearly contemplate the appointment of a day other than the one on which the remonstrance is presented.

The answer further alleges that the allegations of the remonstrance are and were wholly untrue, and that this fact was clearly shown and proven on the 23d of April, at the time the remonstrance was heard. This may all be true, and yet there being no authority or power lodged in the council to so hear or decide at that time, it could constitute no defense to the writ. The question is as to what was the duty of the council at the time, and not what were the merits of the remonstrance.

The affidavits and proofs tend to show that the attorney or representative of the remonstrants was present at the time the final action was taken, and made no objection to it. This in our view could not change the matter. The law prescribed the duty of the council. The mere fact that no objection was made could not relieve them of that duty. The proceeding was statutory, and the statute should be complied with.

It follows that the writ was properly issued in the first instance, and that the motion to vacate the same must be overruled, which is done.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ELIZABETH PEMBERTON ET AL., APPELLEES, v. WILLIAM Z. POLLARD, APPELLANT.

1. **Husband and Wife: DEED TO TRUSTEES FOR WIFE.** Where land was conveyed by husband and wife by warranty deed to trustees appointed by the will of her father, for the "sole and separate use and benefit" of the wife, etc., the consideration being derived from the father's estate a provision in the deed that the husband "shall have the right to occupy, farm, and control said lands for *her* (the wife)" does not create any estate in him, where there is no fraud.
2. **Judgment of Justice: HOW MADE LIEN ON REAL ESTATE.** The transcript of a judgment of a justice of the peace, to become a lien upon real estate, must be filed in the district court of the county where the judgment was recovered, and cannot in the first instance be filed in the district court of another county.

APPEAL from Hamilton county. Tried below before NORVAL, J.

Lamb, Ricketts & Wilson and *R. A. Batty*, for appellant, cited: *Follett v. Tyrer*, 14 Simons, 125. 3 Wash. Real Prop., 375-378. *Hall v. Ionia*, 38 Mich., 493. *French v. Carhart*, 1 N. Y., 96. *Richardson v. York*, 14 Me., 216. Tyler on Infancy and Coverture, § 288. *Canby v. Porter*, 12 Ohio, 79. *Cushing v. Blake*, 30 N. J. Eq., 689. *Rosenfield v. Chada*, 12 Neb., 25.

J. H. Smith, for appellees, cited: *Jackson v. Ireland*, 3 Wend., 99. *Tarter v. Hall*, 3 Cal., 263. *Parker v. Mo-Millan*, 21 N. W. R., 305. *Nichols v. Eaton*, 91 U. S., 716.

MAXWELL, J.

This is an action for an injunction to restrain the sale of certain real estate upon execution, and to quiet the title in the plaintiffs. The defendant demurred to the petition,

and the demurrer being overruled a decree was rendered in favor of the plaintiffs. The defendant appeals. The principal portion of the petition is as follows :

"The plaintiff complains of the defendants, for that on the 23d day of December, A.D. 1876, the plaintiffs were and from thence hitherto and still are the owners and in possession of the following described premises, to-wit :

"The north-west quarter of section number four, in township number nine north, of range number seven west.

"That the plaintiffs became the owners of said premises by virtue of a certain conveyance or deed in the following words and figures, to-wit :

"This deed made this 22d day of December, A.D. 1876, between William D. Pemberton and Elizabeth Pemberton, his wife, of Hamilton county, Nebraska, of the first part, and Ebenezer Z. McColloch and George C. McColloch, trustees, of Ohio county, West Virginia, of the second part, witnesseth : That said parties of the first part in consideration of the sum of twelve hundred dollars in hand paid, the receipt of which is hereby acknowledged, do grant, sell, and convey unto the said parties of the second part, with covenants of general warranty, the following described real estate with all and singular the tenements, appurtenances, and hereditaments thereto belonging. That is to say, the north-west quarter of section four (4), in township nine (9) n., of range seven (7) west, containing one hundred and sixty and $\frac{37}{100}$ acres ($160\frac{37}{100}$), said land lying and being situated in Hamilton county, Nebraska. To have and to hold the said real estate with its appurtenances to the said second parties as trustees of said Elizabeth Pemberton, they being appointed such trustees by the will of their father, Ebenezer McColloch, late of Ohio county, West Virginia, for her sole and separate use and benefit so long as she may live, and after her death for the use and benefit of her children. The said trustees having the power to sell and convey said land, or any part thereof,

on the written request of said Elizabeth Pemberton, and her joining with them in any such conveyances. It is further expressly understood and agreed by and between the parties of this deed, that said William D. Pemberton shall have the right to occupy, farm, and control said land for her so long as he may live (and) the legal title thereto remains in said trustees.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year above written.

"WILLIAM D. PEMBERTON,

"Witness,

"ELIZABETH PEMBERTON.

"S. B. MCCOLLOCH.

"That said deed was duly and legally acknowledged as the law requires, and on the 4th day of January, A.D. 1877, was duly filed for record in the county clerk's office in and for Hamilton county, Nebraska, and recorded in book 'B' of deed record of said county, on page 1379. That on or about the 7th day of September, 1870, Ebenezer McCulloch, deceased, and who was the father of the plaintiffs, made his will," etc., a copy of which is set out in the petition, from which will it appears that the testator devised to Elizabeth Pemberton certain real and personal estate, the proceeds of which were to be retained in the hands of the plaintiffs as trustees for said Mrs. Pemberton and her children, "her husband to have no control over the same whatever, but the said trustees may, with the consent of said Elizabeth Pemberton, invest the same as they may deem best, so that my daughter and her children shall have the benefit of the same without control from her husband." It is also alleged that in pursuance of the terms of the will the property devised to Elizabeth Pemberton was sold and the proceeds invested in the land in question; that on the 14th day of June, 1883, C. N. Paine & Co. recovered a judgment against William D. Pemberton, the husband of Elizabeth, before a justice of the peace of Hall county, for

the sum of \$148.32; that on the 5th day of October, 1883, said Paine & Co. caused a transcript of said judgment to be filed in the district court of Hamilton county, and caused an execution to be issued thereon and levied upon the real estate in question, as the property of William D. Pemberton. It is also alleged that said judgment is not a lien on said real estate, and that said William D. Pemberton has no interest in said real estate, and that a sale upon execution would cast a cloud upon the plaintiffs' title, etc. It is not alleged, nor does it appear from the petition, that Elizabeth Pemberton is dead. The question, therefore, for determination is, does the reservation in the deed of William D. Pemberton to the plaintiffs constitute such an interest in the land as is liable for his debts? It will be observed from an examination of the deed that the conveyance is made "for her (Elizabeth Pemberton's) sole and separate use and benefit so long as she may live, and after her death for the use and benefit of her children, the said trustees having the power to sell and convey said land or any part thereof on the written request of said Elizabeth Pemberton," etc. The reservation is, that "William D. Pemberton shall have the right to occupy, farm, and control said land for her," etc. These words do not create a life estate. At the most they create him a trustee for her in the management of the land. He is not entitled to appropriate the products of the soil or any part thereof to his own use, but the service is to be rendered for his wife. This does not create a life estate.

In *Richardson v. York*, 14 Me., 216, cited by the appellant, the reservation was of the use and control of the lands by the grantor during his natural life. Such language undoubtedly created a life estate, but no such intention is apparent in this case. In the case under consideration the object of the testator in placing the amount devised to Elizabeth Pemberton in the hands of trustees, the object of the trustees in purchasing the land in question, and of William D. Pemberton in making the deed to said

trustees, evidently was to exclude him from all estate or interest in the land. There is no charge of fraud, nor any claim that this entire transaction is not *bona fide*. We therefore must treat it as such. Being a *bona fide* transaction, the entire estate passed by the deed of conveyance to the plaintiffs as trustees, and William D. Pemberton has no estate therein.

2. The judgment before the justice of the peace was recovered in Hall county, and a transcript thereof filed in Hamilton county without having been filed in the district court of Hall county. This the code does not authorize. The authority to file a transcript of a judgment recovered before a justice of the peace, in the district court of the county where the judgment was rendered, is derived alone from the statute, and its provisions must be substantially complied with. Upon the transcript being filed the clerk is required to "enter the same on the execution docket, together with the amount of the judgment and the time of filing the transcript. Code, § 561. The next section provides that the judgment shall be a lien upon the real estate of the debtor, etc., * * * "to the same extent as if the judgment had been rendered in the district court."

Sec. 563 provides that execution may be issued on the judgment in the same manner as if the judgment had been taken in that court. Sec. 429 provides that the transcript of a judgment of any district court of this state may be filed in the office of the clerk of the district court in any county, and such transcript shall be a lien on the property of the debtor in any county in which such transcript is filed in like manner as in the county where such judgment was rendered, and execution may be issued on judgment obtained by such transcript, as on the original judgment; *Provided*, Such transcript shall at all times be affected and be in the same plight as the original judgment.

It is but reasonable to require a transcript of a judg-

ment rendered by a justice of the peace to be filed in the county where the judgment was recovered, where it is to be presumed the parties, or some of them at least, as well as the justice, are known, and where creditors may be enabled by an examination of the docket to determine what judgments exist against the debtor. There was no authority, therefore, to file the transcript of the justice of the peace in Hamilton county, the proper mode being to file a transcript from the district court of Hall county. The judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PATRICK CHAPLIN, PLAINTIFF IN ERROR, V. FRANCIS LEE, DEFENDANT IN ERROR.

1. **Embezzlement: SLANDER.** In an action for slander, on a charge of larceny and embezzlement as treasurer of a school district, where the testimony is conflicting as to the funds in the hands of the treasurer, it is not error to refuse to give an instruction that if the treasurer has "refused to pay any draft, order, or warrant drawn upon him by the proper officer or officers, this would constitute embezzlement."
2. ———. To constitute embezzlement it is essential that the owner should be deprived of the property alleged to be embezzled by an adverse use or holding.

ERROR to the district court of Colfax county. Tried below before Post, J.

Phelps & Thomas, for plaintiff in error, cited: Sec. 124, Criminal Code.

J. A. Grimison, for defendant in error.

18	440
28	333
18	440
46	120
18	440
47	535

MAXWELL, J.

Lee was treasurer of school district No. 11, of Colfax county, and while exercising the duties of that office, Chaplin, in conversation with divers persons, stated in substance that he (Lee) had been guilty of the larceny and embezzlement of \$65.00 of the funds of the district in his hands. The exact words with proper innuendoes are set out at length in the petition. Chaplin in his answer alleges, "that he has no recollection or belief of having so as set forth in said petition accused the said plaintiff, but if he did so accuse the said plaintiff the charge is true," etc. He then proceeds to set forth various acts of Lee, which he alleges justify the charge. On the trial of the cause the jury returned a verdict in favor of Lee for the sum of \$125.00, upon which judgment was rendered. The principal error relied upon in this court is, that the court erred in refusing to give the following instruction:

"If you find that the plaintiff while acting as and being treasurer of said school district refused to pay any draft, order, or warrant drawn upon him by the proper officer or officers, this would constitute embezzlement, and your verdict should be for the defendant."

The testimony is conflicting as to whether or not there were funds in Lee's hands for the payment of all orders drawn upon him. He could only be required to pay orders when there were funds in his hands for that purpose, but the instruction asked ignored the question of the sufficiency of funds, and sought to make the mere refusal to pay an order or draft evidence of embezzlement. Such is not the law, and the instruction was properly refused.

In *Pollard v. Lyon*, 91 U. S., 225, Mr. Justice Clifford classified words which are actionable as follows: "1. Words falsely spoken of a person, which impute to the party the commission of some criminal offense, involving moral turpitude, for which the party, if the charge is true, may

be indicted and punished. 2. Words falsely spoken of a person, which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. 3. Defamatory words, falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such office or employment. 4. Defamatory words, falsely spoken of a party, which prejudice such party in his profession or trade. 5. Defamatory words, falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage. The 1st, 2d, 3d, and 4th of these classes are actionable *per se*, and the 5th when special damages are sustained." The above classification is adopted by Judge Cooley in his work on Torts, page 196 *et seq.*, and may be regarded as correct. The general rule is, that words charging another with a crime involving moral turpitude punishable by law are actionable *per se*. *Ranger v. Goodrich*, 17 Wis., 80. *Filber v. Dauterman*, 26 Wis., 518. *Miller v. Parish*, 8 Pick., 384. *McCuen v. Ludlum*, 17 N. J., 12. *Hong v. Hatch*, 23 Conn., 585. To falsely charge a party with embezzlement or larceny is actionable *per se*, and injury will be presumed, and the defendant in justification must establish the truth of the charge. *Seeley v. Blair*, Wright, 683. *Hicks v. Rising*, 24 Ill., 566. *Ellis v. Buzzell*, 60 Me., 209. *Merk v. Gilzhaeuser*, 50 Cal., 631. Embezzlement is defined as the act of fraudulently appropriating to one's own use what is intrusted to the party's care and management. Webster's Dict., 439. It differs from larceny in this, that the latter is the felonious taking and carrying away of the personal goods of another with the intent to deprive the owner permanently of his property therein. *Thompson v. The People*, 4 Neb., 528. 2 Broom & H. Com. (Am. Ed.), 513. *State v. Gresser*, 19 Mo., 247. *Phelps v. The People*, 55 Ill., 334. 4 Black's Com., 230, 235. But em-

bezzlement is the wrongful appropriation of what is already in the wrong-doer's possession. To constitute the crime the owner must be deprived of the property by an adverse use or holding. At the most the refusal to pay a warrant or order would only be evidence tending to show embezzlement. The question was very fully considered in a late case by the supreme court of Massachusetts in *Com. v. Este*, 2 N. E. Rep., 769. In some respects the charge in that case was similar to the slanderous words spoken in this. It is said: "Embezzlement retains so much of the character of larceny that it is essential to the commission of the crime that the owner should be deprived of the property embezzled by an adverse holding or use. No doubt questions may arise as to what is a sufficient deprivation or adverse holding, as is shown in *Com. v. Mason*, 105 Mass., 163, and cases cited. See also *Rex v. Hall*, Russ & R. Cr. Cas., 463, 464. *Rynice v. Richards*, 1 Cockb. & R., 532. But the principle remains. And when property is held at every moment as and for the master's property, fraud as to the source from which it comes, or fraudulent intent as to something else, is not a sufficient substitute for something else. To this extent we entirely agree with the English case of *Regnia v. Poole*, Dears & B. Cr. Cos., 345. *Regnia v. Holloway*, 2 Cockb. & R., 942, and 1 Dennison Cr. Cos., 370. *Rex v. Webb*, 1 Moody, 431." This, we think, is a correct statement of the law. The owner must be deprived of the use of the property claimed to be embezzled by an adverse holding or use. This element is entirely disregarded in the instruction asked. The law presumes every person to be free from crime, and this presumption continues as evidence in his favor until overcome by proof of guilt. The law also protects, as far as possible, the good name of every one, and places its seal of condemnation upon any person who by false and slanderous words seeks to injure another. The verdict in the case is fully supported by the

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evidence, and there is no error in refusing the instruction asked. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	444
45	784
18	444
51	943
18	444
61	66
18	444
62	234

EDGAR A. BALDWIN, APPELLEE, v. SAMUEL M. BOYD
AND MARY L. BOYD, APPELLANTS.

1. **Public Lands of United States: RECITALS IN PATENT.**
A patent from the United States, which contains a recital that the purchaser (naming him) "has deposited in the general land office of the United States a certificate of the register of the land office at Lincoln, Nebraska, whereby it appears that full payment has been made by the said (purchaser) according to the provisions of the act of congress of the 24th of April, 1820, entitled an act making further provisions for the sale of the public lands," merely shows that the purchaser has made the payments required by law to entitle him to enter the land, and is not a recital that the patent was issued under the act of 1820.
2. ———: **EXEMPTION FROM DEBTS PRIOR TO ISSUANCE OF PATENT.** Where lands are entered under the homestead law of the United States, and afterwards, upon proper proof and payment of the price, the homestead commuted, such lands are not subject to sale on execution on a debt contracted before the patent was issued. And where such lands were exempt from debts when conveyed to a purchaser, the exemption continues in favor of the grantees and he may plead the same.

APPEAL from the district court of Lancaster county.
Heard below before POUND, J.

Sawyer & Snell, N. S. Scott, and M. L. Easterday, for appellants.

Plaintiff claims under a patent issued under act of 1870, and he introduces a patent issued under act of 1820.

Then proceeds by extrinsic evidence to show that the land department erred in judgment. The decisions are uniform, that the records of the proceedings of the land office, to impeach the validity of a patent, are not admissible, unless the patent is absolutely void upon its face, or the issuance thereof was without authority, or was prohibited by statute, or the state had no title to the lands patented. *Ferry v. Street*, 7 Pac. Rep., 712. *Smelting Co. v. Kemp*, 104 U. S., 636. *Patterson v. Winn*, 11 Wheat., 380. *Clark v. Lancaster*, 36 Md., 196. *Mann v. Mann*, 14 Johns., 1. Wade on Notice, Div. IV., Chap. 2. A purchaser from one holding under a patent is not bound to look behind the patent to learn if it was properly issued to the one properly entitled to it. Warville on Abstracts, 132, § 5. *Schnee v. Schnee*, 23 Wis., 377. On second point, cited: *Forgy v. Merryman*, 14 Neb., 515. *Howland v. Fuller*, 8 Minn., 30. *Richards v. Haines*, 30 Iowa, 574.

Mason & Whedon, for appellee, cited: *Perry v. Ashby*, 5 Neb., 293. *Smelting Co. v. Kemp*, 104 U. S., 647.

MAXWELL, J.

This is an action to cancel a sheriff's deed to the defendants for "thirty-five acres off the west end of the north half of the north-west quarter of section 19 in township 10 north, of range 7 east of the 6th principal meridian," and to quiet the plaintiff's title. The court below found the issues in favor of the plaintiff, and rendered a decree in his favor.

It appears from the record that in May, 1871, one Charles E. Van Pelt entered as a homestead, under the laws of the United States, the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 19, T. 10 N., R. 7 E. of 6 P. M., containing 118 $\frac{72}{100}$ acres; that Van Pelt was the head of a family and over the age of twenty-one years, and had served as a soldier in the army of the United

States, during the rebellion, for ninety days and upwards, and had ever been loyal to the United States; that on the 15th of February, 1872, said Van Pelt having cultivated and improved said homestead, and resided thereon as required by law, in pursuance of the act of congress, paid to the receiver of the land office at Lincoln the sum of \$2.50 per acre, with proper proof of settlement and cultivation, and obtained the receiver's receipt, etc., and a patent was duly issued to him on the 15th of June, 1874. On the 23d day of June, 1873, Van Pelt and wife conveyed said premises by warranty deed to the plaintiff, which deed was not filed for record until the 7th day of May, 1874. On the 16th of July, 1873, the defendant, Samuel M. Boyd, recovered two judgments in the probate court of Lancaster county against Charles E. Van Pelt, one of said judgments being for the sum of \$148.75 and costs, and the other for the sum of \$467.92 and costs. Transcripts of said judgments were duly filed in the office of the clerk of the district court on the 17th day of July, 1873, and executions issued thereon and the thirty-five acres of land in controversy sold to the defendants, and in January, 1874, the sale was confirmed and a deed ordered and made to the purchaser, and this is the cloud on the plaintiff's title complained of.

The first objection made by the appellant is, that it appears from the patent that "full payment has been made by Charles E. Van Pelt according to the provisions of the act of congress of April 24, 1820, entitled 'An act making further provisions for the sale of public land.'"

The following is a copy of the patent:

"THE UNITED STATES OF AMERICA.

"To all to whom these presents shall come, greeting:

"CERTIFICATE NO. 2525.

"Whereas, Charles E. Van Pelt, of Lancaster county, Nebraska, has deposited in the GENERAL LAND OFFICE of the United States a certificate of the register of the land

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office at Lincoln, Nebraska, whereby it appears that FULL PAYMENT has been made by the said Charles E. Van Pelt according to the provisions of the act of congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands,' for the north half of the north-west quarter and the north-west quarter of the north-east quarter of section nineteen in township ten north, of range seven east, in the district of lands subject to sale at Lincoln, Nebraska, containing one hundred and eighteen acres and seventy-eight-hundredths of an acre, according to the official plat of the survey of the public lands returned to the GENERAL LAND OFFICE by the SURVEYOR GENERAL, which said tract has been purchased by the said Charles E. Van Pelt.

"*Now know ye* that the UNITED STATES OF AMERICA, in consideration of the premises and in conformity with the several acts of congress in such case made and provided, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said Charles E. Van Pelt and to his heirs, the tract above described, TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Charles E. Van Pelt.

"In testimony whereof, I, Ulysses S. Grant, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made patent, and the seal of the GENERAL LAND OFFICE to be hereto affixed.

"Given under my hand at the city of Washington the fifteenth day of June in the year of our Lord one thousand eight hundred and seventy-four, and of the independence of the United States the ninety-eighth.

"By the President, U. S. GRANT.

"By S. D. WILLIAMS, *Secretary*."

Section 2 of the act of congress of April 24, 1820, provides, "that credit shall not be allowed for the purchase money on the sale of any of the public lands which shall

be sold after the first day of July next, but every purchaser of land sold at public sale thereafter shall, on the day of purchase, make complete payment therefor; and the purchaser at private sale shall produce to the register of the land office a receipt from the treasurer of the United States, or from the receiver of public moneys of the district, for the amount of purchase money on any tract, before he shall enter the same at the land office," etc. Under the act of March 26, 1804, the public lands were sold upon credit.

The failure of the purchasers to pay the installments as they became due led to the passage of a number of acts extending the time for making payments. The credit system, however, does not appear to have been satisfactory, hence the act of April 24th, 1820, which requires the purchaser at private sale to produce from the proper authority a receipt for the purchase money on any tract before he shall enter the same at the land office. The recital in the patent simply shows that this provision has been complied with, and does not and was not intended to show that the patent was issued under the act of 1820. The evidence from the general land office introduced on the trial in this case clearly shows that the land was settled upon by Van Pelt as a homestead under the act of May 20, 1862, and that he afterwards commuted the same under the provisions of the various acts of congress on that subject by paying the double minimum price. Land thus obtained, however, is not liable to compulsory sale for debts contracted before the patent was issued.

This is conceded to be the law by the attorneys for the defendants, but they say that the right is a personal one to Van Pelt and can only be pleaded by him, citing *Forgy v. Merryman*, 14 Neb., 515. In the case cited one Merryman executed a mortgage upon his homestead before making final proof, to secure a *bona fide* debt. Afterwards he made final proof and received a patent for his land and thereafter executed a quit claim deed to one Robinson, who,

Baldwin v. Boyd.

as a defense to an action of foreclosure, set up the invalidity of the mortgage. The court held that as the maker of the mortgage did not attack it, that the grantee in a quitclaim deed who had taken his deed subject to it could not. But this rule does not apply when one is claiming as a grantee of the debtor who had an absolute title unaffected by any liens of the creditor. Thus, although a third party cannot interpose the defense of the statute of limitations, yet a grantee may set up an exception that his grantor might have done. *Dawson v. Calloway*, 18 Ga., 573. *Grattan v. Wiggins*, 23 Cal., 16. *Skidmore v. Romaine*, 2 Bradf., 122. *Taylor v. Courtney*, 15 Neb., 190. *Ford v. Langel*, 4 O. S., 465. Maxwell Pl. and Pr. (4th Ed.), 21. So the purchaser of a mortgagor has the same right to avail himself of the bar of the statute that the mortgagor would have had. *McCarthy v. White*, 21 Cal., 495. *Low v. Allen*, 26 Id., 144. *Coufman v. Sayre*, 2 B. Mon., 206. 2 Wash. R. P. (4 Ed.), 185. The same rule would seem to apply in favor of the grantee in a deed. That is, if the property at the time when the conveyance was executed was not subject to a lien or the grantor's debts, in other words was exempt, that exemption will continue in favor of the grantee and may be pleaded by him. As the debt in this case was contracted before the patent was issued, the land in question is not subject to compulsory sale on execution on a judgment recovered on such debt. The judgment is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	450
20	300
28	197

GEORGE W. LININGER ET AL., PLAINTIFFS IN ERROR,
V. NATHANIEL HERRON, SHERIFF, DEFENDANT IN
ERROR.

1. **Assignment: SALE: FRAUD.** The mere sale by a party of a stock of goods to a relative is not of itself a badge of fraud. While a transfer of a stock of goods by a debtor in failing circumstances to his mother and brother is attended with suspicion, from the facility with which a secret trust in favor of the debtor may be created, yet where it is clear that such transfer was made in good faith, upon a sufficient consideration, and not to hinder or defraud creditors, it will be sustained.
2. ———: **SALE TO RELATIVE OF ASSIGNOR.** Where a bill of sale of a stock of goods was made to the mother and brother of the debtor to pay debts owing by him to them, *Held*, That as against other creditors the grantees acquired only the right to have a sufficient amount of the goods sold to satisfy their claims, and the balance was a trust fund for the benefit of other creditors, and the grantees must account.

ERROR to the district court for Gage county. Tried below before BROADY, J.

L. W. Colby and Hazlett & Bates, for plaintiffs in error.

L. M. Pemberton, T. D. Cobbey, and Burke & Prout, for defendant in error.

MAXWELL, J.

In October, 1882, one J. B. Lininger, a son of Elizabeth Lininger and brother of George W. Lininger, the plaintiffs, was doing business at Wymore, in this state, and being in pressing need of money borrowed about \$3,000 from George, giving his note therefor payable in 90 days. To secure this note J. B. executed to his brother a chattel mortgage on his stock of goods at Wymore. This mortgage was not filed for record until the 5th day of February,

1883. Prior to February 1st, 1883, J. B. Lininger had borrowed from his mother the sum of \$1,800, upon which he was paying interest. Of this sum \$800 had been in his possession for several years while \$1,000 was a later loan. On the 1st day of February, 1883, J. B. Lininger executed to his mother a chattel mortgage upon his stock of goods to secure the sum of \$1,800. This mortgage was filed for record on the 5th day of February, 1883. On the 7th of February, 1883, J. B. Lininger executed a bill of sale to the plaintiffs of all the goods, merchandise, fixtures, and chattels mentioned in the schedule which was attached to the bill of sale, the consideration expressed in the bill of sale being the sum of \$5,000.

The plaintiffs by their agents then took possession of the store and goods and began selling the same in payment of the debts due the plaintiffs. Soon after this transfer the defendant, as sheriff of Gage county, levied a number of attachments, in the aggregate about \$3,000, in favor of creditors of J. B. Lininger, on the goods in question. The plaintiffs thereupon brought an action of replevin and recovered the possession of the property. On the trial of the action in replevin the court found the issues in favor of the defendant and that he had a lien by virtue of the attachment upon the property in question in the sum of \$3,385.38.

The principal error relied upon is, that the judgment is against the weight of evidence. There is no claim that the attaching creditors were induced to give J. B. Lininger credit upon the faith of his ownership of the property covered by the mortgage to George W. Lininger, and that if said mortgage had been filed for record they would not have given or extended credit to J. B. Lininger. This plea, in any event, would be available only to subsequent creditors who trusted him on the faith of the property in his possession. But that question does not arise in this case. Nor does the question of the validity of the chattel

mortgages arise, as they were canceled and the goods delivered to the plaintiffs before the levies under the attachments were made, and they are to be considered only for the purpose of showing the nature of the transaction. The only questions that properly arise in the case are, 1st, Whether or not the plaintiffs were *bona fide* creditors of J. B. Lininger; and 2d, Was the property transferred to them to hinder or defraud the creditors of J. B. Lininger?

Upon the first point it is sufficient to say that all the testimony tends to show that plaintiffs actually loaned to J. B. Lininger in the aggregate the sum of \$4,800. All but about \$400 of this sum was in cash, and none of it on the 7th day of February, 1883, had been repaid. The checks of G. W. Lininger on the Omaha National Bank in favor of J. B. Lininger for about \$2,600, and in favor of Lininger & Metcalf for about \$400 on a debt of J. B., due to them, are in the record. It also appears that at that time J. B. represented to his brother that his stock would invoice \$12,000 or \$15,000. The actual invoice of the stock taken about February 1st, 1883, was \$9,663.00 with notes and accounts to the amount of \$1,700, and as there seems to have been no considerable purchase of stock after the date of this transaction it is apparent that the representations were substantially correct. The amount of the debt to the mother is in effect admitted, and is clearly established by the proof, so that there is a sufficient consideration for the purchase.

2d. The mere sale by a party of his stock of goods to a relative is not a badge of fraud. *Copis v. Middleton*, 2 Madd., 410. *Wrightman v. Hart*, 37 Ill., 123. *Dunlap v. Bournonville*, 26 Penn. St., 72. *Kane v. Drake*, 27 Ind., 29. *King v. Russell*, 40 Tex., 124. If such sales were fraudulent *per se* it would be impossible for family connections to aid each other in case of financial embarrassment without danger of being placed in a false position and losing the entire sum loaned. Such a rule if adopted

could not fail to be productive of great hardship and injustice, and has nowhere, so far as the writer is advised, been accepted as the law. But where a debtor makes a transfer of his property to a relative for the purpose of paying or securing a debt alleged to be due such relative, the presumption of fraud is strengthened, for the reason that the transaction is between persons with whom a secret trust is most likely to exist. *Hanford v. Archer*, 4 Hill, 271. *Bumpus v. Dotson*, 7 Hump., 310. Yet where the proof shows that there was necessity for, or reasonable fitness and propriety in making the transfer—in other words that it was made in good faith upon an adequate consideration—the presumption of secret trust and intent to defraud will ordinarily be overcome. Each case must depend upon its own circumstances, and fraudulent intent being a question of fact, if it should be made to appear from the evidence that the object of a transfer of property was not to hinder or defraud creditors, it should be sustained. All the evidence in this case shows that the object of the transfer of the goods in question was to secure the debts owing the plaintiffs, and in such case the transaction will be sustained. *Lorton v. Fowler*, ante p. 224. *Polk v. Bierbower*, 17 Neb., 268. There is testimony in the record tending to show that the value of the goods did not exceed the sum of \$5,000 when the transfer was made. The invoice, however, shows the value to have been nearly twice that sum. This property was a trust fund for the payment of the debts of J. B. Lininger, and he could not as against creditors transfer a greater amount to the plaintiffs than sufficient to pay their claims. As to any excess, they hold the same as trustees for the benefit of creditors of J. B. Lininger.

While the plaintiffs have a claim upon these goods for the amount of their debts, other creditors also have rights in the premises that must be protected. It is evident that the value of the goods is nearly sufficient to pay all claims of

both the plaintiffs, and those in the hands of the defendant. As the plaintiffs by virtue of the bill of sale and possession have a prior lien on the goods to the attachment liens, their claims must be first satisfied, the remainder going to the defendant. The judgment of the district court is reversed and the cause remanded for further proceedings, the plaintiffs being required to account for the goods disposed of by them under the bill of sale.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	454
25	790
25	809
18	464
42	358

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, V.
ERNEST SHUCHARDT, DEFENDANT IN ERROR.

1. **Criminal Law: FAILURE OF JURY TO AGREE ON VERDICT.**
The authority of a judge of the district court in the trial of a criminal case to discharge the jury in the event of disagreement, without the consent of the prisoner, can only be exercised after the jury have been in consultation for so long a time that there is no reasonable probability that they will agree.
2. ———: ———. Where a cause was submitted to the jury at 7 o'clock P.M., and the jury at 6 A.M. next day reported to the judge that they were unable to agree, and were discharged by him without the consent of the prisoner, or notice to him or his attorney; *Held*, That the discharge of the jury was unauthorized, and the prisoner was entitled to be released.
3. ———: ———. Where a jury in a criminal case is discharged for any of the causes mentioned in section 485 of the Criminal Code, the record must show the necessity for such discharge.

BILL OF EXCEPTIONS filed by district attorney under provisions of Sec. 515, Criminal Code.

Guy R. Wilbur and *W. F. Bryant*, for plaintiff in error.

T. M. Franse, for defendant in error.

MAXWELL, J.

At the November term of the district court of Cuming county the defendant was indicted for an attempt to kill one John Melder. A plea of not guilty was entered by the defendant, and a trial had, the cause being submitted to the jury on Saturday, December 1st, 1883, at about 7 o'clock P.M. About 6 o'clock on Sunday morning the jury reported to the judge that they were unable to agree, whereupon he discharged them, without notice to or the consent of either the defendant or his attorney, and in the absence of both. The journal entry in regard to the disagreement of the jury is as follows:

"And on this 2d day of December, said jury returned into court and reported that they were unable to agree, whereupon said jury were discharged by the court." The defendant filed a plea in abatement, setting up the above facts, and issue was joined thereon, and testimony taken. The court found the issues in favor of the defendant, and discharged him. A writ of error was allowed on the application of the district attorney, and the cause is now submitted to the court. The question for determination is, has the defendant been once in jeopardy? Sec. 485 of the Criminal Code provides that, "in case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, or after they have been kept so long together that there is *no possibility of agreeing*, the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and such discharge shall be without prejudice to the prosecution." When a jury is impaneled the state must proceed with the prosecution. There can be no non-suit as in civil actions. If the accused cannot be convicted he is entitled to a verdict of acquittal. And if, after the jury has been sworn and the jeopardy thus begun, the court without sufficient cause discharges them, without a

verdict, this in law is equivalent to an acquittal. 1 Bish. Cr. Proc. (3d Ed.), § 821. *Wright v. State*, 7 Ind., 324. *Reese v. State*, 8 Id., 416. *Morgan v. State*, 13 Ind., 215. *People v. Barrett*, 2 Caines, 304. *McCawley v. State*, 26 Ala., 135. *Poage v. State*, 3 O. S., 229.

In the case cited last it is said (page 239): "That the power to discharge is a most responsible trust, and to be exercised with great care, is too obvious to require illustration." It is a discretion, said Mr. Justice Story, to be exercised only "under very extraordinary and striking circumstances." 2 Gall., 364. "The power," said the same judge, "ought to be used with greatest caution under urgent circumstances, which would render it proper to interfere." *U. S. v. Perez*, 9 Wheat., 579. "I am of the opinion," said Chief Justice Spencer, "that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of *extreme and absolute necessity*." *People v. Goodwin*, 18 Johns., 187. "That the discretion ought to be exercised in cases of mere disagreement only after a long effort of the jury to agree, and when there is no reasonable hope of their doing so, is well settled, and the reasons for the discharge ought to be stated in the record." *Id.*

In *Dobbins v. State*, 14 O. S., 499, it is said: "Counsel for the plaintiff very justly and necessarily concede that a case of necessity may exist which would legally justify the course taken in this instance; but they insist that such a case can only arise when some intervening impediment has necessarily stopped the progress of the first trial before verdict; that the power of discharging a jury in a criminal and especially in a capital case is a delicate and highly responsible trust, to be exercised on account of the disagreement of the jury only when they have deliberated so long as to preclude all reasonable expectation that they will ever agree upon a verdict without being compelled to do so from famine or exhaustion; that this

power does not rest upon the arbitrary or uncontrollable discretion of the judge presiding at the trial, but is a legal discretion, to be exercised in conformity with known and established rules; and finally, that unless the facts stated in the record clearly established a case of necessity, the discharge will operate as an acquittal of the accused, and preclude his further prosecution. Abating something from the claim made as to what must of necessity affirmatively appear in the record, we have no hesitation in yielding to these propositions our entire assent, and they are certainly very strongly supported by the cases cited in argument. *Hurley's Case*, 6 Ohio Rep., 402. *Mount v. The State*, 14 Ohio Rep., 304. *Poage v. The State*, 3 Ohio St. Rep., 238. *McKee's Case*, 1 Bailey's Rep., 651. *United States v. Perez*, 9 Wheat., 580. *People v. Goodwin*, 18 Johns. R., 187. *People v. Olcott*, 2 Johns. Cas., 301. *United States v. Coolidge*, 2 Gallis. R., 364. *People v. Barret*, 2 Caines' R., 304."

Where the jury are discharged for any of the causes stated in section 485 of the Criminal Code, the record must show the necessity which required their discharge, otherwise the defendant will be entitled to an acquittal. *Hines v. State*, 24 O. S., 134. *Poage v. State*, 3 Id., 229. *Hurley v. State*, 6 Ohio, 400. *Mount v. State*, 14 Ohio, 295. This was not done in this case.

It never was intended to permit a court arbitrarily to discharge a jury for disagreement until a sufficient time had elapsed to preclude all reasonable expectation that they will ever agree. The county should not be subjected to the expenses incident to a second trial where there is a reasonable probability that a verdict may be reached on the first, while the accused is entitled as a matter of right to a verdict in his favor, if after a full and careful consideration of all the testimony, and on comparison of views the jury should find that the charge was not established by the proof. In this case the jury was discharged

Mayer & Schurmann v. Zingre.

after being in consultation only eleven hours. The jury had not then deliberated for so long a time that there was no probability of their agreeing, and the court could not discharge them on that ground alone, without the assent of the defendant. The record shows that the court remained in session until the 6th of December, so that there was no necessity for the discharge. The judgment of the court below is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18 458
22 58818 458
27 37118 458
33 42118 458
36 4818 458
36 72318 458
48 86818 458
49 605

55 119

18 458
59 604

**MAYER & SCHURMANN, PLAINTIFFS IN ERROR, V.
CHRISTINE ZINGRE, DEFENDANT IN ERROR.**

1. **Attachment: MOTION TO DISCHARGE.** When a motion to discharge an attachment for the reason that the facts stated in the affidavit are untrue, has been heard on affidavits in support as well as in resistance, decided thereon by the trial court, brought to this court on error, and it appears from an examination of such affidavits that there is a conflict of evidence, the order of the trial court will not be disturbed unless the preponderance of evidence against it is clear and decisive.
2. **—: PETITION.** A cause of action in a petition upon a debt not fraudulently contracted, if coupled with a cause of action upon a debt which was fraudulently contracted, and an order of attachment covering both counts is issued upon an affidavit alleging that "said defendant fraudulently contracted the debt and incurred the obligation for which this suit is brought," *Held*, To vitiate such order of attachment and justify its discharge.

ERROR to the district court for Dodge county. Tried below before Post, J.

E. F. Gray, for plaintiffs in error, cited: 1 Bouvier

Dic., 436. 2 Id., 251. Chitty on Bills (13 Amer. Ed.), 516. Comp. Stat., Chap 41, § 1.

N. H. Bell and *W. H. Munger*, for defendant in error, cited: *Bowen v. True*, 53 N. Y., 640. *McGovern v. Payn*, 32 Barb., 84.

COBB, CH. J.

The plaintiffs sued out an attachment against the defendant in the county court of Dodge county upon an indebtedness consisting of a promissory note executed and delivered by the defendant to the plaintiffs for the sum of \$330.11, and a balance of account for goods sold amounting to \$51.09. The grounds of attachment as set out in the affidavit were: "That the said defendant has assigned, removed, and disposed of a part of her property with intent to defraud her creditors, and that said defendant is about to assign, remove, and dispose of a part of her property with the intent to defraud her creditors, and that said defendant has converted a part of her property into money with the intent to defraud her creditors and with intent to place it beyond the reach of her creditors; and that said defendant is about to convert a part of her property into money for the purpose of placing it beyond the reach of her creditors, and with intent to defraud her creditors; and that said defendant fraudulently contracted the debt and incurred the obligation for which this suit is brought."

The defendant moved in the said county court to discharge the said attachment upon affidavits filed with such motion. The plaintiffs filed affidavits in resistance; the motion was heard thereon and the court decided the same in favor of the defendant and discharged the said attachment. Thereupon the matter was taken to the district court of said county on error, was argued to said district court, by which the said judgment of the county court was affirmed. And thereupon the plaintiffs bring the cause to this court on error.

Although presented in several different ways, there is but one error presented, to-wit, that the district court erred in affirming the judgment of the county court dismissing the order of attachment.

Upon a thorough examination of the pleadings and affidavits, as well those in resistance as those in support of the motion, and the authorities cited on either side, in the consultation room, we all came to the conclusion that, so far as all the grounds for attachment as contained in the original affidavit, except the last one, are concerned, the same being denied by the defendant and her agent, the evidence is so evenly balanced and conflicting as to render the judgment of the trial court conclusive thereon. In respect to the last clause of the original affidavit, to-wit: "That said defendant fraudulently contracted the debt and incurred the obligation," etc., it is true that the same is in terms denied in the affidavits of the defendant, her husband, and son. Yet we do not think the denial sufficient in view of the affidavit in resistance of Ernest Schurman, one of the plaintiffs, who states in his said affidavit, "That September 17, 1883, the said Christine Zingre, defendant, was indebted to the plaintiffs for goods sold and delivered to her in the sum of \$330.11. * * * Said Jacob Zingre, as her agent, done and transacted all of the business in relation to her store, and personally kept the same, * * * and said \$330.11 being then due and payable, I asked said Jacob Zingre for payment, and thereupon said Jacob Zingre asked me for further time to pay the same, and to induce the affiant to extend the time of payment he represented in behalf of the defendant that her stock of goods in her said store was worth the sum of \$2,500, and that she owned twenty-two head of young cattle, worth \$500, and that she was not owing—outside of a debt of about \$900, secured by mortgage on her homestead—to exceed five hundred dollars, the largest part of which was due the plaintiffs, * * * and requested me to take her note for the

amount due in ninety days, and to continue to sell her goods, * * * and thereupon affiant, believing said statement and representation, and relying upon the same, did take the note sued upon in this action, and did sell and deliver to her the goods, the amount of which are set up in the second count of the petition herein," etc. This affidavit must have been taken as true, as it was not contradicted by any affidavit in reply, and while it may be doubted that the evidence was sufficient to establish the falsity of these representations in so far as they related to the amount and value of the stock of goods in defendant's store, it was sufficient to establish their falsity in regard to the amount of her indebtedness, and such representation being false was *prima facie* fraudulent. And a debt contracted or an obligation incurred by reason of and upon such false and fraudulent representations would doubtless be a proper foundation for an attachment. But it seems that the principal debt had been contracted and obligation incurred before these representations were made, and the only effect upon said principal debt that the said representations had was to induce the plaintiffs to consent to change it from an open account to a note at ninety days. Nevertheless, we are all of the opinion that it remained the same debt in the meaning of the attachment law, and that fraud to sustain an attachment must have existed at or before the time of its original contracting. Such fraud did exist at the time of the contracting of the debt, which still stands in an open account, to-wit, \$51.34, and upon it attachment would doubtless lie.

The only question which remains to be considered is, whether an attachment which has been issued on two causes of action, one of which is a proper and statutory cause for attachment, and the other of which is not, can be sustained. The framers of the statute seem to have recognized the process of attachment as a harsh remedy, and one which, though proper in a certain class of cases, should

be confined within strict and narrow limits. Hence they provided that an order of attachment should only be issued in any case after an affidavit has been filed, showing the nature of the plaintiff's claim, that it is just the amount which the affiant believes the plaintiff ought to recover, and the existence of some one of the grounds for an attachment enumerated in the preceding section. These, with other provisions, clearly indicate the purpose of the legislature to secure the people against unauthorized and excessive attachments. These provisions would afford no protection if a party holding a small claim, upon which an attachment might lawfully issue, may attach to it another claim, upon which, under the law, no attachment could be issued, and obtain an attachment for the consolidated and increased amount.

The New York cases cited by counsel for the defendant, in the absence of authorities to the contrary, are sufficient as authority, yet I think the reason why the attachment should be confined to the cause of action upon which an attachment may properly issue, and that the consolidating therewith, and thus increasing the amount of plaintiff's claim by the addition thereto of a cause of action, upon which, if standing alone, no attachment could lawfully issue, will vitiate the whole, is so plain and manifest as to render authorities to that effect of secondary importance.

The order and judgment of the district court are affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

LENA ASPINWALL, APPELLEE, V. OLIVER C. ASPINWALL, APPELLANT.

18	463
19	586
22	167
18	463
34	7
18	463
30	85

Final Order. An order in an action for divorce awarding the wife alimony and suit money *pendente lite* to be paid by the husband, cannot be taken by appeal or error to the supreme court before judgment or decree granting or denying a divorce.

APPEAL from the district court for Gage county. Heard below before BROADY, J.

L. W. Colby, for appellant.

R. W. Sabin, for appellee.

COBB, CH. J.

The plaintiff filed her petition and commenced her action in the district court of Gage county against the defendant for divorce and alimony for the several causes set out in her said petition. She also prayed for an order of said court to compel "the said defendant to pay plaintiff temporary alimony, sufficient for her support and that of her child, and the necessary conducting of said suit," etc.

The defendant made answer to the said petition denying his marriage with the plaintiff, and making other denials and admissions of facts stated in said petition. To this answer there was a reply denying all new matter.

On the 11th day of March, 1885, the said district court made an order in said cause: "That the defendant pay to the plaintiff or to R. W. Sabin, her attorney, the sum of \$300 in installments of \$100 each, on the first day of each and every month for the next three months, and the further sum of \$50 per month to be paid on the first day of each and every month, commencing on the first day of April next, until the further order of this court for the maintenance and support of the plaintiff and her child."

To this order the defendant excepted and brought the same to this court by appeal. The plaintiff filed a motion in this court to dismiss the appeal for the reason "That the order of the district court granting alimony *pendente lite* is not such a final order as can be appealed from the district court to the supreme court while the cause is still pending in the court below."

By an arrangement of counsel at the hearing, the motion and the questions presented by the appeal were argued together.

In natural order the motion must be first considered.

Section 675 of the code provides, "That in all actions in equity either party may appeal from the judgment or decree rendered, or final order made by the district court, to the supreme court," etc. The "judgment or decree" here referred to must be the final or main judgment or decree in the case, otherwise the definite article would not be used in stating it. But appeal also lies from a "final order made by the district court."

The action of the district court appealed from in the case at bar is clearly not the final or main judgment or decree in the case. The principal thing sought and litigated for in the action is a divorce, and no judgment or decree in the case can be considered final unless it either awards or denies such divorce. But is it a final order? If the statute above quoted stood alone it might be somewhat difficult to answer this question. Section 581 of the code provides that, "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." This definition of a final order was made in view of proceedings in error. But, it being the only statutory definition applicable thereto, it must be held also to

control as well when used in reference to proceedings by appeal.

A considerable portion of the brief of appellant is devoted to the argument of convenience. And, if addressed to the legislature, would, in the opinion of the writer, be worthy of very serious consideration. There the mischief complained of might be remedied by careful legislation, and made to apply to a limited and well defined class of cases. But even were it granted that this court possesses the power to extend by construction the class of orders which may be brought by appeal from the district courts, the exercise of such power would be to declare a general principle, which would necessarily be far-reaching in its effects, and necessarily tend to protract and complicate litigation, and that would certainly be progress in the wrong direction.

Under the above statutory definition then, the order appealed from, although it affects a substantial right in an action, it does not determine the action and prevent a judgment. It is not an order made in a special proceeding, but is one made in an action to which the general rules of equity apply, although in some respects limited by statute. Nor is it an order made upon a summary application in an action after judgment.

Having reached the conclusion that the order appealed from is not appealable as an order, it will not be examined on the merits.

The order of the district court is affirmed, and the cause remanded to said court for further proceedings in accordance with law.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18 466

20 848

21 188

18 466

25 689

18 466

36 800

18 466

41 354

18 466

42 55

18 466

48 175

18 466

57 685

THE COUNTY OF OTOE, APPELLANT, v. AMELIA H.
MATHEWS, APPELLEE.

1. **Tax Sale.** County commissioners are authorized to purchase at tax sale for the use of their respective counties any real estate offered for sale, when the same remains unsold for the want of bidders. *Brown v. Otoe County*, 16 Neb., 394.
2. ———: **CERTIFICATE.** When such sale was made at the time required by law, but the tax certificate was not made until three months afterwards, the sale was held to be valid. *Ibd.*
3. ———: **REDEMPTION: FORECLOSURE OF TAX LIEN.** After the time for redemption has expired, a county having given the notice to the land-owner or occupant required by law may bring an action to foreclose the tax lien, and may include all delinquent taxes whether accruing before or after the sale. *Ibd.*
4. **Limitation against Tax Lien.** The statute of limitations does not begin to run against a tax lien until the title acquired by the tax deed has failed. *Ibd.*
5. **Foreclosure of Tax Lien.** In an action in the nature of equity brought to foreclose a tax lien the court will look to the statute and not to the assessment as the foundation of such lien, and will regard no defense or objection which goes only to the manner of assessing or levying such taxes, of advertising or conducting the sale, or the qualification of any officer or person performing any act or duty in respect to such assessing, levying, or sale.

APPEAL and cross-appeal from the district court of Otoe county. Heard below before POUND, J.

John C. Watson, for plaintiff.

Charles W. Seymour, for defendant.

COBB, CH. J.

Action was brought in the district court of Otoe county by the county of Otoe for the foreclosure of tax liens for the taxes of several years and upon the several parcels of

real estate situate in said county, as set out, specified, and described in the petition in said action. The defendant answered, setting up the several defenses hereinafter mentioned. A trial was had to the court, which found in favor of the plaintiff as to certain of the taxes in said finding and judgment specified, and rendered a judgment or foreclosure and sale thereon. But as to other of said taxes in said finding and judgment set out and enumerated, found for the said defendant, and adjudged that the plaintiff had no cause of action therefor.

Both parties appealed to this court.

The questions presented by the appeal of the defendant may be briefly stated as follows:

1. That the purchase of the defendant's land for delinquent taxes was not the corporate act of the county, but the act of the county commissioners, and was *ultra vires*.

2. That the county commissioners had no right to purchase the said property except in case of the same having been offered for sale and remaining unsold for want of bidders.

3. That the county cannot foreclose the lien in this case for the reason that at the time of the purchase of said lands for taxes the same had not been delinquent for one year.

4. That the notice does not truly state the time when the right of redemption would expire.

5. That the certificates were not signed by the county treasurer, but by his deputy, and not by him until long after the date borne by said certificates.

6. * * *

7. That all taxes five years old are barred by the statute of limitations.

8. * * *

9. The county cannot foreclose until the title fails.

10. From 1861 up to 1877 real estate could not be sold for taxes by foreclosure or any other way until the personal property of the owner had been exhausted.

11. The act of February 28, 1881, had no retrospective effect, etc.

Every one of the foregoing points were made and questions presented by the same counsel in the case of the same plaintiff against W. A. Brown. That case was disposed of at the July term, 1884, and is reported at pp. 394-8, 16 Neb., to which, and the opinion following the same on motion for a re-hearing, I refer rather than to re-write the same.

2. The plaintiff appeals from that part of the finding and judgment of the district court which is in the following words, to-wit: "And the court further finds that the state and county taxes for 1867 and 1869, and the city taxes for 1867, 1869, 1870, 1871, 1872, 1873, 1874, 1875, and 1876, alleged in plaintiff's petition herein against the premises described, are illegal and void and are no lien on said premises."

There is no evidence in the record that the defendant's property was taxable or that there was any effort upon the part of either the city or county to tax it prior to the year 1870. Accordingly so much of the above finding and judgment as holds that no lien exists against said real estate for taxes for the years 1867 and 1869, or either of them, must be affirmed. But in so far as the said finding and judgment is adverse to the lien of said plaintiff for the city taxes of the years 1870, 1871, 1872, 1873, 1874, 1875, and 1876 the same must be reversed. So far as can be ascertained from the record and the briefs of counsel the district court found against the said taxes for the reason that no oath of the city assessors for said years was produced in evidence. The statute in force at the date of these taxes provides that, "Taxes upon real property are hereby made a perpetual lien thereupon, commencing from the first day of March of the current year, against all persons and bodies corporate, except the United States and this state." Sec. 50, Chap. 66, Gen. Stat.

It will be seen by reference to section 26 of the chapter above referred to that under the law as it then stood the assessors had until the first Monday of April of each year in which to complete the assessment, while by virtue of the section above quoted the taxes on the property to be assessed became a lien thereon from the first day of the preceding month. It cannot be, then, that the statutory lien of unpaid taxes is founded upon the assessment. On the contrary such lien is founded upon the statute. To the end that the burden of taxation may be borne as nearly equal as possible by each piece of property in the political subdivision in proportion to its relative value, an assessment is provided for by an officer elected for that purpose. The law provides, among other things, that he shall take and subscribe a certain oath and attach it to the assessment roll. This is a duty which may be enforced by mandamus, and for the refusal or failure to perform which the law has probably provided an appropriate punishment. But does such failure dissolve the statutory lien which had already attached, or does it render the other acts of such assessor void, or even voidable. The valuation of taxable property is not permanently fixed by the assessor, but it serves as a basis for the action of the precinct assessors of the county when met as a board of equalization, as provided for by section 26 of the chapter in question, and of the county commissioners when constituting the county board of equalization, as provided for by section 27 of the same chapter. Every owner of private property within the state is chargeable with knowledge that such property is subject to annual taxation. If his property is over assessed, he may attend before these boards and obtain redress, and in cases of oppression doubtless the courts are open to him for relief. But he cannot stand idly by and when these proceedings have ripened into a sale of his lands for such taxes, and the purchaser has sought the aid of a court of equity for the foreclosure of his lien, come

into such court and be heard to plead a technical defense to such taxes.

Whatever may have been the holding of this court in cases where it has been sought in a purely legal action to enforce a tax title, or whatever might be the ruling in a direct proceeding against the officers charged with the duty of assessing, levying, or collecting taxes, while such proceedings are *in elimini*, based upon the failure of the assessor to take, subscribe, or return the oath prescribed by the statute, or upon other illegality in the proceedings, it is clear and well settled that in a proceeding in the nature of equity to enforce a tax lien the court will look to the statute, and not to the assessment, as the foundation of such lien, and will regard the amount of the taxes against the property in question as borne upon the books of the county as unalterably established.

That part of the judgment of the district court which is brought to this court by the appeal of the defendant is therefore affirmed, and that part of said findings and judgment which are appealed from by said plaintiff is reversed. The cause is referred to the clerk of this court to compute the amount due on the causes of action rejected by the district court, but not including any taxes for any year prior to 1870, and upon the coming in of the report of said clerk the decree will be modified in this court accordingly.

DECREE AS ORDERED.

THE other judges concur.

**JACKSON ROBERTS, PLAINTIFF IN ERROR, v. THE COUNTY
OF ADAMS, DEFENDANT IN ERROR.**

Taxes: WRONGFUL SALE BY TREASURER. Where the treasurer of a county sells lands for taxes which are not liable to taxation and upon which no taxes were due, the tax purchaser may recover from the county the amount paid by him with interest thereon.

ERROR to the district court of Adams county. Tried below before MORRIS, J.

R. A. Batty, for plaintiff in error.

L. J. Capps, for defendant in error.

MAXWELL, J.

The plaintiff presented an account to the board of county commissioners of Adams county for money paid by him for the purchase of lands for taxes at private tax sale, the land not being liable to taxation. The county commissioners rejected the claim. The plaintiff then appealed to the district court. On the trial of the cause the court found for the defendant and dismissed the action.

There are 49 counts in the petition, which, except in date, description of land, and amount, are substantially alike. The following is a copy of the 1st count:

"That on the 1st day of April, 1879, the county commissioners of said defendant did furnish to the assessor of Little Blue precinct what purported to be a list of the lands in said precinct subject to taxation; that said list erroneously contained the following described lands, to-wit: The north-west quarter of the south-west quarter of section eleven, township five, range nine west, 6th principal meridian, in Adams county, Nebraska; that said assessor did value said lands at \$160, and returned said valuation with other lands on the first Monday in June, 1879, to

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20	411
18	471
26	682
18	471
33	723
18	471
28	812
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39	297

the county clerk of said defendant; that said county clerk extended the taxes of 1879 against said land as follows, to-wit, total, \$11.14; that on the 1st day of May, 1880, said taxes not having been paid, the same became delinquent, and said land was offered for sale by the treasurer of said defendant on first Monday in November, 1880, but the land was not sold on that day for want of bidders, and that on the 16th day of November, 1880, said plaintiff bought said lands of said treasurer at private sale for said delinquent tax of 1879, and paid said treasurer the sum of \$11.83 therefor, that being the amount of taxes and interest claimed to be due against said land by the treasurer of said defendant; that there was no tax due against said land at the time of said sale and purchase for the reason that said land at the time it was so assessed was land belonging to the general government of the United States, and not liable to taxation; that said lands were wrongfully placed upon said tax list by said defendant's commissioners and said defendant's assessor; that said lands were sold, upon which no tax was due at the time, and on account of the premises set forth as above, the defendant became liable to this plaintiff for the amount so paid by him as aforesaid, to-wit, the sum of \$11.83, with interest at the rate of twenty per cent per annum from the 16th day of November, 1880; that said lands were again wrongfully assessed for the year 1880, and the plaintiff, to protect his tax lien, paid to the defendant's treasurer, as subsequent taxes upon said land, on the 19th day of September, 1881, the sum of \$2³⁶/₁₀₀, and on account of the premises set forth as above the defendant is liable for said amount, with interest at the rate of twenty per cent per annum from said date. The plaintiff says that there is now due him from the defendant the sum of \$11.83, with interest at twenty per cent per annum from November 16th, 1880, and \$2.36, with twenty per cent interest per annum from September 19th, 1881."

A demurrer was filed to the 9th count, but no answer to any of them. The facts stated in the petition are thus admitted: It is thus conceded that the treasurer of Adams county sold lands for taxes to the plaintiff which were not taxable, and upon which no taxes were due.

Sec. 131 of the revenue law (Comp. Stat., Ch. 77) provides that, "When, by mistake or wrongful act of the treasurer or officer, land has been sold upon which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold," etc.

This applies to all cases where the sale was made by mistake or wrongfully. The theory of our revenue laws is that a purchaser at tax sale shall, if the tax title fails, recover the purchase money, with interest. Hence the right to enforce the tax lien by foreclosure. If, however, the lands were not taxable, so that the lien for taxes did not attach, and consequently no interest pass the purchaser, the county is required to return the money with interest. Honesty and fair dealing require that this should be done. A county no more than an individual should be permitted to receive and retain money obtained through a mistake of fact or wrongful act. The court below, therefore, erred in holding, as it must have done, that the petition fails to state a cause of action, and the judgment is reversed and the cause remanded, with leave to the county to answer the petition and for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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42 411REBECCA ATKINS, APPELLEE, V. HENRY ATKINS AND
MARTHA IRENE COURTNEY, APPELLANTS.

1. **Dower of Non-resident.** Where a husband conveys lands in this state while his wife is a non-resident thereof, she has no dower interest in the lands thus conveyed. *Ligare v. Semple*, 32 Mich., 438, approved and followed.
2. **Divorce: CONVEYANCE BY HUSBAND TO DEFEAT ALIMONY.** Where a husband, while a divorce suit was pending, conveyed all his property to his daughter, the offspring of the plaintiff and defendant, the apparent purpose being to defeat a decree for alimony, *Held*, That the burden of proof was on the grantee to show a valuable consideration. *Lane v. Starkey*, 15 Neb., 285. *Gregory v. Whedon*, 8 Id., 377. *Savage v. Hazzard*, 11 Id., 327.
3. **Constitutional Law: REMEDY FOR CREDITORS.** Where an equitable right exists in favor of creditors the legislature may create a legal remedy in their favor that will operate upon existing judgments.

APPEAL from the district court of Lancaster county.
Tried below before POUND, J.

Mason & Whedon and *D. G. Courtney*, for appellants.

J. H. Foxworthy and *J. R. Webster*, for appellee.

MAXWELL, J.

The decree of divorce was affirmed in *Atkins v. Atkins*, 13 Neb., 271, but the alimony reduced from \$5,600 to \$3,000, and the allowance for attorneys' fees and expenses from \$2,000 to \$1,000. The alimony thus allowed, it seems, was not paid, and the decree not being a lien upon the lands of Henry Atkins the plaintiff was unable to collect the same. In 1883 the legislature passed "An act to provide additional remedies for enforcement and collection of judgments and orders for alimony or maintenance." Comp. Stat., Ch. 25, §§ 4a, b.

The first section provides that, "All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by execution and proceedings in aid thereof, or other action or process, as other judgments."

An execution was thereupon issued on the decree, and levied upon certain real estate as the property of Henry Atkins, but the legal title to which was in Martha I. Courtney. The plaintiff thereupon filed a creditor's bill to have the conveyance of said real estate to Mrs. Courtney declared fraudulent and void as against the plaintiff's rights. The court below found the issues in favor of the plaintiff, and rendered a decree accordingly.

Three questions are presented by the record: *First*. Has the plaintiff any dower interest in the lands in controversy? *Second*. Where a conveyance is made while an action is pending, the effect of which will be to defeat the judgment, on whom is the burden of proof of a valuable consideration? And, *Third*. May the plaintiff avail herself of a remedy created by statute after a decree in her favor?

Sec. 20 of chapter 23 of the Comp. St. provides that, "A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state, of which her husband *died seized*; and the same may be assigned to her or recovered by her in like manner as if she and her deceased husband had been residents within this state at the time of his death."

It will be seen that any woman residing out of the state is entitled to dower only in such lands of her deceased husband lying in this state as he was seized of at the time of his death. This section of the statute seems to have been copied from the statute of Michigan on that subject, the language being the same. The proper construction of the section was before the supreme court of that state in *Ligare*

v. Semple, 32 Mich., 438, and it was held that where a husband conveyed lands in that state while his wife was a non-resident thereof she was not entitled to dower therein. In our view this is the proper construction to be given to the language of the statute, and we approve of and adopt it. The plaintiff, therefore, being a non-resident of the state, had no dower interest in any of the lands conveyed by Henry Atkins.

Second. The testimony shows that Martha I. Courtney is the daughter of the plaintiff and Henry Atkins; that the property in question is all the property in this state, so far as is known, possessed by Henry Atkins, and the effect of the transfer is to defeat the plaintiff's decree for alimony.

Sec. 17, Chap. 32, Comp. Stat., declares every conveyance or assignment "made with the intent to hinder, delay, or defraud creditors or persons of their lawful rights, damages, forfeitures, debts, or demands," etc., void. Rights of alimony certainly are included in this provision. *Morrison v. Morrison*, 49 N. H., 69. *Chase v. Chase*, 105 Mass., 385. *Dawson v. Damon*, 28 Wis., 512. *Draper v. Draper*, 68 Ill., 19. *Turner v. Turner*, 44 Ala., 437. A transfer made while a suit is pending of all the debtor's property is merely a badge of fraud. It may be shown to be valid because the mere pendency of the suit does not make the transfer void. Bump Fraud. Conv. (3d Ed.), 37, 38. But where all the debtor's property is conveyed with the apparent intention on the part of the grantor to defeat a judgment about to be recovered against him, and these facts are known to the grantee, the burden of proof rests upon her to show a valuable consideration. *Baxter v. Septimus*, 3 Md., 334. *Spindler v. Atkinson*, 3 Id., 409. *Hunter v. Waite*, 3 Gratt., 26. *Crossley v. Elworthy*, L. R., 12 Eq., 158. *Wilson v. Buchanan*, 7 Gratt., 334. *Woolston's Appeal*, 51 Penn. St., 452. *Crumbaugh v. Kugler*, 2 O. S., 873. *Reynolds v. Lansford*, 16 Tex., 286. *Raymond v.*

Cook, 31 Id., 373. *Oliver v. Moore*, 23 O. S., 473. *Spence v. Dunlap*, 6 Lea, 457. It is the *bona fide purchaser* and not the innocent donee that is protected. Therefore the burden of proving a valuable consideration is on the grantee, when proof of that fact becomes necessary to her protection against those standing in the relation of creditors of the grantor. *Lane v. Starkey*, 15 Neb., 285. *Gregory v. Whedon*, 8 Id., 377. *Savage v. Hazzard*, 11 Id., 327. 1 Am. L. C. (4th Ed.), 53. *Battle v. Jones*, 2 Ala., 314. *Abbott's Tr. Ev.*, 448, 449. As Mrs. Courtney failed to introduce any proof on that point there is no evidence that she paid any sum whatever for the property.

Third. Remedies for the collection of judgments are largely within the control of the legislature, and if no vested right is destroyed such acts are valid. It will not be seriously contended that one holding property of a debtor as voluntary donee has any vested right to hold the same as against one holding a valid claim against the donor at the time the donation was made. The property in such case, to the extent of the creditor's claim against the debtor, is liable for the satisfaction of the same, and the legislature by providing a mode for subjecting property to the payment of the judgment merely provides for the more perfect administration of justice by the application of the property.

It is well settled that where an equitable right exists in favor of creditors, the legislature has the right to create a legal remedy in their favor. *Lewis v. McElvain*, 16 Ohio, 355. *Bolton v. Johns*, 5 Penn. St., 149. *Henderson v. Dickerson*, 17 B. Mon., 173. *Sempeyac v. U. S.*, 7 Pet., 222. The act in question, therefore, is valid, and the proceedings under it legal. It follows that the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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AUGUST G. MANSFIELD, APPELLEE, V. STEPHEN D.
AVERY ET AL., APPELLANTS.

Pleading: ANSWER. Where an answer puts in issue the truth of the material facts stated in the petition, a demurrer to the answer should be overruled.

APPEAL from the district court of Boone county. Heard below before TIFFANY, J.

Lamb, Ricketts & Wilson, for appellants.

Miller & Price, for appellee.

MAXWELL, J.

This action was brought in the district court of Boone county to have a mortgage of certain real estate in that county canceled of record and declared satisfied. It is alleged in the petition that the promissory note which the mortgage was given to secure "was duly paid, the debt discharged, and satisfaction of said mortgage entered upon the margin of the record thereof, in the words and figures following, to-wit: .

"ALBION, July 26, 1873.

"Having this day received satisfaction for the within mortgage, I hereby cancel this mortgage.

"Signed, W. H. PRESCOTT."

That "said satisfaction is insufficient in this, it is not attested by the county clerk or his deputy as a subscribing witness, as required by law." To this petition the defendant Prescott filed an answer, to which the plaintiff demurred, and the demurrer was sustained and a decree entered in favor of the plaintiff. The sole question presented is the sufficiency of the answer. The following is a copy thereof:

"Comes now the defendant W. H. Prescott, and for his separate answer to the plaintiff's petition herein filed says, that he admits that on the 15th day of October, 1872, S. G. Avery executed and delivered to this defendant a mortgage on the south-west quarter of section twenty-two of township number twenty north, of range number six west, situated in the county of Boone, and state of Nebraska, to secure the payment of the sum of one hundred and ninety dollars then due and owing plaintiff, as alleged in the petition; admits that said mortgage was duly recorded in the records of mortgages in said county of Boone, and state of Nebraska. This defendant denies each and every other allegation in said petition contained; this defendant further answering says, that he expressly denies that the said sum so due and owing the defendant from the defendant S. D. Avery, the payment of which was secured to this defendant by said mortgage, was paid to this defendant on the 26th day of July, 1873, or at any other time, and alleges the fact to be that the said sum so due and owing this defendant from said Avery, and secured by said mortgage, remains wholly unpaid, and the said Avery and the said mortgage are in equity, good conscience, and good morals still bound for the payment of said sum together with the lawful interest thereon; and this defendant further answering says, that he expressly denies that he ever released the said mortgage, denies that the signature attached to the pretended release of mortgage on the margin of the record thereof is the signature of this defendant; and this defendant alleges the fact to be that he did not sign his name to said pretended release on the 26th day of July, 1873, or at any other or different time, nor yet did he authorize, empower, instruct, or otherwise direct any person whomsoever to sign his name to said pretended release, and defendant further alleges that the handwriting of said pretended release and the name of W. H. Prescott written thereunder are not, nor yet either of them, in the

handwriting of the defendant, nor was the said pretended release or the name attached thereto written upon the margin of said record with the knowledge or consent or by procurement of this defendant; that the name of the defendant written under the pretended release of said mortgage on the margin of the record of said mortgage is a forgery of the name of this defendant by some person to this defendant unknown; and this defendant further says that he had no knowledge whatever of said pretended release or said forgery until after the bringing of this action. Defendant further alleges that it would be inequitable and obnoxious to good conscience and good morals to declare the said mortgage canceled, annulled, or removed as a cloud upon the title of said premises without payment to this defendant of the amount due and owing this defendant and secured to him by the said mortgage."

The answer states a defense to the action. It is denied therein that the note in question had been paid or the mortgage released, and it is alleged that the purported release of the same on the record was made without authority and is a forgery. For the purposes of the demurrer these statements must be taken as true and they put in issue the facts upon which relief is sought in the action. The judgment of the district court is reversed and the cause is remanded for further proceeding.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE L. SMITH, PLAINTIFF IN ERROR, V. HARRIET

I. JONES ET AL., DEFENDANTS IN ERROR.

1. **Partnership Property.** Real estate purchased by a firm with partnership funds, and for the use of the partnership, is the property of the firm although the conveyance be made to one of the parties.
2. ———: **INSOLVENT PARTNERSHIP.** The property of an insolvent partnership will be applied in the first instance to the payment of debts due the partnership creditors in preference to the creditors of the individual members of the firm.
3. **Assignment for Creditors.** An assignee for the benefit of creditors under a valid assignment may maintain an action to set aside a sale of real estate under an attachment levied after the execution and delivery of the deed of assignment, where such sale would impair or defeat his title as assignee.

ERROR to the district court for Seward county. Heard below before POST, J., sitting for NORVAL, J.

D. C. McKillip and John H. Ames, for plaintiff in error, cited: *Blake v. Graham*, 6 Ohio State, 583-4. Wade on the Law of Notice, § 204 and *et seq.* to § 213. *Ely v. Wilcox*, 20 Wis., 551. *Maul v. Rider*, 59 Pa. State, 167. *Chicago v. Witt*, 75 Ill., 211. *Bates v. Norcross*, 14 Pickering, 224.

Hastings & McGintie, for defendants in error, cited: *Ashton v. Jones*, 14 Neb., 426. *Sullivan v. Smith*, 15 Id., 477. *Burpee v. Smith*, Walkers Ch., 327. *Colby v. Brown*, 10 Neb., 413. *Drake v. Jones*, 27 Miss., 427. *Watkins v. Logan*, 3 B. Mon., 20.

MAXWELL, J.

A demurrer to the petition was sustained in the court below, and the action dismissed. The plaintiff appeals. It is alleged in the petition, in substance, that prior to the

14th day of October, 1880, Peter Hennegin and William Ashton were partners doing business at Seward under the name and style of "Hennegin & Ashton;" that prior to said date said firm had purchased and paid for with partnership funds certain real estate in Seward county, which is described, which real estate was purchased for and used by said partnership, but the legal title to the same was in Hennegin; that on 14th day of October, 1880, said firm was indebted in about the sum of \$5,000, and was unable to pay its debts in full, and the members of said firm were also individually insolvent and unable to pay their debts; that on said day said "co-partnership, by a deed of assignment duly signed, executed, acknowledged, and delivered to the plaintiff, duly assigned and conveyed to the plaintiff in trust for the benefit of the creditors of said co-partnership all and singular the goods, chattels, effects and property, lands and tenements of said co-partnership, including the real estate in question; that said firm was openly and notoriously in possession of said real estate until the time of said assignment, and since that time the plaintiff has been and now is in possession thereof, and that said assignment was duly recorded within thirty days from its date, etc.; that on the 15th of October, 1880, and after said deed of assignment had been executed and delivered to the plaintiff, the State Bank of Seward and others began actions by attachment against Peter Hennegin for his individual debts, and caused said attachments to be levied upon the real estate in controversy as the property of said Hennegin; that afterwards judgments were recovered in said actions and the property in question sold under the attachments to the defendants in this action, and "should said sales be confirmed by order of this court, and conveyance thereof be made to the purchasers of said property thereat, said property would all of it be conveyed by said purchasers to innocent parties, and be wholly lost to the plaintiff and the creditors of said partnership," etc. It is also alleged that

"Hennegin had absconded and abandoned said partnership business and property, and had ceased to act as a member of said firm long before the said 14th day of October, 1880, leaving the said Wm. H. Ashton the only remaining and acting partner of said firm, and that said deed of assignment was executed by said Ashton in the firm name of Hennegin & Ashton, alone and without the individual name or signature of said Peter Hennegin, so that the same does not purport of record to convey the above mentioned property, the apparent record of title of which is in said Hennegin individually, as aforesaid." The prayer is for an injunction and to have said sales set aside, and the application of the property to the creditors of the firm. It is well settled in this court that property purchased with partnership funds inures to the benefit of the partnership. *Catron v. Shepherd*, 8 Neb., 308. *Bowen v. Billings*, 13 Id., 439. And even if the title be taken in the name of one member of the firm, the property is that of the partnership. *Id.* And where the firm is insolvent the partnership property is primarily liable for the partnership debts. *Bowen v. Billings*, 13 Neb., 439. *Roop v. Herron*, 15 Id., 73. This is the general rule, and where a firm is insolvent its property is a trust fund for the benefit of its creditors. *Murray v. Murray*, 5 Johns. Ch., 60. *West v. Skip*, 1 Ves. Sen., 239. *Ex parte Ruffin*, 6 Ves., 119. *Campbell v. Mallett*, 2 Swanst., 551. *Young v. Frier*, 1 Stockt. Ch., 465. *Robbins v. Cooper*, 6 Johns. Ch., 186. *Ex parte Crowder*, 2 Vern., 706. *Ex parte Cook*, 2 P. Wms., 500. Parsons on Partnership, *pages 348, 349, and notes. The property in question, therefore, if the allegations of the petition are true, belonged to the firm, and should be applied in favor of the creditors of the partnership, and the attempt to apply it to creditors of one of the members of the firm is entirely unauthorized, and the sale should be set aside.

2. The right of the plaintiff to bring the action. In

England the courts seem to hold that primarily such assignments do not create a trust, nor clothe the creditors with the character *cestuis qui trustent*, but merely make the assignee an agent of the debtor to dispose of and apply the property under the debtor's directions. *Garard v. Lauderdale*, 3 Sim., 1. *Walcryn v. Coutts*, 3 Id., 14. *Acton v. Woodgate*, 2 M. & K., 492. *Brooks v. Marbury*, 11 Wheat., 78. In this country, however, it is generally held that a voluntary assignment for the benefit of creditors, if valid, is not a mere agency of the debtor, but creates trust relations, and the creditors are the beneficiaries. *Moses v. Margatroyd*, 1 Johns. Ch., 119, 129. *Shepherd v. McEvers*, 4 Id., 136. *Nicoll v. Mumford*, Id., 523. *Ward v. Lewis*, 4 Pick., 518. *N. E. Bank v. Lewis*, 8 Id., 113-118. *Pingree v. Comstock*, 18 Id., 46. *Read v. Robinson*, 6 W. & S., 329. *McKinney v. Rhoads*, 5 Watts, 343. *England v. Reynolds*, 38 Ala., 370. *Pearson v. Rockhill*, 4 B. Mon., 296. The assignee, therefore, can maintain an action to protect the trust estate. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

C. C. HOUSEL, PLAINTIFF IN ERROR, V. GEORGE THRALL, DEFENDANT IN ERROR.

1. **Commission Merchant.** A factor or commission merchant, while not a guarantor of the responsibility of the persons with whom he deals, is held to the same degree of care and diligence which a reasonably prudent man would exercise in the management of his own affairs.
2. —: LIABILITY IN CASE STATED. Where a commission

Housel v. Thrall.

merchant in Omaha, doing business in San Francisco, caused commission goods to be consigned to another person in San Francisco, that person being one whom the consignor had stated to him he, the consignor, would have no dealings with, such commission merchant could not relieve himself from liability resulting from the loss of the consigned property, on the ground that the person to whom the goods were shipped was a sub-agent, for whose acts he could not be held responsible; and the fact that the goods were consigned to the objectionable person by the consignor would not change the application of this rule, it being shown that the commission merchant was purchasing other goods of the consignor at the same time, and causing them to be shipped to such person in the same way.

ERROR to the district court for Douglas county. Heard below before NEVILLE, J.

John L. Webster, for plaintiff in error, cited: *Story Agency*, § 201. *McCants v. Wells*, 4 S. C. (Rich.), 381. *Darling v. Stanwood*, 14 Allen, 504. *Commercial Bank v. Martin*, 1 La. Ann., 344. *Tiernan v. Commercial Bank*, 7 How., 648. *Daly v. Bank*, 56 Mo., 94. *Dorchester v. Bank*, 1 Cush., 177.

George W. Doane, for defendant in error, cited: *Story Agency*, §§ 13, 14, 452, 454. *Allen v. Merchants Bank of N. Y.*, 22 Wend., 215. *Montgomery Co. Bank v. Albany City Bank*, 3 Selden, 459. *Com. Bank v. The Union Bank of N. Y.*, 1 Kernan, 203. *Smedes v. Bank of Utica*, 20 Johns., 372. *Bank of Orleans v. Smith*, 3 Hill (N. Y.), 560. *Reeves v. The St. Bank*, 8 O. St., 465. *American Express Co. v. Haire*, 21 Ind., 4. *Wingate v. Mech's Bank*, 10 Pa. St., 104. *Borup v. Nininger*, 5 Minn., 417. *Thompson v. Bank of S. C.*, 3 Hills (S. C.), 77. *Tabor v. Perrot*, 2 Gall. (U. S.), 565.

REESE, J.

This action was instituted in the district court of Douglas county. The petition alleges substantially that plain-

tiff below, defendant in error here, employed defendant below, plaintiff in error in this court, who was a forwarding and commission merchant in Omaha, to forward to the city of San Francisco, in the state of California, and sell on commission at the highest market price for cash a certain quantity of lard of the value of \$694.72, and that plaintiff in error received the lard and undertook to forward and sell it in the manner agreed upon, and in consideration of the commission agreed to be paid, to exercise due care and diligence in the disposition of the lard, but that he did not use due diligence in that behalf; neglected to sell the lard in San Francisco, and without the consent of defendant in error shipped it to Nevada, and that he has failed to account for the same.

The answer denies the employment, the agreement, receipt of the lard, or that he shipped it to Nevada. Alleges that he had nothing to do with the matter, and hence was guilty of no negligence. It is also averred that at the time the lard arrived in San Francisco it had no market value, and was entirely worthless. The reply is a general denial of the allegations of the answer. The cause was tried to a jury, who returned a verdict for defendant in error. Upon the motion of plaintiff in error for a new trial being overruled, and a judgment being entered upon the verdict, plaintiff in error brings the cause into this court by proceedings in error for review.

By reference to the issues joined, as well as to the testimony introduced on the trial, it may be seen that defendants in error based their right to recover upon the allegation that they employed plaintiff in error personally to handle the property, and that they had no dealings with any other person in that behalf. This being denied by the answer, as well as by the testimony introduced by plaintiff in error, the question of fact thus presented was one for the jury to decide, under proper rulings and instructions of the court.

The errors assigned will be examined in the order in which they are presented by the brief of plaintiff in error.

It is insisted that certain instructions to the jury, as set out by the petition in error, were not applicable to the case as made by the testimony; that they had a tendency to mislead the jury, and for those reasons were improperly given. These instructions are as follows:

"You are instructed that the law holds a consignee in the conducting of the business of a consignor to the same degree of care and diligence which a prudent man would exercise in the management of his own business.

"You are instructed that a factor or commission man, while he cannot be held as a guarantor of the responsibility of the persons to whom he sells in the ordinary course of business, and in accordance with the usages of the market where the sale takes place, must, nevertheless, use all reasonable effort, and resort to all reasonably available sources of information, to learn the pecuniary liability of the purchaser, and if he does not do so, and any loss occurs by reason thereof, he will be liable for such loss."

It is true, as claimed by plaintiff in error, that instructions given to a jury must be applicable to the case as made by the testimony. But it is contended by defendant in error that the instruction is applicable to the testimony and was properly given.

The soundness of the law when applied to a proper case is not questioned. It therefore only remains for us to enquire whether or not it was applicable to the case at bar.

The action was against plaintiff in error as a commission merchant. The allegation is directly made that he undertook to use proper diligence in disposing of the consigned property, and that he failed to comply with his contract in that behalf. The testimony tends to show that when the matter was first talked of between the parties, plaintiff in error suggested the name of a

person in San Francisco with whom he had some business relations as a proper person to whom the property might be shipped, but that defendant in error refused to deal or have any business relations with him, and insisted upon dealing alone with defendant in error, and that this was understood between the parties to the contract. It is shown that the property was shipped to this person. It is true that plaintiff in error denied having had anything to do with the transaction, and in substance so testified. It is also true that defendant in error claimed, and testified in substance, that plaintiff in error was the only person with whom he dealt. Now if we could say that the theory of plaintiff in error was the correct one, then we could also say that the court erred in giving the instruction. But if the defendant's theory was the correct one then the instruction was proper. This question of fact had to be left to the jury, and in doing so it was necessary to so instruct as to state the law correctly applicable to the issue thus presented. *Severance v. Melick*, 15 Neb., 614.

Plaintiff in error requested the court to give the following instructions, which were refused:

"If the testimony satisfies the jury that Housel was doing business in Omaha, and that the lard in controversy was shipped to San Francisco, and was to be sold in San Francisco, and if the plaintiffs knew that Housel was not personally doing business in San Francisco, and that the nature of the business was such that it would be necessary for Housel to employ an agent in San Francisco to sell the lard, then the defendant Housel was authorized to employ a sub-agent in San Francisco to sell the lard, and Housel would only be bound to use ordinary care and diligence in the selection of such agent, and if any loss arose through the carelessness or fault of such agent then the defendant would not be liable in this action."

"If the jury believe from the testimony that Housel authorized the shipment of the lard on his (Housel's) account,

still the plaintiff cannot recover if at the time he knew the lard was to be shipped to San Francisco to be sold by George W. Forbes, as agent, with a knowledge on the part of plaintiff of who George W. Forbes was, as well as of his character and standing, and made no objection to the shipment of the lard to George W. Forbes to be sold by him as such agent. If the plaintiffs intended to hold the defendant Housel for any defalcation or misconduct on the part of George W. Forbes, and the plaintiffs were possessed of a knowledge of the character and standing of George W. Forbes, then it was the business of the plaintiffs to notify the defendant not to have said Forbes employed as a subagent to sell the lard in controversy."

"If the plaintiffs were possessed of a knowledge of the character and business standing of George W. Forbes, and knew that he was the agent to sell the lard in controversy in San Francisco, and the plaintiffs themselves shipped the goods direct to George W. Forbes at San Francisco, and in his name as consignee, then they cannot hold the defendant liable for the value of the goods in controversy on account of any misconduct of the sub-agent, George W. Forbes, unless the testimony further satisfies you that the defendant Housel was also guilty of negligence, and that such negligence on the part of Housel contributed to the default or misconduct of the said George W. Forbes."

The court over the objection of plaintiff in error gave the following instruction:

"If the jury believe from the evidence that Forbes was the agent of Housel, and not plaintiffs, to dispose of the lard in San Francisco, on commission, and that Forbes as said agent did not use due and ordinary diligence in disposing of the lard, and by reason thereof a loss accrued to the plaintiffs, the defendant is liable for such loss, and the plaintiffs are entitled to recover their damages sustained by reason thereof."

It will be seen that by the refusal of the court to give

the instructions prayed for by plaintiff in error, and the giving of the one last above quoted, the question of the subagency of Forbes as a defense was virtually withdrawn from the jury. It may be true that in a proper case the doctrine contended for by plaintiff in error is the law, and that the instructions refused should have been given. But whether it had any proper application to the case at bar is another and more difficult question. This difficulty arises out of the testimony in the case. It is insisted by defendants in error all through the record that they at all times informed plaintiff in error that they were not dealing and would not deal with Forbes; that they would have nothing to do with him in this transaction, and that if they shipped the lard it must be upon the credit of plaintiff in error, and that they would look to no one else for returns, and from a lack of confidence in Forbes they especially objected to having any business relations, either directly or indirectly, with him, and that plaintiff in error stated that he had \$2,600 of Forbes' money, and that he would be safe in sending the lard to Forbes to be sold for him, and would do so. If this is true, it would seem that the question of subagency, growing out of Forbes' employment, could have no place in the case. While it is true that plaintiff in error insisted upon the trial that this was not the case, yet in his cross-examination he substantially admitted the facts to be as claimed by defendant in error. From that part of his testimony referring to a conversation with Mr. Thrall, before the shipment was made, we quote as follows:

Q. Then you had a talk with Mr. Thrall in the street car.

A. Yes, sir.

Q. How long after Mr. Roddis had spoken to you?

A. I don't remember how long it was.

Q. Was it a few days or weeks?

A. Probably a week or so.

Q. In that talk that you had with Mr. Thrall in the street car you merely said something to him about wanting to see him about a matter of business that might be of interest to him.

A. I don't recollect that kind of a talk; if I had any business with him I would just as soon have told him in the street car as anywhere else.

Q. State if that talk in the street car was anything more than to the effect that you told Mr. Thrall that you wanted to talk to him about a matter of business that would be of interest to him, and wanted him to come to the office.

A. It is likely I did.

Q. Did he go to the office?

A. I think likely.

Q. You had a talk with him at the office.

A. Probably.

Q. Do you remember what time it was?

A. No, sir.

Q. Was it before any meats were ordered from Roddis & Thrall?

A. I judge it was.

Q. Did you say in that conversation something to him about Roddis & Thrall shipping meats to George Forbes on commission?

A. Only in answer to what Mr. Roddis had said to me.

Q. What occurred in that conversation between you and Mr. Thrall? In that conversation did you say anything to Mr. Thrall about shipping meats to Mr. Forbes, or shipping lard to Mr. Forbes on commission to San Francisco?

A. I don't think I did, unless it was for them to ship it on their own account.

Q. Did you say anything to them?

A. I don't remember.

Q. Did Mr. Thrall, when Mr. Forbes' name was men-

tioned, say to you in that conversation that that would end the question; if he was to ship to Forbes that he did not care to have any business with him?

A. I think very likely he said that.

Q. Don't you remember that he did say that?

A. I don't think but what he did say that, and I do not deny it. I think probably he did.

Q. Did you tell him what he testifies you did about Forbes having been misunderstood; that he came here from Montana with a large amount of money; that he had been in various kinds of business, and taken in by different persons?

A. I might have told him about Forbes bringing his money home the last time, I do not remember, etc.

By this it appears beyond question that prior to the consignment of the lard it was clearly understood that defendants in error were not willing to make consignments to Forbes, or have any dealings with him, and the evidence fails to show any agreement or contract by which it is made to appear that they had any dealings with him. The fact that they shipped the lard to "George W. Forbes, agent," argues nothing, since they were at the same time shipping to him other consignments of meat, etc., in the same way, which plaintiff in error had purchased. While it may be that plaintiff in error, by the usages of trade, or otherwise, had authority to employ a subagent, for whose acts he would not be responsible, if not negligent in the selection, yet after the declarations made by Thrall he could not then select the objectionable party and avoid the liability, even if he had such authority ordinarily in the usual course of trade. We therefore think the court did not err in refusing the instructions asked.

It is contended that the court erred in admitting certain letters, etc., in evidence. The first of these is a letter referred to in the record as exhibit "A." This letter was written by Forbes to plaintiff in error, and by plaintiff in

Housel v. Thrall.

error delivered to defendants in error. It was written and received before the consignment was made. It suggests the sending of the lard on commission, and says, referring to defendants in error and others: "If those parties prefer to send lard on commission, let them send it, and say to them that you will handle it for five per cent commission," etc. This letter having been received by plaintiff in error and delivered by him to defendants in error was, to say the least, a circumstance tending to show that he considered himself as dealing with them, and interested in the transaction. The next is a postal card written in San Francisco, signed "C. C. Housel & Co., F.," acknowledging the receipt of the lard. It was written by Forbes, and was competent for the purpose of showing this one fact: the lard having been shipped to him with the knowledge of Housel. But the error in this matter, if it was error, was without prejudice, as no issue is made upon it, the receipt of the lard by Forbes not being disputed.

Certain other letters and correspondence were admitted over the objections of plaintiff in error, and of which complaint is made. These letters were written either by plaintiff in error to defendant in error, or by Forbes to plaintiff in error, and by him delivered to defendant in error. Coming as they all did from plaintiff in error, and each tending to throw some light upon the transaction, their admission was proper.

We are unable to perceive any prejudicial error in the record. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**B. & M. R. R. Co. IN NEB., PLAINTIFF IN ERROR, v.
YOUNG BEAR AND SHARP WAYNE, DEFENDANTS
IN ERROR.**

Replevin: ANSWER. An answer in replevin containing an allegation that the property was not unlawfully detained by the defendant, nor was plaintiff entitled to the immediate possession thereof, states a defense and is not demurrable.

MOTION for rehearing of case reported in 17 Neb., 668.

REESE, J.

Plaintiff in error has filed a motion for rehearing, accompanied by an elaborate brief, which it is deemed proper to notice. As stated in the original opinion, the answers of the defendants contain the allegations that the property "was not unlawfully detained by him from said plaintiff, nor was the said plaintiff entitled to the immediate possession of the same, as claimed in said petition," etc. To this answer a demurrer was filed. This demurrer seeks to attack only a part of the answer, which is designated as the second count or part, which seeks to set up a lien under the salvage act of 1883. One of the answers referred to by the demurrer is stated in paragraphs; the other is not. The one demurrer is made to both answers. But the last paragraph of the demurrer is as follows: "The said answer and counts where specified do not state facts sufficient to show any right to said property on the part of defendants." This must be considered as attacking the whole answer. The language above quoted from the answer must be treated as a denial of the allegations of the plaintiff's petition. Although in the affirmative form it is a direct traverse of the essential allegations of the petition, viz., the unlawful detention and plaintiff's right of possession. This was sufficient to defeat plaintiff's recovery, without proof. It

would put the plaintiff to the proof of the averments of the petition thus attacked. *Ruth v. Ruth*, 12 Neb., 594. The demurrer was properly overruled. *Lewis v. Coulter*, 10 O. S., 451. *Trustees v. Odlin*, 8 Id., 293. *Moore v. Kepner*, 7 Neb., 291. *Mansfield v. Avery*, ante p. 478.

The fact that a right under the alleged lien was not well pleaded by the answer can make no difference, as such plea was not necessary. The same defense could have been made under the denial as under the allegation of special defenses, had they been properly alleged; the plaintiff being required to recover on the strength of his own title. *Richardson v. Steele*, 9 Neb., 486. *Hedman v. Anderson*, 8 Neb., 184. *Cool v. Roche*, 15 Id., 27.

The motion for rehearing is denied.

JUDGMENT ACCORDINGLY.

The other judges concur.

THE WESTERN HORSE AND CATTLE INSURANCE COMPANY, PLAINTIFF IN ERROR, V. WILLIAM SCHEIDLE, DEFENDANT IN ERROR.

1. **Insurance: TITLE TO PROPERTY INSURED.** A policy of insurance is *prima facie* an admission by the insurers of the title of the insured to the property embraced in the policy.
2. **Petition examined, and Held,** Good when assailed after verdict.
3. **Insurance: WAIVER OF PREMIUM.** An insurance company may waive the payment of the premium after it is due. And when it is provided in the note given for the premium that if the note be not paid at maturity the company shall have the right to cancel the policy, the failure to cancel it will be deemed a waiver of such right, and in case of loss payment will be enforced. And especially would this be true if payment of the premium was received (even after the loss and without knowledge thereof) and the money held until after suit brought.

18	495
35	495
18	495
37	473
18	495
44	748
18	495
147	749
18	495
56	480

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Webster & Stewart and Charles Ogden, for plaintiff in error, cited: *Johnson v. Van Epps*, 14 Ill. App., 214. *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn., 174. *Mutual Benevolent Association v. Hoyt*, 46 Mich., 478. *Rombach v. Reid and Arl. L. Ins. Co.*, 35 La Ann., 234. *Smith v. Ross*, 51 Mich., 117. *Davis v. German Ins. Co.*, 135 Mass., 255. *Schoneman v. Ins. Co.*, 16 Neb., 406.

A. K. Webster, for defendant in error, cited: *Joliffe v. Madison Ins. Co.*, 39 Wis., 111. *Phoenix Ins. Co. v. Lansing*, 15 Neb., 495. *Schoneman v. Ins. Co.*, 16 Neb., 406, and cases cited.

REESE, J.

This cause was tried in the district court upon the following stipulation or agreed statement of facts:

"1st. That on the 5th day of June, 1883, the defendant issued and delivered to plaintiff its policy of insurance, No. 6858, the same being hereto attached marked 'A' and made a part of this stipulation, insuring plaintiff against loss on one sorrel gelding in the sum of \$125.00, and on one bay horse, \$75.00.

"2d. That plaintiff gave his note for the premium, said note being hereto attached marked 'B' and made a part of this stipulation.

"3d. That before the expiration of said policy of insurance, but after said premium note was due and unpaid, defendant placed said note in the hands of an attorney for collection. That said attorney gave plaintiff notice that said note was in his hands for collection, which notice is hereto attached marked 'C' and made a part of this stipulation.

"4th. That on the 15th day of March, 1884, the plaintiff paid said note and interest thereon to said attorney, and said attorney remitted the same to the defendant within one week thereafter less collection fees, and that plaintiff did not disclose to said attorney the fact that the said sorrel horse had died on the day previous.

"5th. That said sorrel gelding died on the 14th day of March, in the afternoon of said day, about three o'clock P.M., and without fault or neglect on the part of this plaintiff.

"6th. That plaintiff gave the defendant notice of said loss as soon as he could find the agent of said company, and within six days after said loss.

"7th. That more than forty-five days before the commencement of this action plaintiff gave defendant proof of said loss on blanks furnished by defendant as required in said policy.

"8th. That said horse, said sorrel gelding, was of the value of \$150.00; that defendant refused to pay the sum of \$125.00, and has not paid the same nor any part thereof.

"9th. Plaintiff has performed all other conditions of said policy by him to be kept and performed, except as negatived by this stipulation.

"10th. It is further stipulated that after defendant was served with summons, and before this cause was tried in justice court, defendant tendered the premium paid by plaintiff for insurance on said sorrel gelding from the time said note was due to the expiration of said policy to plaintiff, with interest and costs to that date thereon, and is now ready to pay the same, and brings the same into court and makes said tender good.

"The above are stipulated to be the facts of the cause so far as competent or material.

"Signed, &c."

It is not necessary to set out copies of exhibits attached to the stipulation, further than to say the note referred to

as exhibit "B" is a negotiable promissory note with condition that in case of loss the note should become due and be deducted therefrom; and that in case of the non-payment of the note at maturity "the company shall have the right to cancel the policy, but at their option may revive it after full payment of principal, interest, and charges have been made."

The court found in favor of defendant in error, whereupon a motion for a new trial was made upon the grounds that:

"1st. The pleadings of the cause will not support a judgment.

"2d. That upon the issues joined defendant is entitled to a judgment for costs, and that plaintiff's action be dismissed.

"3d. Because judgment was rendered in favor of the plaintiff, whereas upon the pleadings and facts defendant was entitled to judgment upon the law and issues joined.

"4th. Because the court admitted the stipulation of facts to be considered in evidence, to which defendant at the time objected and excepted because the petition of plaintiff did not entitle him to adduce any evidence in the cause."

This motion being overruled and judgment entered, plaintiff in error seeks a review.

There are two principal and decisive questions in this case, to-wit: *First*, Whether or not the petition is sufficient to sustain the judgment; and, *Second*, If so, whether the defendant in error could rightly recover under the stipulated facts.

The petition alleges in substance that defendant is an incorporated insurance company. That on the 5th of June, 1883, in consideration of the covenants performed by the plaintiff it issued and delivered to him the insurance policy, a copy of which is attached to the petition. That the gelding horse insured in said policy for \$125.00 died on the 14th day of March, 1884, and that said death was not

caused by the fault, neglect, or procurement of the plaintiff in the action, and that of all of which defendant, plaintiff in error, had due notice. That on the 28th of March, 1884, proof of loss was served on the company, and that the horse was worth \$150.00, and that plaintiff has kept all the conditions of the policy which he was required to keep and perform. That defendant company has not paid and will not pay the said sum of \$125.00, nor any part of it, to his damage in that sum. The answer admits the incorporation of the company and the issuance of the policy as alleged, and denies all other allegations.

The objections to the petition will be noticed in the order presented by the brief of plaintiff in error, the first of which is, that there is no allegation that at the time of the issuance of the policy the defendant in error was the owner of the horse insured or had any interest in him. The policy is attached to the petition and its recitals are made a part of it. In this policy it is said that the company does insure William Scheidle against loss by accident, etc., to the property described. This showed the interest of defendant in error. *Ins. Co. v. Slaughter*, 20 Ind., 526. The mere fact of the contract of insurance being effected should, we think, be enough *prima facie* to prove the ownership of the property. If the contract was procured by fraud, and such ownership did not exist, or if the insurance was simply a wager policy, it was proper matter of defense, and if relied upon should be pleaded as a defense. The same may be said of the second objection, that it is not alleged that defendant in error was the owner of the horse at the time of his death.

The third objection is, that it is not alleged that any consideration was given for the issuance of the policy. We think it is substantially so alleged. It is alleged that the policy was issued in consideration of the covenants performed by the plaintiff, and the policy itself, which is embodied in the petition, shows upon its face and acknowledges the payment of the premium.

The fourth and fifth objections are, that there is no averment that payment has been demanded or that any sum is or has been due plaintiff on the policy. As to the demand, it would seem clear that the proof of loss "on blanks furnished by defendant's agent," with the allegation that plaintiff in error "would not pay said sum of \$125 nor any part thereof," is a sufficient allegation of demand if such allegation were necessary. While it is true that the petition was not drawn with that degree of care usually deemed necessary by a careful and skillful pleader, yet we think it fully appears from the petition that the amount claimed is due. The contract is set out at length. The allegation of compliance with its terms on the part of defendant in error, the failure of plaintiff in error to pay, and the damage resulting is stated. The objection being made for the first time after judgment, the petition will be upheld if by any reasonable construction it is found sufficient. Other objections of a general nature are made to the petition, but upon an examination of all the allegations it is deemed sufficient.

The next question presented is as to the right of defendant in error to recover upon the facts as agreed to in the stipulation; the note given for the premium not having been paid until after the death of the insured property.

By reference to the note, a copy of which is attached to the stipulation, it may be seen that the non-payment of the amount for which it was given does not terminate the policy, the provision being as follows: "If this note be not paid at maturity the company shall have the right to cancel the policy, but, at their option, may revive it after full payment of principal, interest, and charges has been made." By this provision it is apparent that the vitality of the policy did not necessarily depend upon the payment of the note. Plaintiff in error had the right, if it so elected, to terminate the contract of insurance, but in order to do so an affirmative act upon its part was necessary.

So long as it insisted upon the payment of the note and declined to cancel the policy, so long its obligations continued. Had suit been brought upon the note its collection could not have been successfully resisted. The policy continued in force until canceled. It never was canceled. The right to cancel was waived. *Schoneman v. Ins. Co.*, 16 Neb., 404, and cases there cited. Also *Heaton v. Ins. Co.*, 7 R. I., 502. *Goit v. Ins. Co.*, 25 Barb., 189.

It is insisted that the payment of the note to the attorney in whose hands the note was placed for collection, without making known to him the fact of the death of the property, was an act of bad faith, and that the tender of the money back, after suit brought, should relieve the company from any liability. To this it may be answered, the note matured on the 27th day of July, 1883, and plaintiff might have terminated its liability had it seen proper to do so. The note was paid on the 15th day of March, 1884. Notice and proof of loss was given and made more than forty-five days before the commencement of this action, yet plaintiff in error held the money until after the commencement of the action, thus treating the contract of insurance as binding until the service of summons.

It may be, and is perhaps true, that the loss hastened the payment of the note, yet the payment not being essential to the life of the policy, its payment or non-payment would not change the rights of the parties.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1886.*

PRESENT:
HON. SAMUEL MAXWELL, CHIEF JUSTICE.
" M. B. REESE, } JUDGES.
" AMASA COBB, }

JULIA ABBOTT AND BROWN & RYAN BROTHERS, PLAINTIFFS IN ERROR, V. ALONZO ABBOTT ET AL., DEFENDANTS IN ERROR.

1. **Fraud.** The representation of a fact in the future, and not a mere promise which has been acted upon and turns out to be false, will entitle the injured party to the same remedies as fraudulent misrepresentations of an existing fact.
2. **Lien of Attorney.** An attorney is not entitled to a lien before judgment upon a cause of action for tort, which in case of case of the death of the parties would not survive.

ERROR to the district court of Lancaster county. Tried below before MITCHELL, J.

* NOTE.—Decisions herein published as of this term, are cases argued and taken under advisement at July Term, 1885, and filed prior to Jan. 8, 1886, when, under the constitution, Judge Maxwell became Chief Justice.—REP.

Brown & Ryan Brothers, for plaintiffs in error.

Lamb, Ricketts & Wilson, for defendants in error.

MAXWELL, J.

This case is presented to the court upon two petitions in error upon separate orders of the district court, one of which denied the right of Julia Abbott to reinstate the case, and the other the right of Brown & Ryan Brothers to an attorney's lien and to intervene. The action was originally brought by Julia Abbott to recover damages of the defendants for "colluding, conspiring, and confederating together to injure the plaintiff, and to alienate and estrange from plaintiff her husband, and to deprive her of the society of her husband, and to cause plaintiff to lose her home, and to bring her and her good name into disrepute," etc. Then follows a statement of the alleged acts causing the injury. This petition was filed in December, 1883. Answers were filed in March, 1884, and notice of an attorney's lien in April of that year. In May, 1884, the plaintiff dismissed her action in vacation. Afterwards, in April, 1885, she filed a motion supported by an affidavit to reinstate the case. In her affidavit she states in substance that the defendant Abbott, through an agent, promised to convey to her a house and lot worth at least \$1,000, that her husband, the father of her child, and son of the defendant, should live with her again; that the defendant would furnish her money as she needed it; that her husband did reside with her until after the case of the *State v. Alonzo Abbott* was tried, when her husband left her and has continued to remain away ever since. She also alleges the failure of the defendant to comply with any of the conditions upon which the dismissal was made, etc. She further states "that relying alone upon the above promises I signed the stipulations above referred to."

There are other material allegations to which it is unnecessary to refer. For the purposes of this motion we must consider the allegations of the affidavit as true, and so considered, sufficient is shown to require the court to reinstate the case. While fraud cannot be predicated upon a mere promise not performed, *Perkins v. Lougee*, 6 Neb., 220, yet, where a party through misrepresentation and fraud has gained an advantage in the action, a court of equity in a proper case will grant appropriate relief; and this, even if the advantage was obtained by fraudulent promises in the nature of the assertion of facts which there was no intention to perform—that is, where the representation is that of a fact in the future and not a mere promise, and it is relied upon, and turns out to be false, the remedies of the injured party are the same as where fraudulent misrepresentations are made in regard to existing facts. *Choateau v. Goddin*, 39 Mo., 229. *Vanderpool v. Brake*, 28 Ind., 130. *Bridgway v. Morrison*, Id., 201. *Davidson v. Young*, 38 Ill., 145. *De Beil v. Thompson*, 3 Beav., 469. *Bold v. Hutchinson*, 20 Id., 250. The court, therefore, erred in overruling the motion to reinstate.

2. The right of Brown & Ryan Brothers to intervene and assert their attorney's lien. No case was cited by them on the argument holding that an attorney had a lien prior to the recovery of judgment in a cause of action for tort which in case of the death of the parties would not survive; and in our view no such lien exists. We must hold, therefore, that they have no right to intervene. The court, therefore, did not err in overruling their motion. The order as to Julia Abbott is reversed and the cause remanded to the district court with directions to reinstate the case in her favor, and as to Brown & Ryan Bros., the order of the court below is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18 506
46 84THE STATE, EX REL. JOHN LYTTLE, V. COMMISSIONERS
OF DOUGLAS COUNTY.

Mandamus: CONSTITUTIONAL LAW. On an application for a mandamus against the county commissioners of Douglas county to compel them to call an election in the city of Omaha for twelve justices of the peace therein, there being six precincts, and alleging that the act reducing the number of justices in such city to three was unconstitutional and void, *Held*, That the court would not in that proceeding determine whether or not the act was in contravention of the constitution. .

ORIGINAL application for mandamus.

Patrick O'Hawes, for relator.

No appearance for respondent.

MAXWELL, J.

This is an application for a mandamus to compel the county commissioners of Douglas county "forthwith to call an election for the city of Omaha, for the purpose of electing two justices of the peace for each precinct in said city." The application was filed and submitted on the 29th of October, 1885, the day of election being the 3d of November thereafter.

The relator alleges that he is an elector of the city of Omaha; that in October, 1869, the board of county commissioners of Douglas county divided said city of Omaha into six precincts numbered respectively one, two, three, four, five, and six, which precincts as thus constituted still exist; that under the statute of 1879 each of said precincts is entitled to elect two justices of the peace, making twelve in all for said city; that by an act approved March 5th, 1885, it was provided that in cities of the first-class, which includes Omaha, but three justices of the peace shall be

elected in and for such city and no more; that by virtue of said act the defendants "were required to divide said six precincts constituting the city of Omaha into three districts for the purpose of and intending thereby to decrease the number of justices of the peace in said Omaha to the number of three, which said defendants, as their duty was, proceeded to do," etc.; that so much of the statute above referred to as relates to justices of the peace is contrary to and in derogation of the constitution of the state, section 15 of Art. X. of which provides, that the legislature shall not pass local or special laws "regulating county and township officers, providing for the election of officers in townships, incorporated towns and cities," and "in all other cases where a general law can be made applicable, no special law shall be enacted." Also section 19, Art. VI., which provides, "that all laws relating to courts shall be general and of uniform operation, and the organization of such courts severally shall be uniform." It will be seen that the questions presented in this case are very important, involving as they do the validity of an act reducing the number of justices of the peace in Omaha. Such questions should not be decided without a full hearing of all parties interested, and a careful examination of the entire subject. Less than this would not justify the court, in a case of this importance, in rendering a decision. Yet, on the eve of an election, with many other important cases pressing on our attention, this case was submitted, practically without argument, and we are asked to determine whether or not the act reducing the number of justices in Omaha to three is constitutional. We cannot dispose of the case in this summary manner.

In *State v. Stevenson*, ante p. 416, Judge Mitchell intervened and stated facts showing that he was exercising the duties of an important office which affected the public and the rights of individuals, and asked the court to determine the validity of the act creating the office. Abundant oppor-

tunity had been given all parties to present the case to the court and elaborate arguments were made, and briefs filed. The court, therefore, was possessed of all the points relied upon by either party; but that is not the case at bar. The presumption is that the legislature has done its duty, and that an act passed by it is not in conflict with the constitution, and it is the duty of all ministerial officers to obey it until the act is declared invalid. The writ must be denied.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	508
39	520
18	508
53	761

WILLIAM H. WHITALL ET AL., PLAINTIFFS IN ERROR, V.
MARK S. CRESSMAN, DEFENDANT IN ERROR.

1. **Deposit of Funds into Court: INTEREST.** Where money was paid into the district court in satisfaction of a decree and for distribution, and an appeal taken to the supreme court, where the order of distribution was changed, *Held*, There being no order of the district court requiring the money to be put out at interest, that a party entitled to a portion of the funds, and who had obtained the same, was not chargeable with interest thereon; but for money to which he was not entitled, he was chargeable with interest.
2. **Costs: RETAXATION.** A party complaining of the taxation of costs in the district court must file a motion in that court to retax the same. The ruling on the motion to retax is subject to review.

ERROR to the district court for Cuming county. Tried below before CRAWFORD, J.

John D. Howe, for plaintiffs in error.

Lamb, Ricketts & Wilson, for defendant in error.

MAXWELL, J.

This case grows out of that of *Cressman v. Whitall*, 16 Neb., 592, the cause being remanded to the district court for the entry of a new decree in accordance with the views expressed in the opinion. The district court thereupon rendered a decree as follows:

"This cause coming on to be heard on the motion of the above-named defendants, for an order of the court to file the mandate of the supreme court herein and for the entry of a decree thereunder as therein commanded; said order and decree to be entered as of the term of the court said mandate was received and as the date of the same appears to have been filed by the clerk of this court, which said motion, after arguments by counsel, is hereby sustained. The court, after being fully advised in the premises, finds that the defendants, William H. Whitall, John D. Howe, and Richard F. Stevenson, received of said fund the sum of six thousand six hundred and fifty-six dollars and eighty-three cents, of date December 22, 1883, and that they are properly chargeable with seven per cent interest thereon from date of receipt up to November 19, 1884, when decree was ordered entered by the supreme court allowing certain defendants amounts therein stated, amounting to \$419.29, which, with principal, amounted \$7,076.12.

"The court further finds that on said nineteenth day of November, 1884, the said Howe and Stevenson were entitled to retain of said fund so as aforesaid found in their possession, the sum of \$5,799.36, due thereon, and their clients, to-wit: Howe and Stevenson, \$2,800; Eliza B. Gavit, administratrix of the estate of Nelson Gavit, \$2,986; William H. Whitall, \$18.26. That after deducting the above amounts there remained in the hands of Howe and Stevenson and Whitall, on November 19, 1884, the sum of \$1,276.76, which amount they are required to pay to the

clerk of this court; that the defendants, the West Point Manufacturing Company and the West Point Butter and Cheese Association, still retain of said fund the sum of \$500, which, with interest at 7 per cent from December 22, 1883, should be paid into court.

"It is therefore ordered, adjudged, and decreed by the court that the defendants, William H. Whitall and John D. Howe and Richard F. Stevenson, pay into court the sum of \$1,276.76, and that execution is awarded therefor; that the West Point Manufacturing Company and the West Point Butter and Cheese Association pay into court the sum of \$543.75; that on their failure so to do that the plaintiff is authorized to enforce the judgment lien in favor of William H. Whitall, and against the said West Point Manufacturing Company and the West Point Butter and Cheese Association in the case of *Romig et al. v. The West Point Manufacturing Company et al.*, and it is further ordered that the residue of said fund be disbursed in the manner following: That \$1,200 of the residue be held to await the order heretofore entered herein; that the residue of said fund be at once paid over to the said plaintiff, together with the \$1,200, if the same remains unclaimed under the order heretofore entered herein, or shall be awarded said plaintiff on further proceedings, as provided by the order heretofore entered herein; and that the plaintiff have and recover his costs, taxed at \$....., of, from, and against William H. Whitall, and that Howe, Stevenson, Gavit, or their attorneys, who received and retained out of said fund the several amounts so as aforesaid found due thereon, are required to file receipts with the clerk of this court for the several amounts so received and retained," etc.

The principal objection made by the plaintiff in error to the decree is the item of interest of \$419.29 for the use of \$6,656.-83 from December 22d, 1883, to November 19th, 1884, as it is claimed a considerable part of this money belonged to the parties named, and they should not be required to pay

interest on their own money. The directions of this court as to what the decree should contain is found in *Cressman v. Whitall*, 16 Neb., 600. It is there stated that the sum of \$2,800 was to be paid to Howe and Stevenson, and the money found due the Gavit estate, less the deduction of \$746, was to be paid to the agent or attorney authorized to receipt therefor. That \$1,200 was to be held for further proof of ownership, and that the remainder was to be paid to plaintiff (together with the \$1,200) if not awarded to the estate of Blair or his assignees.

There was no order of the district court that the money be put out at interest, and so far as the record discloses the money was simply held by the parties named, awaiting the order of distribution. This being so, a party should not be required to pay interest on *his own money*. The court awarded them certain sums. This money was theirs, and if they had not had the use of the money they would have been entitled to interest on the same; but as to those funds to which they were not entitled, interest will be charged at seven per cent. Some question is raised as to certain costs, but so far as appears no motion to retax has been filed, and a ruling had thereon by the lower court. This is necessary in order to review the proceedings on error. *Wood v. Colfax Co.*, 10 Neb., 556. *Linton v. Housh*, 4 Kas., 536. The decree of the court below will be modified in this court to conform to this opinion, and as thus modified it is affirmed.

JUDGMENT ACCORDINGLY. •

THE other judges concur.

STATE, EX REL. F. W. MATTOON, V. THE REPUBLICAN VALLEY RAILROAD COMPANY.

Railroads: DUTY TO MAINTAIN STATIONS. Under the provisions of the constitution and statutes relating to railroads, where a railroad is built through a town of fifteen hundred or more inhabitants, and it is *necessary* to have a station at that place, the corporation may be compelled to erect the same with the necessary side tracks, notwithstanding it has a station at the junction of that and another line one and one-half miles distant.

REHEARING of case reported 17 Neb., 647.

Burke & Prout, for relator.

Marquett & Deweese, for respondent.

MAXWELL, J.

An opinion was filed in this case in July, 1885, which is reported in 17 Nebraska, 647. A motion for a rehearing was filed on behalf of the defendant, and was sustained, and the case has since been reargued and again submitted. The facts are stated in the former opinion and need not be repeated here. It is claimed on behalf of the corporation that section 72 of the act providing for the incorporation of railroads authorizes the corporation to determine its own termini, and necessarily where its track shall be laid between the points named. Probably the construction of that section contended for, within reasonable limits, is correct, but the question is not involved in this case, as the company has actually laid its track through the city of Blue Springs. No question therefore arises under section 72.

In the defendant's brief it is said that, "the rights and powers given by the laws of Nebraska, commencing at section 72 on page 195 of the Compiled Statutes, under what is known as our charter, with all the rights and privileges

conferred by that general law, and those which may be fairly implied, as well as those which are expressly given, became a contract with the state and the respondent railroad company."

"We admit that the legislature under our constitution has a right to modify this contract in some respects, but it cannot go so far as to interfere with vested rights."

No one will seriously contend that the legislature or the courts can interfere with vested rights. But has a railroad company any vested rights under our constitution and statute to refuse to make a station and the necessary side tracks and buildings at a point on the line of its road between the places of the termini where it is *necessary* that there should be such a station? In order to determine this question it will be necessary to refer to a few of the sections of the constitution and the statute.

Section 1, Art. XI. of the constitution requires every railroad corporation doing business in the state to maintain a public office for the transaction of its business, where transfers of stock shall be made, etc., and requires those having control of the road to make an annual report, etc.

Section 2 provides that the rolling stock and movable property shall be liable to sale on execution.

Section 3 prohibits the consolidation of parallel lines, etc.

Section 4 declares railways to be public highways, and "free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law," etc.

Section 5 prohibits the watering of stock, and requires sixty days' notice of a proposed increase of stock.

Section 6 authorizes the taking by the legislature of the property and franchises of incorporated companies, when necessary.

Section 7 requires the legislature to "pass laws to correct

abuses, and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state," etc.

Section 7 limits the exercise of the right of eminent domain to corporations organized under the laws of this state. Other duties are imposed on the legislature in regard to the control and supervision of railroads, to which it is unnecessary to refer.

The several sections of the statute referred to in the defendant's brief must be construed subject to the above provisions of the constitution.

Section 72 of the general railway act provides that "any number of natural persons, not less than five, may become a body corporate, with all the rights, privileges, and powers conferred by, and subject to all the restrictions of this subdivision." Comp. Stat., Chap. 16.

Section 73 provides what the certificate shall contain and its form, and where to be filed.

Section 74 confers corporate power on the corporation "to do all needful acts to carry into effect the objects for which it was created," etc.

Section 75 provides that "such corporation shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate, and enjoy a railroad, with single or double tracks, with such side tracks, turn-outs, offices, and depots as *shall be necessary*, between the places of the termini of said road, commencing at or within, and extending to or into any town, city, or village named as the termini of said road, and construct branches from the main line to other towns or places within the limits of this state."

The above section is the one under which the defendant claims it has a vested right to locate stations at such points as it pleases. In view of our constitution it is unnecessary to discuss in this connection the public character of railroad corporations. That is very fully considered in the able and well-considered opinion heretofore filed in this

case by Judge COBB. By the terms of the statute the corporation is required to construct such side tracks, turn-outs, offices, and depots as shall be necessary.

In case of a contention between the public to be benefited by a station and the company in regard to the necessity of a station at any given point, the question becomes one of fact, to be ultimately determined from the evidence by an impartial arbiter—a court—although the legislature may provide the necessary rules and procedure for the determination of the matter. Being, therefore, a question of fact to be determined from the evidence, the court has jurisdiction in the premises and may inquire into the necessity for a station at the point indicated. That such necessity exists in this case, is fully shown by the evidence referred to in the former opinion. The railroad is built directly through the town—the property of its citizens taken for right of way, but no station at that point. It is said, however, that there is a station on the main line running east and west at Wymore, a town about one and a half miles away, and which has been built up since the construction of the road through Blue Springs. But that does not accommodate the people of the place last named and those that do business there. Suppose a railroad should run through the city of Omaha or Lincoln, and refuse to establish a station in the city, but did establish one a mile and a half beyond—would the court not have power to require the corporation to put in a station in either of these places upon it appearing that it was necessary to do so? That a station within the city would be necessary in such cases will be conceded; yet such a case differs only in degree from the one at bar. Here is a city of the second class, with fifteen hundred inhabitants, the center to a considerable extent of grain and stock shipments and of trade. Its business is not accommodated by the facilities of a rival town some distance away. We hold, therefore, that where a railroad is built through a town, particularly if of the size of Blue Springs,

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the railroad company must establish a station at that point whenever there is a necessity for the same. We adhere to our former decision, granting the writ.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18	516
27	424
18	516
28	747

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD
v. BROWN COUNTY AND JOHN STALEY, TREASURER.

1. **Revenue in Unorganized Counties.** Brown county was created in March, 1883, being attached to Holt county under the general statute for election, judicial, and revenue purposes. In June, 1883, the county commissioners of Holt county levied state, county, and school taxes upon the property in Brown county. In July, 1883, an election was had for county officers, and officers elected, who qualified and entered upon the duties of their office. In April, 1884, the F., E. & M^o. V. R'y Co. paid to the treasurer of Holt county the taxes levied by the county commissioners of that county on the railroad in Brown county; *Held*, That the taxes should have been paid to the treasurer of Brown county.
2. **New Counties: ORGANIZATION.** Upon the organization of a new county, and the election and qualification of its officers, the ligament which bound to the county to which it was attached for election, judicial, and revenue purposes is severed, and all business must thereafter be transacted with the new county.

ORIGINAL application for injunction.

H. C. Brome and Joy, Wright & Hudson, for plaintiff.

William H. Munger, for defendants.

MAXWELL, J.

This is an action to restrain the treasurer of Brown county from collecting from the plaintiff certain taxes levied

by the commissioners of Holt county on the property of the plaintiff in Brown county, in the year 1883. The cause is submitted on the following stipulation:

It is hereby stipulated and agreed by and between the above named parties that the above cause be submitted to the court upon the following statement of facts and conditions:

1. That plaintiff is a corporation duly organized and incorporated under the laws of the state of Nebraska, owning and operating a line of railroad from Fremont, in the state of Nebraska, north-west through the counties of Dodge, Cuming, Stanton, Madison, Antelope, Holt, and Brown, in said state, with a road-bed, tracks, side tracks, depots, right of way, bridges, and such other property necessary and used in the construction and use of said railroad, and plaintiff was such a corporation and owned said railroad at the various times hereinafter mentioned.

2. That the county of Holt, in said state of Nebraska, is a corporation duly organized and created under and in pursuance of the laws of said state, and was such corporation at the various times hereinafter mentioned.

3. That the defendant, the county of Brown, is now one of the counties of said state organized under and by virtue of the provisions of the act of the legislature of the state of Nebraska, which took effect September, 1878, entitled "An act to provide for the organization of new counties, and to locate the county seats thereof," and amendments thereto, and found in article II., chapter 17, of part I., of the Compiled Statutes of Nebraska. That said county of Brown did not become permanently organized until the 23d day of July, 1883, and the officers elected at the first election therein did not qualify until the 7th day of August, 1883.

That in pursuance of said act of said legislature last aforesaid, the governor of the state of Nebraska, on the 18th day of March, 1883, appointed commissioners to call

an election in said county for the purpose of electing county officers in said county and determining the location of the county seat therein. That said election was called by said commissioners and held on the 19th day of July, 1883, and the same was the first election ever held in said county, and the votes cast at said election were canvassed on the 23d day of July, 1883, and the officers elected at said election did not qualify until the 7th day of August, 1883. That the defendant John N. Staley is now the treasurer of said county of Brown.

4. That the boundaries of what is now the county of Brown were fixed by an act of the legislative assembly of the state of Nebraska in the year 1883, which took effect February 19, 1883, and all of said territory included in said boundaries by said act was named and entitled the county of Brown.

5. That said territory embraced and included in said county of Brown, as now organized, was situated directly west of said county of Holt, said county of Holt being in the year 1883, and for several years prior thereto, duly organized; the said territory now embraced in said county of Brown was by virtue of the laws of the state of Nebraska attached to the county of Holt for election, judicial, and revenue purposes, and the county authorities of said county of Holt, under the provisions of said statute, exercised control over, and their jurisdiction extended to all the territory embraced in what was afterwards Brown county.

6. That under and by virtue of the provisions of the act of the legislature of the state of Nebraska, approved March 1, 1879, found in Compiled Statutes of Nebraska, in article I. of chapter 77, part I., the proper accounting officers of plaintiff, on or about April 7, 1883, listed and returned to the auditor of public accounts of said state for assessment and taxation the property of said plaintiff, as provided by section 39 of said statute, which report and return showed the number of miles of said railroad in each

organized county of the state, and the total number of miles of its railroad in the territory which now comprises the county of Brown. That said return disclosed that said company had 57.36 miles of railroad in the county of Holt, then organized, and that it then had in the territory which has since become (but not then organized) the county of Brown 51.70 miles of said road.

That in pursuance of the provisions of section 40 of said statute last aforesaid, after said return was made by the plaintiff to the auditor of public accounts, the state board of equalization of said state of Nebraska returned and assessed the value per mile of said railroad of plaintiff so returned to said auditor; and on or before the 15th day of May, 1883, the said auditor certified to the clerk of said county of Holt the assessment per mile of said state board on said railroad, and the said mileage of said railroad in Holt county and in said territory which now comprises the county of Brown, and said assessment of said railroad in Holt and in the territory now comprising the county of Brown was received by said county clerk of Holt county from said state authorities for taxation, the said territory embraced in what is now the county of Brown being then still attached to Holt county for revenue purposes.

7. That the county commissioners of the county of Holt, on the 14th day of June, 1883, and while said county of Brown was still attached to said county of Holt for revenue purposes and unorganized, duly levied taxes upon all of the taxable property in said county of Holt, and upon all of the taxable property included in said territory which now comprises the county of Brown, including taxes upon the assessment made by said state board upon plaintiff's railroad in said county of Holt and in said territory now comprising the county of Brown; and all assessments made for said year 1883, upon all property for taxation in Holt county and in the territory now embraced in the county of Brown (excepting the plaintiff's said railroad assessed by

said state board) were made by assessors elected or appointed in said Holt county. That the said county commissioners of the county of Holt, in making said levy of taxes for the year 1883, levied a state tax of $6\frac{1}{8}$ mills, a county tax of 14 mills, and school taxes (certified up to the county clerk of Holt county by the several district boards) upon the assessed valuation of the plaintiff's road in Holt county, and in the territory attached thereto as Brown county, as well as on all other taxable property therein.

That the total taxes thus levied by the county commissioners of Holt county on the assessed valuation of plaintiff's railroad in said territory now comprising the county of Brown amounted to the sum of \$7,141.01.

That the said taxes thus levied by the commissioners of Holt county on the plaintiff's railroad in the territory now embraced in Brown county were carried out on the tax books of Holt county against said plaintiff's property, and the same delivered to the treasurer of said Holt county for collection as by law provided, with the warrant thereto signed by the county clerk of said county, commanding the treasurer of said county of Holt to collect the same as by law provided.

8. That on or about the 24th day of April, 1884, the said taxes so levied by the county of Holt on the plaintiff's said property in the county of Holt and in the territory now comprising the county of Brown being due, and said tax list being in the hands of the treasurer of said Holt county for collection, the plaintiff paid into the treasurer of Holt county on said day, in good faith, but with notice of the permanent organization of said Brown county, said taxes so levied against the said railroad in Holt county and in said territory now embraced in the county of Brown, and paid all taxes assessed and levied on its property for the year in said territory aforesaid, and received a receipt from said treasurer of Holt county therefor.

9. That the county authorities of Brown county never

at any time levied any taxes whatever upon any property in said county of Brown for the year 1883, and never levied any tax for said year on said railroad of plaintiff in said county of Brown, and said county of Brown was not organized at the time when by law the counties in said state of Nebraska are required to levy the taxes, but the taxes on all the property subject to taxation in said territory now comprising the county of Brown were levied by the proper authorities of Holt county.

10. That immediately after the permanent organization of said Brown county, and in the month of August or September, 1883, the county clerk of said county of Brown obtained from the tax books of Holt county a transcript of the said tax list or tax roll for said year 1883 of the taxable property within said Brown county, including the said property and railroad of this plaintiff, and filed the same in the office of the treasurer of said county; the said tax list being the taxes levied and carried out on plaintiff's property by the county authorities of Holt county aforesaid. And said transcript of said tax lists so obtained by said county clerk of Brown county from said Holt county is claimed by said Brown county to have been done under section 13, article II., chapter 17, part I., page 172, Compiled Statutes of Nebraska.

The foregoing are the facts with regard to the matters therein stated and agreed to as such by the parties to this action, and in addition thereto the plaintiff claims:

That the county of Brown never made any claim or asserted any right to any tax upon plaintiff's said railroad for said year 1883 before plaintiff paid the same to said county of Holt, but on the contrary disclaimed any right to receive or collect the same from plaintiff before plaintiff paid said taxes to said county of Holt, and the plaintiff paid said taxes without any knowledge or notice of any claim thereto on the part of said Brown county.

Which proposition defendants deny. And it is agreed

by the parties hereto that if the court shall be of the opinion that said statement of facts as last above stated, and to which said parties do not agree, is material to a proper determination of this case, then the said parties may take evidence in the manner of taking depositions upon said question, and the truth of said statement be determined by the court from such evidence, said depositions to be taken within such time as the parties shall agree upon or the court direct.

The said parties, from the foregoing facts, submit for the judgment of the court the following:

First. Did the taxes levied by Holt county upon the property of the plaintiff within the territory now comprising the county of Brown for the year 1883, belong to the revenue of Brown county?

Second. If so, did the payment of said taxes in full by plaintiff to the treasurer of Holt county on the 24th day of April, 1884, discharge plaintiff's liability for said taxes to Brown county?

Third. Under the agreed facts is plaintiff now liable to said Brown county for said taxes of 1883, levied as above stated and paid by plaintiff to Holt county?

FREMONT, ELKHORN & MO. VALLEY R. R. Co.

BY JOY, WRIGHT & HUDSON, *Attorneys.*

W. H. MUNGER, *Attorney for Brown County.*

Section 146 of chapter 18, Comp. St., provides that, "all counties which have not been organized in the manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county directly east for election, judicial, and revenue purposes," etc.

Section 147 provides that, "the county authorities to which any unorganized county or territory is attached shall exercise control over, and their jurisdiction shall extend to, such unorganized county or territory the same as if it were a part of their own county."

Section 1, Art. II. of Chap. 17, provides that, "when it shall be made to appear by the affidavit of three resident freeholders in any one of the unorganized counties of this state that such county contains a population of not less than two hundred inhabitants, and ten or more of such inhabitants being tax payers, may by memorial petition the governor to appoint three persons therein mentioned to act as special county commissioners, and one person by them named to act as special clerk for such county, and shall also name some place centrally located in the county for a temporary county seat, whereupon it shall be the duty of the governor to appoint and commission the persons so named for special county officers, and shall by appointment under his hand and seal declare the said place the temporary county seat of said county."

The second section requires the officers thus appointed to take an oath. The third requires the commissioners to divide the county into precincts, and to fix the time and places where an election will be held, and cause notices thereof to be given—the notices to specify the places of voting. The fourth section provides the mode of conducting the election. The fifth to the twelfth, inclusive, relate to the county seat. The thirteenth section provides that, "whenever any county organized under the provisions of this chapter shall have been previously attached to any other county for election, judicial, and revenue purposes, it shall be the duty of the county clerk chosen at the first election, after having qualified according to law, to procure from the proper officer of such county a transcript of all deeds, mortgages, judgments, and liens of *every description* upon real or personal property lying and being in such newly organized county, and cause the same to be recorded in the proper offices of his own county; such clerk shall be at full liberty to take such transcripts himself, and when recorded in the proper office in his own county shall stand headed with the name of the county and offices where taken,

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and a certificate attached thereto that they are correct, and such clerk shall receive for his services ten cents per folio for taking such transcripts, ten cents per folio for recording them, and ten cents per mile in going after and returning with them, which shall be audited, allowed, and paid to him by his own county.

Section fourteen provides, "that county and precinct officers elected at the first election as herein provided shall continue to hold their respective offices until the next general election held for the same offices in other counties, as provided by the election law in force at that time, and until their successors are elected and qualified." The third section provides for the election of county and precinct officers.

It will thus be seen that the attachment of an unorganized county to one that is organized for election, judicial, and revenue purposes is merely of a temporary character, nor need the relation continue longer than sufficient time to organize after the unorganized county contains two hundred inhabitants and ten tax payers. The unorganized county does not become a part of the organized one but for certain purposes therein named is placed under its care.

The object evidently was to protect life and property in the unorganized county and prevent a failure of justice. For the purposes named in the statute—election, judicial, and revenue, the organized becomes as it were a trustee for the unorganized, and this relation continues until the proper officers are elected and have qualified in the new county—in other words, until the unorganized county becomes organized and the officers elected at the first election have taken the oath and given the security required by the statute. The new county then has provided the machinery for county government and put the same in motion. It is now able to transact its own business, and it would seem both unjust and unreasonable to deny it and its citizens the right. Being an organized county the ligament that

bound it to the former county is severed by the force of the organization, and it takes its place as one of the counties of the state, and its officers become amenable to the law for the faithful performance of their duty. The county clerk of the new county is to obtain "a transcript of all deeds, mortgages, judgments, and liens of every description upon real or personal estate lying or being in such newly organized county." While this language in terms, perhaps, does not include tax liens, yet we think they were intended to be included, otherwise it would have been unnecessary to provide for the election of a county treasurer. Why provide a treasurer if the tax rolls are not to be placed in his possession and the revenue collected and disbursed by him upon warrants properly drawn? It is evident, therefore, that the transcripts referred to include the property assessed and taxes levied in the new county. This being so, after the organization of the new county is complete and its officers have qualified, all taxes due to it are to be paid to its treasurer, and a payment to the treasurer of the county to which it was formerly attached is not a payment to it. The fact that the taxes were levied by the commissioners of the former county under a special power, gives that county no authority to collect such taxes if in the meantime such special power has ceased, as the object of the statute is not to enable the organized to make the unorganized a source of revenue.

It is clear, therefore, that upon the organization of Brown county and the qualification of its officers, that it became an organized county and the special authority of the county officers of Holt county ceased. A payment, therefore, after that date to the treasurer of Holt county of taxes due to Brown county for 1883 upon property lying therein, was not a payment to Brown county and not a valid payment of said taxes. Such taxes being paid under a mistake, in justice should be repaid to the plaintiff or offset against other taxes due from the plaintiff. But that question is

not in this case. The injunction must be denied, and the treasurer of Brown county permitted to collect from the plaintiff the taxes in question.

JUDGMENT ACCORDINGLY.

THE other judges concur.

**EQUITABLE LIFE ASSURANCE CO., PLAINTIFF IN ERROR,
V. SAMUEL M. BROBST, DEFENDANT IN ERROR.**

1. **Insurance: AUTHORITY OF GENERAL AGENT.** Where the general agent of a life insurance company employs an agent to solicit risks, the company will be bound by the contract of employment unless the person employed had notice of private restrictions upon the authority of such agent.
2. ———: **EVIDENCE CONFLICTING ON AGENCY.** If the employment is admitted, but it is claimed that it was entered into by the general agent in his own name and for his benefit; where the evidence is conflicting the question must be submitted to the jury and its finding will not be set aside if sustained by sufficient evidence.

ERROR from Adams county. Tried below before MORRIS, J.

R. A. Batty, for plaintiff in error.

Capps & Cliggitt, for defendant in error.

MAXWELL, J.

This action was brought by the defendant in error against the plaintiff to recover for his services in soliciting risks of life insurance for the society. He states in his petition that he was employed by an agent of the company

and had rendered services of the value of \$350, on which there was a credit of \$25.00.

The insurance company in its answer alleges that W. W. Craine, with whom the contract was made, "is the agent of the defendant for all of its business of the north-west; that said W. W. Craine receives a commission on all of said business coming through his office; that said W. W. Craine has not or ever did have any authority to appoint agents for the defendant. The defendant denies that said plaintiff was ever employed by W. W. Craine as the agent of the defendant, but alleges the truth to be that plaintiff was employed as the agent of W. W. Craine with the express understanding and agreement that he should have no claim on the defendant. It is also alleged that one E. W. Connor, who assisted the plaintiff below in securing the premiums, was not the agent of the insurance company, but was employed by Craine.

On the trial of the cause the jury returned a verdict for \$325.00 and interest in favor of the plaintiff below, and judgment was rendered on the verdict. Exceptions were taken by the insurance company to a number of the instructions given and for the refusal to give certain instructions, but no reference is made thereto in the brief filed by its attorney and the errors, if any, will be considered waived. The only question, therefore, for consideration is, does the evidence sustain the verdict?

The testimony tends to show that in February and March, 1882, W. W. Craine employed the plaintiff below to solicit risks of life insurance; that in pursuance of such employment he did go to Hastings to solicit insurance, and in connection with Mr. Connor, who was sent by Craine to assist him, policies to a large amount were issued, the first premiums on which amount to \$2,000 or more; that this money was all paid to Connor, who it is claimed sent the same to the company, and that Connor paid the plaintiff below \$25, which is all the compensation he received.

All the testimony shows that the plaintiff below rendered the services, and that a fair compensation would be the sum claimed. Was Mr. Craine the general agent of the insurance company? And if so, did he on behalf of the company employ the plaintiff below?

All the testimony tends to show that Craine was the general agent of the company. The rule is well settled that the acts of a general agent with reference to the subject of the agency will bind his principal, although he may have received private instructions narrowing his authority, unless such instructions are known to the party dealing with him. *Furnas v. Frankman*, 6 Neb., 429. *Johnson v. Jones*, 4 Barb., 369. *Bryant v. Moore*, 26 Me., 84. *Davenport v. P. M. & F. Ins. Co.*, 17 Iowa, 276. *Cross v. Huskins*, 13 Vt., 536. *Hatch v. Taylor*, 10 N. H., 538. *Cruzan v. Smith*, 41 Ind., 288. *Cosgrove v. Ogden*, 49 N. Y., 255. *Bradford v. Bush*, 10 Ala., 386. *Hunter v. Janeson*, 6 Ired. L., 252. Whether Craine had private instructions or not of which the plaintiff had notice was a question for the jury, and having been found in favor of the plaintiff below the verdict will not be disturbed. The question as to the special employment of the plaintiff below by Craine was properly submitted to the jury, and in our view the verdict in that regard is correct. The claim that the plaintiff below was to render his services for the experience he would acquire in the business is not very plausible nor probable, and it is not surprising that the jury found against it. It is evident that justice has been done and the judgment is in all things affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PETER W. ROSE, PLAINTIFF IN ERROR, v. AMOS PECK,
DEFENDANT IN ERROR.

Offer to Confess Judgment: COSTS. In a case pending in the district court an offer made by defendant to allow judgment to be taken by the plaintiff in a certain amount therein stated and costs, which offer was in writing and filed in the office of the clerk of said court, but was not served upon the plaintiff or his attorney, nor was it made in open court, the plaintiff being present or having notice thereof; *Held*, Unsavailing to throw the costs made after the filing of such offer upon the plaintiff.

ERROR from Lancaster county. Tried below before POUND, J.

Brown & Ryan Brothers, for plaintiff in error.

Marquett, Deweese & Hall and *Foxworthy & Son*, for defendant in error.

COBB, CH. J.

This cause came up in the district court on appeal from a justice of the peace. The action was for trespass by live stock, for which the plaintiff claimed damages in the sum of one hundred dollars. There was an answer consisting of a general denial by the defendant and a reply by the plaintiff.

There appears upon the record an offer of judgment by the defendant, of which the following is a copy :

" AMOS PECK
v.
PETER W. ROSE. }

"Now comes the defendant, Peter W. Rose, by his attorneys, Brown & Ryan Bros., and offers to allow judgment to be taken against him for \$5.00 and costs in this action, wherein Amos Peck is plaintiff and Peter W. Rose is de-

Rose v. Peck.

fendant, now pending in the district court of Lancaster county, Nebraska.

"BROWN & RYAN BROS.,
"Attys. for Deft."

Which paper was endorsed:

"Amos Peck v. Peter W. Rose. Offer to confess judgment. Clerk's office, district court. Filed March 2, 1885.

"E. R. SIZER,
"Clk. D. C."

And also the following acceptance of offer:

"PECK }
 v. }
 ROSE. }

"Now comes the above-named plaintiff, and waives service of written notice of offer herein and hereby accepts the offer of defendant for judgment against defendant in favor of the plaintiff for the sum of five dollars and all accrued costs:

"AMOS PECK, *Plaintiff.*
"Per Foxworthy & Son, his Attorneys."

This paper was endorsed as filed in the clerk's office March 4, 1884.

There is a journal entry under date the 5th day of March, 1885, and 10th day of the term, reciting the said offer of the defendant and acceptance by the plaintiff, followed by a judgment for the plaintiff and against the defendant for the "said sum of five dollars, together with his costs therein expended, taxed at \$122.40."

On the same day there was filed a motion, of which the following is a copy: "*Amos Peck v. P. W. Rose*, comes now the defendant and moves the court for an order requiring the costs in this case, which have accrued in this case since the filing of the defendant's offer to confess judgment, to be taxed to plaintiff.

"BROWN & RYAN BROS.,
"Attys. for Deft. Rose."

There seems to have been several affidavits filed as well in support as in resistance of the said motion, but as they were not preserved by a bill of exceptions they cannot be considered here. There was also a cross-motion by plaintiff to tax the costs to defendant.

The court overruled the motion of defendant and sustained that of the plaintiff. The defendant thereupon brings the cause to this court on error, and assigns the following errors:

"1. The court erred in not sustaining the motion of plaintiff herein to tax the costs which were made after filing of offer to confess judgment to the defendant herein.

"2. The court erred in taxing the costs made after offer to confess judgment to plaintiff herein.

"3. The court erred in sustaining the motion of defendant herein to tax all costs in the case to plaintiff herein."

There is no brief by either party. The record contains no bill of costs, nor is there any evidence that there were any costs made in the case by either party after the filing of the offer to confess judgment, nor a suggestion even as to the amount of costs that were thus made.

Section 570 of the code provides as follows:

"After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed or part of the causes involved in the action. Whereupon if the plaintiff being present refuses to accept such confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount, and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer," etc.

Section 565 also provides that, "the defendant in an action for the recovery of money only, may at any time be-

Rose v. Peck.

fore the trial serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum specified therein. If the plaintiff accept the offer and give notice thereof to the defendant or his attorney within five days after the offer is served, the offer and an affidavit that the notice of acceptance was delivered in the time limited may be filed by the plaintiff, or the defendant may file the acceptance with a copy of the offer verified by affidavit; and in either case the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer."

Section 1004 also contains a provision on the subject of offers to confess judgment. But as that section applies only to justices courts it will not be noticed further.

The offer of the defendant not having been made in open court, nor served on the plaintiff in the court below out of court, does not come within the provision of either section, and was therefore unavailing to throw the costs made after its being filed in the clerk's office upon the plaintiff below, even if it appeared that any costs were made in said court after the filing of such offer.

The judgment and order of the district court are therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

GUST UPPFALT, PLAINTIFF IN ERROR, V. JOHN NELSON,
DEFENDANT IN ERROR.

18	533
30	184
18	533
35	167
18	533
39	186

Ejectment: PLEADINGS. Where in an action for the recovery of real property the answer of the defendant put in issue the title of the plaintiff, but alleged no equitable defense, a finding and judgment for the plaintiff upheld, notwithstanding there was evidence which, under proper allegations, would have tended to establish an equitable defense.

ERROR to the district court for Cuming county. Tried below before POST, J., sitting for CRAWFORD, J.

Parrish & Lewis and *Uriah Bruner*, for plaintiff in error.

T. M. Franse, for defendant in error.

COBB, CH. J.

This was an action for the recovery of a tract of land, together with compensation for the use thereof while in the alleged unlawful possession of the defendant. It was such an action as before the code was called an action of ejectment. But many years before the adoption of the code the legislatures of most of the states had abolished the most of the artificial and technical features of the action of ejectment as described by the common law writers; and yet it remained a common law remedy, as distinguished from equitable ones, and since the adoption of the code it remains "the remedy generally made available for the trial of title to land." See note to Chase's Blackstone, p. 733.

The statute of Nebraska, section 626 of the code of civil procedure, provides as follows:

"In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has

Uppfalt v. Nelson.

a legal estate therein, and is entitled to the possession thereof, describing the same * * * and that the defendant unlawfully keeps him out of possession. * * *"

Section 627 also provides that, "It shall be sufficient in such action if the defendant in his answer deny, generally, the title alleged in the petition, or that he withholds possession, as the case may be; but if he deny the title of the plaintiff possession by the defendant shall be taken as admitted. * * *"

Now I understand the meaning of these two sections, taken together, to be that this action is based primarily upon the legal title on the part of the plaintiff, but also depending upon his having also the right of immediate possession. The letter of the statute would seem to confine the defendant to a legal defense in so far as he may seek to dispute the legal title of the plaintiff; but after admitting the legal title of the plaintiff he may doubtless plead, and upon the trial prove, any fact or facts which upon recognized principles of equity would defeat the claim of the plaintiff to the immediate possession of the land. It will be seen, upon an examination of the section of the code last quoted, that such an answer on the part of the defendant would be altogether consistent with the actual possession of the land by the defendant, and in point of fact it is usually the case that the facts and circumstances of such possession constitute an important part of such equitable defense.

To apply the above observations to the case at bar, the petition of the plaintiff in the court below seems to be in due and approved form. The answer of the defendant in said court is equally unexceptionable in form for the purpose of presenting an issue upon the legal title of the plaintiff. Such legal title it not only does not admit, but directly denies, and it fails to state a single fact of an equitable character or which tends to invoke the equitable powers of the court.

This court has often repeated that proper allegations in pleadings are as necessary to a judgment as are the proofs to sustain such allegations; neither can be dispensed with in contested cases.

Having carefully examined the evidence in the case as preserved in the bill of exceptions, there remains no doubt on the mind of the writer that the *legal title* to the land is in the defendant in error, the plaintiff in the court below. Had there been such pleadings as were necessary to lay a proper foundation for the evidence introduced by the defendant and received by the court over the objection of the plaintiff, tending to show his equitable rights growing out of his transactions with the former owner of the land before the proper recording of plaintiff's deed, and other circumstances, such evidence would have been deemed entitled to very great weight in the disposition of the case. But for the want of such allegations in the pleadings it must be presumed that although the objection to the introduction of such evidence was overruled by the trial court, its final consideration was refused, and in this I conceive there was no error.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	536
24	103
18	536
62	427n

THE STATE OF NEBRASKA, FOR THE USE OF CUMING
COUNTY, PLAINTIFF IN ERROR, V. JAMES MORAN,
SEN., DEFENDANT IN ERROR.

Recognizance. In an action on a recognizance taken by a justice in a proceeding before him, under the provisions of chapter 37 of the Compiled Statutes, *Held*, That such recognizance was binding upon the security thereunto although the same was not recorded by the justice in his docket and was signed by the parties thereto.

ERROR to the district court for Cuming county. Tried below before BARNES, J.

Wilbur F. Bryant and *T. M. Franse*, for plaintiff in error.

E. K. Valentine, for defendant in error.

COBB, CH. J.,

This action was brought in the district court of Cuming county by the state, for the use of Cuming county, plaintiff, against James Moran, Jr., and James Moran, Sr., defendants. The defendant, James Moran, Sr., was served with process, appeared, and answered. James Moran, Jr., was not served, and did not appear in the case. The cause was tried to the court without a jury. There was a finding and judgment for the answering defendant, and the cause is brought to this court on error by the state.

It appears from the pleadings and bill of exceptions that on the 13th day of February, 1882, James Moran, Jr., was arrested upon a warrant issued by H. J. Stevens, a justice of the peace of Cuming county, and brought before said justice on a charge of bastardy by an unmarried woman whose name it is deemed unnecessary to give for the purposes of this case. There was an examination before

the justice in accordance with the provisions of section 1 of chapter 37 of the Compiled Statutes. That thereupon the said justice found probable cause for the said charge, and ordered the said James Moran, Jr., "to enter bail to appear at the next term of the district court in and for Cuming county, and in default thereof, of giving bond of \$500 to appear as above ordered, to stand committed to the jail of Cuming county. Whereupon said James Moran, Jr., submitted his bond with James Moran, Sr., as his surety thereto for his appearance, which bond was duly approved" by said justice in the sum of \$500. It further appears that at the next regular term of the district court of Cuming county the said James Moran, Jr., appeared and entered his plea of not guilty to said charge of bastardy, whereupon a trial was had to a jury, which found the defendant guilty. Thereupon the said defendant made a motion for a new trial, which was overruled, and thereupon it was by the court "ordered and adjudged that said James Moran, Jr., is the reputed father of the child of the prosecutrix * * * that said James Moran, Jr., pay the costs of this prosecution and pay * * * or her order, for the maintenance and support of said child, eighty dollars per year until said child be fourteen years old or until further ordered by this court," etc., and further ordered that said James Moran, Jr., give security in the sum of five hundred dollars for the performance of the said orders of the court, and that if he neglect or refuse to give security as aforesaid, and to pay the costs of said prosecution, "he shall stand committed to the jail of the county, to remain until he shall comply with the order of this court."

It further appears that afterwards and on the 21st day of March, 1882, the said cause came on again for hearing on a motion of plaintiff to forfeit the bond in said cause, "and thereupon the said James Moran, Jr., and James Moran, Sr., were each three times solemnly called in open

court, and appeared not, and the court adjudged said bond forfeited, and ordered a *capias* to issue for the said James Moran, Jr.," etc.

Upon the trial of the case at bar the defendant James Moran, Sr., objected to the introduction in evidence of the record as above, and especially of the said recognizance or bond, on the ground that the same was not such an instrument as is authorized by law to be taken by a justice of the peace, and hence is not binding upon the parties. And although such objection was overruled by the court on the trial and the record and bond or recognizance admitted in evidence, yet the court finally found "the facts to be that a *bond* was taken in this cause by the justice instead of a recognizance, and that the bond taken was not in law such a recognizance as the justice could take, and was not entered of record in his docket. The court therefore finds for the defendant."

The only question then for the consideration of this court is, whether the surety, James Moran, Sr., is legally bound for the penalty fixed by the said justice and contained in the bond or recognizance required to be given for the appearance of the said James Moran, Jr., and for his abiding the order of the court on said accusation. The recognizance or bond is in the following form:

"THE STATE OF NEBRASKA, } ss.
CUMING COUNTY.

"Be it remembered that we, James Moran, Jr., of Cuming county, Nebraska, as principal, and James Moran, Sr., as surety, do hereby acknowledge ourselves indebted to the State of Nebraska, for the use of Cuming county, in the penal sum of \$500, to be well and truly paid if default be made in the following conditions: Whereas, the said James Moran, Jr., has been arrested upon a warrant issued by H. J. Stevens, a justice of the peace in and for Cuming county, Neb., West Point precinct, upon the complaint of * * * an unmarried woman resident of said county, for being

the father of a bastard child of which said * * * was delivered June 18, 1881. The condition of this recognizance is such if the said James Moran, Jr., shall appear at the next term of the district court to be held in and for Cuming county, Neb., to answer such accusation and to abide the order of the court therein, then this recognizance to be null and void, otherwise in full force and effect.

"[Signed]

JAMES MORAN, JR.

"JAMES MORAN, SR."

"Taken and acknowledged before me this 13th day of February, 1882.

"Signed,

H. J. STEVENS,

"Justice of the Peace."

The proceedings in the original case, including the recognizance for the appearance of the accused, seem to have been substantially in accordance with the forms of procedure as contained in an approved and standard work on practice in justices court, and to be in conformity with the requirements of the statute.

The point is made by counsel in his brief that no testimony was admissible, for the reason that the petition does not state a cause of action on the following grounds:

"1. The conditions and obligations of the said recognizance are not set out, and a failure of said obligation averred as by law required.

"2. It does not aver that James Moran, Jr., principal obligee, failed to appear and abide the order of the 'district court of Cuming county, Nebraska,' at its next term after the making of the alleged recognizance, or at any term of that court.

"3. It does not state before whom said alleged recognizance was entered into.

"4. It is silent on the following necessary averments: 'A recognizance must be filed or made a record of a court to sustain a suit, and must be so averred in the petition.

It should also be averred that the default in not complying with the conditions of the recognizance was entered of record.'

"5. It does not aver that said alleged recognizance was ever filed by the justice of the peace, or that he certified the same to the clerk of the district court, as by statute required."

Some of the above points of objection would probably be good under a strict and technical system of pleading, but under a liberal system like ours, I think the court committed no error in receiving the testimony. Besides, the counsel presenting said points is not here attacking, but seeking to sustain, the judgment of the district court. The main question in the case—that arising upon the recognizance—not having been entered on the docket of the justice, and its having been signed by the parties, was fully discussed in this court in the case of *King v. The State*, ante p. 375, and to that case I refer for the reasons and authority upon which I come to the conclusion that the district court erred in its finding of fact, that the bond taken by the justice was not in law such a recognizance as the justice could take, and in finding for the defendant. By reference to the opinion in that case, it will be seen that a recognizance will be considered of record although never recorded by the justice taking it, and that it becomes such upon being returned to the proper court and there placed on file. The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

The other judges concur.

GEORGE W. ADAMS, PLAINTIFF IN ERROR, v. JOSEPH
N. THOMPSON, DEFENDANT IN ERROR.

Action on Appeal Bond: ESTOPPEL. Suit brought on an undertaking or bond entered into for the purpose of appealing from the judgment of a justice of the peace; *Held*, That the defendant was estopped to deny that an appeal had been taken in the case, in contradiction of his undertaking or bond executed in conformity to the statute for the purpose of perfecting an appeal, although the same was filed with the justice of the peace after the expiration of the time limited for that purpose; and the said appeal was dismissed in the district court for the reason of said undertaking or bond having been filed out of time. *Gudtner v. Kilpatrick*, 14 Neb., 347.

ERROR to the district court for Cass county. Tried below before POUND, J.

Beeson & Sullivan, for plaintiff in error.

H. D. Travis and *Crites & Ramsey*, for defendant in error.

COBB, CH. J.

It appears from the record in this case that the defendant in error, Joseph N. Thompson, in a certain action before G. C. Cleghorn, a justice of the peace of Cass county, recovered a judgment against one William W. Riggs, on the 11th day of September, 1882, for the sum of two hundred dollars and costs. That for the purpose of appealing said judgment to the district court, the plaintiff in error, George W. Adams, executed an appeal bond in said case in the usual form. This bond bore no date on its face, but was endorsed by the said justice as follows: "Received this bond this 22d day of September, 1882, and approved the same as to form and sufficiency, and not as to time, it being the eleventh day after judgment, and does not oper-

18	641
23	164
18	541
34	074
18	541
36	411
18	541
40	451
18	541
44	61
18	541
53	196

ate as stay of execution." At the following term of the district court, the said appeal having been docketed in said court, was, on motion of the said Thompson, appellee, dismissed, and the judgment affirmed, for the reason that the said appeal had not been taken within the time provided by law. Upon the said order of dismissal being certified to said justice of the peace, as required by law, an execution was duly issued against the said Riggs thereon, placed in the hands of a constable for service, and by him returned wholly unsatisfied for the want of goods of the said Riggs whereon to levy the same.

Thereupon the said Joseph N. Thompson brought his action in the district court against the said George W. Adams on the said appeal bond. The said Adams filed his answer in said action in which he denied that the said William W. Riggs ever appealed the said action from the said justice, or that he ever caused the said bond to be approved by the said justice, or that the same ever was in fact approved by him, and averred that the said justice refused to approve said bond. Also that the said first action was dismissed out of the said district court on motion of the said plaintiff, for the reason that said bond was not given within the time required by law, etc.

The cause was tried to the court, which found the issues for the plaintiff, and rendered judgment for him in the sum of three hundred thirty-six dollars and ninety-seven cents, besides costs. The defendant brings the cause to this court on error.

The question presented by the record is, whether a person who voluntarily becomes security for a losing party in an action before a justice of the peace or other inferior court for the purpose of enabling such party to appeal to the appellate court, upon the failure of such appeal on account of the same not having been taken within the time limited by law, will be held to the terms of such suretyship notwithstanding such failure of the appeal.

The purpose and object of an appeal in judicial proceedings is generally two-fold: 1. To enable the losing party to obtain a new trial in a higher court, and thereby possibly escape what he conceives to be an unjust judgment; and, 2. To stay the issuance of an execution against him. Hence it cannot generally be said that when the appellant fails to obtain a new trial he fails in the whole object and purpose of his appeal, as he has usually enjoyed the benefit of the stay of execution. But plaintiff in error claims that this case is an exception in that respect, and because of the endorsement by the justice of the peace on the bond that the same was not approved "as to time, it being the eleventh day after judgment, and does not operate as stay of execution," and as the court refused to approve the said bond and appeal, the office of securing a new trial of the cause in the appellate court, that the whole proceeding was abortive and of no effect to bind the maker of the bond. In support of this proposition counsel cited cases, most of which are cases arising upon incomplete delivery of official bonds, deeds of land, and commercial paper, and none of them exactly in point to the case at bar. There is a broad distinction between such cases and one like that under consideration, where a party to a proceeding in court presents a paper which immediately upon such presentation becomes a part of the record. No question of delivery or acceptance can, in my judgment, arise in such case. As to the point whether the giving of the appeal bond under consideration did, in point of fact or of law, stay the issuance of an execution, notwithstanding the peculiar endorsement of the justice, it is quite evident that it was given that effect by the plaintiff in that court, as no execution was issued or applied for, so far as the record shows. And had one been issued by the justice, after the filing of the bond, it would doubtless have been enjoined. A justice of the peace doubtless has control of his own records, and has the power to reject or return a paper presented for approval

and filing clearly out of time. But when, instead of rejecting or returning it, he endorses even a qualified approval upon and places it on file, thus making it a part of the record of the case, he is in his future action bound to recognize it as such.

But while the justice is estopped by the record which he has made, the party who has procured the same to be made is equally estopped to deny its legal effect, and equally so is his bondsman or security.

The question of law involved in this case was before this court in the case of *Gudtner v. Kilpatrick*, 14 Neb., 347. The only difference between that case and the case at bar is, that there the appeal was taken in time, but the district court dismissed it, holding that the case was not appealable, the judgment before the justice having been taken and rendered upon default of and in the absence of the defendant, etc. After a pretty thorough examination of authorities we held in that case that the defendants—the defendant in the justice's court as well as his security having signed the appeal bond and been sued thereon—were estopped to deny that an appeal had been taken in the case, etc., and so reversed the judgment of the district court in favor of the defendants, and I see no sufficient reason for reversing the conclusion to which we were led by the authorities and reasons then considered.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

D. E. SEDGWICK, APPELLEE, v. GEO. W. DIXON ET AL.,
APPELLANTS.

18	545
34	515
18	545
39	687
18	545
43	715

1. **Usury.** Where a promissory note secured by mortgage based in part upon an usurious consideration is transferred before maturity to a *bona fide* purchaser for value, without notice, and in the usual course of business, he takes it free from the defense of usury. *Wortendyke v. Meehan*, 9 Neb., 221.
2. **Attorney's Fee.** An attorney's fee under the act of February 18, 1872, when allowable should "be fixed" and allowed by the trial court upon a recovery of judgment by a plaintiff, and when once fixed within the statutory limits the amount thereof will not be changed by the supreme court.

APPEAL from York county district court. Heard below before NORVAL, J.

Scott & Gilbert, for appellants.

Sedgwick & Power, for appellee.

COBB, CH. J.

This action was brought in the district court of York county to foreclose a mortgage executed on real property situated in the said county by the appellants to the Phoenix Mutual Life Insurance Company. Judgment was rendered for the plaintiff in the district court, and the cause is brought to this court on appeal by the defendants.

The only defense presented by the pleadings is, that the consideration for the note to secure which the mortgage was given was usurious. And defendants set out in their answer the facts upon which their said plea of usury is based: 1. That said Phoenix Mutual Life Insurance Company agreed to loan the defendants the sum of seven hundred dollars for five years at ten per cent interest payable

semi-annually, but that said Phoenix Mutual Life Insurance Company only actually paid or delivered to said defendants the sum of six hundred and eighteen dollars, and took therefor their principal note, due in five years and twenty-two days, for seven hundred dollars, and their nine interest or coupon notes for thirty-five dollars each, and one interest or coupon note for thirty-nine dollars and twenty-seven cents.

Defendants also deny in their answer that Juliette H. Lawrence and Frank Tipton purchased the said note and mortgage in good faith and before the maturity thereof, but allege that they purchased the same with full knowledge of the facts in the said answer before stated, etc.

If the note was usurious in the hands of the Phoenix Mutual Life Insurance Company, but was by it sold before maturity to a purchaser who received it *bona fide* for value and in the usual course of business, and who afterwards transferred it to the plaintiff, then the defense must fail as completely as though there were nothing in the pleadings or proof to establish usury in the inception of the transaction.

It appears from the pleadings and testimony that the note became due on the first day of May, 1883, and that on the 28th day of March, of the same year, the note was sold and assigned to Juliette H. Lawrence for its value, and without notice of its usurious character. Mrs. Lawrence having been called to the stand to prove the above facts was submitted to a searching cross-examination. But from the findings of the court we must presume that she sustained herself throughout, not only in the assertion of her own *bona fides* and want of notice or knowledge of the usurious character of the note, if such it had, but of its having been purchased by herself without the intervention of an agent, and in the usual course of *her own business*; and I cannot say that there was not sufficient evidence before the court to sustain such findings.

Having reached the above conclusion it becomes unnecessary to examine whether the transaction was usurious as between the original parties to the note, or the subordinate question as to whether Moore and Ocoboc were the agents of the loaner or of the borrower, or the question raised by counsel for the plaintiff, whether upon the assumption that the husband of Juliette H. Lawrence acted as her agent in the purchase of said note it was incumbent upon the plaintiff to negative his knowledge or notice of the usurious character of the note, if such it had, or whether on the other hand the burden of proof again shifted upon proof of the *bona fides* and want of knowledge or notice of the purchaser herself. These are all interesting questions, but a press of business and the near approach of the next term admonish me to resist the temptation to enter upon their discussion at this time.

The note in this case contained a clause for the payment of an attorney's fee equal to ten per cent of the amount found due to the holder of the note in case of its collection by law. The district court found that fifty dollars was a reasonable attorney's fee for the services performed in that court, and awarded the plaintiff that sum. Counsel for appellee, in the brief, now contend that as by reason of the appeal to this court appellants having made further service of attorneys necessary, this court ought to award them an additional sum.

The act of February 18, 1873, Gen. Stat., 98, which was in force at the date of the transaction we are now considering, did not contemplate the naming of a particular or definite sum in a note or mortgage which the maker would pay as an attorney's fee, but it simply empowered the court in the class of cases therein mentioned to award to the plaintiff an attorney's fee not exceeding ten per cent of the recovery. But this is to be awarded to the plaintiff upon "a recovery of judgment," and no power is

Selling v. State.

granted this court to enlarge such award upon affirming such judgment on appeal.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

HENRY SELING, PETER FOX, JAMES CLARK, JOSIAH CLARK, AND FREDERICK NAUBAUER, PLAINTIFFS
IN ERROR, V. THE STATE OF NEBRASKA.

1. **Criminal Law: HOUSE BREAKING.** In a prosecution for a violation of section fifty-one of the Criminal Code, where it is shown that the accused went to the house of another in the night time and called to the persons within, who were asleep, to open the door, falsely stating that he was the sheriff of the county and desired to serve a subpoena; but when the door was opened he ordered the inmates of the house to throw up their hands, but before he could enter the house the door was closed, and through which he shot twice, and then forced the door open and entered the house, this was held to be sufficient proof of a breaking and entering.
2. ———: ———: **EVIDENCE.** The fact that such person after obtaining admission approached the head of the family in his bed, fired off his pistol, and presented the muzzle thereof to the person, ordering him in a threatening manner to hold up his hands, would be sufficient proof of personal violence to meet the requirements of said section fifty-one.
3. **Trial: QUESTIONS FOR JURY.** Questions of fact are for the trial jury to determine, and when the testimony is conflicting a verdict of guilty in a prosecution for a misdemeanor will not be set aside if there is evidence sufficient to sustain it, notwithstanding it may be contradicted by the testimony on the part of the defense.

ERROR to the district court of Adams county. Tried below before MORRIS, J.

Hayes & Taggart, for plaintiffs in error.

William Leese, Attorney General, and *A. H. Bowen*,
for the state.

REESE, J.

Plaintiffs in error were indicted for a violation of section fifty-one of the Criminal Code. Upon trial they were found guilty, and judgment of conviction was rendered on the verdict. Three questions are presented for decision by their brief. The first is, that the verdict was not sustained by sufficient evidence. The plaintiffs were tried jointly, but the contention in the brief is separately made, and it is insisted with considerable force that as to a part of them at least the verdict should be set aside. The bill of exceptions is quite voluminous, and we can see no good purpose to be subserved by a critical review of all the testimony. We have carefully read all the evidence, and find it as contradictory as it is possible for it to be. The witnesses for the state speak with absolute certainty as to the identity of plaintiffs in error, some of whom they knew by their faces, although they were partially masked, and some by their voices, while each defendant as positively testified that he was not present at the time of the commission of the offense, and knew nothing of it until his arrest after the finding of the indictment, and by the testimony of their families and co-defendants proved that they were elsewhere at the time the crime is alleged to have been committed. Two of the witnesses for the defense were, upon cross-examination, shown to have been criminals; one, a defendant, admitting that he had been twice convicted of felonies, and the other, the wife of a defendant, having cohabited with her husband in adultery for a number of years until the Monday last preceding the trial. Six witnesses testify that the reputation of the principal

witness on the part of the state for truth and veracity is bad, while five testify it is good. Under these circumstances the question of the weight of the testimony of each witness was peculiarly for the decision of the jury. Without discussing any of the testimony as applicable to each one of plaintiffs in error it is sufficient to say that if the jury believed the testimony of the witnesses for the prosecution there was sufficient to sustain the verdict.

The second contention upon the part of plaintiffs in error is, that the testimony of the witnesses for the state, if true, does not sustain the charge of *breaking* into the dwelling-house of the witness Hornback as charged in the indictment. The testimony on this branch of the case is, in substance, that soon after four o'clock on the morning of the 26th of February, 1884, while it was yet dark, plaintiffs in error went to the house of the witness and called. This call awoke Hornback, who was asleep with his family in the house, and he inquired who was there. The answer was, "The sheriff from Hastings, with a subpoena." He then instructed his son to open the door. The son lighted a lamp and opened the door. As soon as the door was opened he was ordered to throw up his hands, which he declined doing, but closed the door. Two shots were then fired, the balls passing through the door. The door was broken open, when the assailants entered, firing two additional shots, and ordering Mr. Hornback to throw up his hands, and Mrs. Hornback to get out of bed and dress herself. Three pistols were pointed at Mr. Hornback, yet in bed, accompanied with the order to throw up his hands. No further notice need here be taken of what occurred in the house. This is sufficient to show the breaking. Wharton's Crim. Law, § 765.

The third contention is as to the proof of personal violence. Upon this part of the case but little need be added to what we have already said. The firing of four pistol balls into a house, one of which, from the direction taken,

might quite reasonably be presumed to have been aimed at Mr. Hornback, would seem to be sufficient. The pointing of a loaded pistol at another in a menacing manner is an assault. Wharton's Crim. Law, § 606. Would the pointing of three loaded pistols in such a manner be any the less an assault? We presume not. As to the ultimate purpose or object of the visit we are left in doubt. A part of Mr. Hornback's property was carried out of the house, but when he called his assailants by name and told them he recognized them they withdrew, but not until after the commission of the crime charged was complete.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE VILLAGE OF PONCA, PLAINTIFF IN ERROR, V.
JAMES CRAWFORD, DEFENDANT IN ERROR.

1. **Evidence.** The rule of evidence which precludes the proof of the contents of written instruments or records by parol testimony, does not preclude oral testimony of the existence of such instruments or records preliminary to their introduction or proof of their loss or destruction.
2. **Discretion of Court.** The order of introducing evidence is discretionary with the trial court.
3. **Error Without Prejudice.** A judgment will not be reversed nor a verdict set aside for an error which has been committed without prejudice to the party complaining.
4. **Personal Injuries: DAMAGES: EVIDENCE.** Where in an action for damages resulting from personal injuries a physician, being a son of plaintiff, was permitted to testify, over the objection of defendant, to the opinions expressed by consulting physicians who were called to examine plaintiff as to the results of the injury, it was *Held*, To be error, the testimony being incompetent and hearsay.

18	551
23	663
18	551
27	774
18	551
31	107
18	551
36	146
18	551
44	20
18	551
45	281
18	551
50	544

ERROR to the district court of Dixon county. Tried below before CRAWFORD, J.

Ganti & Norris, for plaintiff in error.

L. S. Fawcett and Barnes Bros., for defendant in error.

REESE, J.

This action was instituted in the district court by defendant in error to recover damages alleged to have been sustained by reason of personal injuries suffered in the corporate limits of defendant, by falling from the end of a sidewalk onto a "saw-bench" and other obstructions which had been left lying at the end of the sidewalk. The sidewalk was laid along the east side of Union street from Third street south, along the west side of a building to its south-west corner, where it terminated at a height of about three feet above the ground, and without any steps or other convenient way of getting onto or off the sidewalk. The night of the accident was a dark one. Defendant in error, being a stranger in the village, and desirous of passing south on Union street, took the sidewalk referred to, following it to the end, where he discovered the termination of the walk by the dark appearance in front of him, but supposing it had been provided with steps or other convenient method of descent, placed one foot on the end of the sidewalk and reached down with the other, "feeling" for the step. He lost his balance and fell, receiving the injury complained of. The trial resulted in a verdict in favor of defendant in error for \$1,100.00, upon which judgment was rendered. Plaintiff in error brings the case to this court, and seeks a review. The questions presented for discussion will be noticed in the order in which they occur in the brief of plaintiff in error.

The first proposition to which our attention is called is,

that the district court erred in overruling a motion for an order on defendant in error requiring him to make his petition more definite and certain. We are unable to find any record of a ruling upon this motion, and as an answer to the petition was subsequently filed, we must presume the motion was waived.

On the trial one W. H. Clark was a witness for the purpose of proving certain steps taken by the citizens of plaintiff in error preliminary to its organization as a village, that question having been put in issue by the answer. This witness testified that in the year 1876 he was one of the members of the board of county commissioners of Dixon county. He was then asked whether or not there was ever presented to the board of commissioners of which he was a member a paper purporting to be a petition asking for the incorporation of the village of Ponca. This question was objected to by plaintiff in error as being incompetent, irrelevant, and immaterial, and not the best evidence, the petition itself being the best evidence. The objection was overruled, and the ruling of the court is now assigned for error. Leaving out of consideration the fact that the petition was shown by the next witness to be lost, we cannot see that the court erred in overruling this objection. The question put to the witness did not seek to prove the contents of the paper referred to, but the fact that what purported to be such a paper had existed and was presented to the commissioners. We do not understand that the rule prohibiting oral proof of the contents of a paper also prohibits proof of the existence of such a document.

The county clerk was called as a witness, and after the necessary preliminary proof the county commissioners' record for July 5, 1876, was offered in evidence, to which objection was made as incompetent, irrelevant, and immaterial. This objection was overruled, and the ruling is complained of. This record was clearly competent, relevant, and material. Had the objection been urged that the proper

foundation had not been laid by the introduction of the petition, or proof of its loss, a different question would have been presented, and the witness could have been interrogated, if necessary, as he was a moment afterward, as to the loss of the petition. The record showed by its recitals that a petition was filed, and while we do not decide that any further proof was necessary, yet, if such were the case, the want was supplied by proof of the loss of the petition. Objection was also made to the introduction of two patent deeds from the United States to the trustees of Ponca, under the act of congress of March 3, 1855, commonly known as the "Town Site Act," by which the land upon which the village is situated was deeded to the corporate authorities of defendant. These patents were introduced for the purpose of proving the incorporation in fact of defendant. Whether they were competent for that purpose is not a controlling question in this case, for the reason that their introduction could work no possible prejudice to plaintiff in error, since it was shown by defendant's own records that the trustees appointed by the county commissioners on the 5th day of July, 1875, duly qualified and entered upon the discharge of their duties on that day, and that the corporate powers of defendant had been maintained and exercised ever since. While it was material and necessary to show the incorporation of defendant, yet the legality of each step taken in such organization and incorporation, which had been in actual existence for years before the accident, was not a material nor necessary inquiry. *Back v. Carpenter*, 29 Kas., 349. In this connection it is insisted that the court erred in overruling the motion of plaintiff in error to strike out all of the testimony of the witness then upon the stand that did not tend to prove the corporate capacity of plaintiff in error, the court having sustained an objection to further testimony as to the condition of the sidewalk, upon the ground that the incorporation had not been proved. But as the incorpor-

ation was subsequently proven, the error, if one, was without prejudice, and could not affect the rights of plaintiff in error. At most it could only reach to the order of the introduction of proof, as it could not be claimed the testimony would have been improper had it been introduced after proof of the user of the corporate franchise by plaintiff in error. The order of the introduction of testimony must be left to the discretion of the trial court. *Goodman v. Kennedy*, 10 Neb., 270.

The clerk of plaintiff in error was called as a witness, and identified the claim presented to the board of trustees for the damages demanded, and which was rejected by them. The claim was admitted in evidence over the objection of plaintiff in error. The object of this evidence, as stated and understood at the time of its introduction, was to show a compliance with section eighty of chapter fourteen, Compiled Statutes of 1881, which provides, in substance, that no costs shall be recovered against a city or village in certain cases where the claim has not been presented to the city council or board of trustees to be audited. As it has been decided by this court that the provision of this section applies alone to claims arising upon contract, and not upon torts, the testimony was improperly admitted. *Nance v. Falls City*, 16 Neb., 85. But whether or not the error would be considered of so prejudicial a character as to require a reversal of the judgment, it is not necessary now to decide, as the judgment will have to be set aside for reasons hereafter given.

The next question presented by plaintiff in error is based upon the action of the court in overruling its objection to the testimony of the witness Dr. R. B. Crawford, a son of defendant in error. Defendant in error in his testimony stated in substance that he had suffered a great deal, and that one of his breasts had become greatly enlarged, and there was at that time a swelling there, and that about two or three weeks before the trial "something swelled up in"

his breast which almost suffocated him. After considerable testimony of that character he was caused to remove his clothing and expose his body to the jury, exhibiting the enlargement. When Dr. Crawford, the son, was called as a witness, he testified, among other things, as to this enlargement, and the condition of defendant in error from the time of the injury to the trial. His testimony upon the subject of this enlargement was in part as follows:

Q. State, if you can, what caused that or what it is?

A. I don't exactly know what it is. I will be honest in that confession. I have been puzzled in my own mind in regard to it. So much so that I laid the case before Drs. Frazee, Beggs, and Clinger, of Sioux City, and they were not fully decided in their own minds as to what it was.

Q. Were you present at the time of this alleged examination by those doctors?

A. I was, yes, sir.

Q. Did you take part in it?

A. Yes, sir.

Q. Go on and state what was done.

A. They removed his clothing and examined this enlargement. I had it done with a view to know whether it was endangering his life or not. I was undecided in my own mind whether it was or not, and it worried me a good deal. Their opinion was it was the result of an injury.

Defendant objects as being incompetent and not responsive. Objection overruled by the court. Defendant excepts.

Q. State whether or not you took part in this examination?

A. I did, as I said before, I believe.

Q. State what you found as the result of that examination?

A. They didn't decide fully what it was.

Q. State more fully whether you took part in the examination, and in the forming of the opinion that resulted?

A. Well, if you will allow me to explain, I took him into Dr. Frazee's office first and told him there was a matter that I wanted an opinion about, and if he thought best I wanted other opinions in regard to it. I told him what my opinion was about it. He said he would like to have Dr. Beggs see that also, so we had Dr. Beggs come in, and then we had Dr. Clinger come in, and they all examined that with him. All of us had hands in that examination, and each expressed his opinion of it after it was done. The result of that examination was that we decided that it was the result of an injury.

Defendant objects to the last clause of the above answer as being incompetent, irrelevant, and immaterial, and hearsay, and moves to strike it from the record for that reason. Motion and objection overruled by the court. Defendant excepts.

Q. State your conclusions as the result of that joint examination?

A. I think we all decided that it was a tumor resulting from an injury.

The admission of this testimony so far as it applied to the expressions of opinion by the other physicians was clearly incompetent and prejudicial. The examination was *ex parte* produced by defendant in error and his son, without the knowledge of plaintiff in error, its agents, or attorneys, none of the physicians engaged in it were under oath and no opportunity given the defendant in error to cross-examine them as to the basis of their conclusions. The testimony was upon an essential part of the case, and was simply hearsay.

We know of no rule by which the testimony or opinions of expert witnesses may be produced in evidence, save by the usual methods of taking their testimony where the opinion rests upon the facts of the case on trial. If those doctors had opinions as to the cause of this enlargement of which defendant in error desired the benefit, he should

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have placed them upon the witness stand, in order that plaintiff in error might cross-examine them.

It is contended that the court erred in giving certain instructions asked by defendant in error, and in refusing to instruct according to the prayers of plaintiff in error. It is sufficient to say that we have examined these instructions and find no good cause for complaint.

For the error in admitting the objectionable testimony above referred to a new trial must be granted.

The judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

18	558
43	611
43	858
18	558
47	371
18	558
58	773
18	558
59	50

BENJAMIN A. GIBSON, PLAINTIFF IN ERROR, v. ALBERT N. SULLIVAN AND REUBEN W. HYERS, DEFENDANTS IN ERROR.

1. **Error Without Prejudice.** A judgment will not be reversed nor a verdict set aside when an error has been committed without prejudice to the party complaining.
2. **Written Instructions for Jury.** The provision of section 54 of chapter 19 of the Compiled Statutes, directing the charge of the court to the jury to be written in consecutively numbered paragraphs, is a right which the supreme court will regard as waived if no objection is made or exception taken at the time the charge is given, or where exception is taken to a particular clause only. *Smith v. The State*, 4 Neb., 277.
3. **Trial: QUESTIONS FOR JURY.** Juries are the judges of questions of fact when properly submitted to them in cases of conflicting testimony.

ERROR to the district court for Cass county. Tried below before BROADY, J., of the first district, sitting in that county.

E. H. Wooley, for plaintiff in error.

Beeson & Sullivan, for defendants in error.

REESE, J.

This was an action brought by plaintiff in error against defendants in error to recover the sum of \$200.00, alleged to be due from them as commissions for negotiating a sale of certain real estate owned by them. The cause was tried to a jury, and resulted in a general verdict for defendants and a judgment against plaintiff for costs. Plaintiff alleges error and brings the case into this court.

The real difference between the parties was, that plaintiff insisted that the land was placed in his hands for sale as a real estate broker, for a certain price, that he effected a sale of part and procured a purchaser for the remainder, and, therefore, was entitled to the usual and customary fees or commissions charged by brokers, while defendants insist that they instructed him that the price named was the net price required by them, and, therefore, no commissions were due, even if plaintiff had sold the land. The testimony showed that the transaction was a tedious one in its development, and that it was some time after the first contract or agreement was made until the sale was finally ratified by defendants. Various objections were made as to terms of payment, etc., and offers submitted for the purpose of overcoming them, but finally the sale was consummated. The whole can be said to constitute but one transaction or trade. Urging the contrary view, plaintiff insists that the court erred in overruling an objection made by him to a question asked him on his cross-examination. One answer to this objection is, that the answer of plaintiff being directly in favor of his theory of the case, even if the court did err in overruling the objection, no possible prejudice could result to him, and

therefore the judgment could not be reversed on that ground. *Dillon v. Russell*, 5 Neb., 489. *Eiseley v. Malchow*, 9 Id., 181. Other reasons supporting the ruling could be assigned, but this is sufficient.

The next contention is, that the motion for a new trial should have been sustained because the instructions given by the court on its own motion were not in consecutively numbered paragraphs, and the word "given" was not written on the margin as required by sections 54 and 55 of chapter 19 of the Compiled Statutes. This objection was not made until after verdict. The record shows that when the objection was made the court offered to number and endorse the instructions, but the offer was "respectfully declined." The objection now urged cannot be available to plaintiff in error. The court proposed to number the instructions and allow exceptions to such as were objected to. Nothing more could have been accomplished had the instructions been numbered by paragraphs before being read to the jury. If it was not desirable before the exceptions were taken, it could accomplish no good purpose, and would be an empty form. It may also be observed that parts of the instruction were excepted to, and this "will be considered as a waiver of the right to have the charge paragraphed and numbered." *Smith v. The State*, 4 Neb., 277.

Objection is made to certain instructions given to the jury. It is claimed that they are indefinite, and might tend to confuse the jury. We have carefully examined all of the instructions and cannot so hold.

The contention on the part of plaintiff is, that he actually sold one quarter of a section and procured a purchaser for two others. The court gave the following instruction, which is excepted to: "The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence of every material allegation of his petition, as to each alleged sale and service before he can recover for such sale,

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and to satisfy you by a fair preponderance of the evidence as to every material allegation of his petition as to both sales before he can recover for both." It is claimed that this part of the instruction, when considered with the rest of the charge, might lead the jury to conclude that no recovery could be had by plaintiff unless he could recover for both sales. We do not think this position can be successfully maintained, as the next succeeding instruction was in the following language: "It is competent for you, if you think the evidence so justifies, to find in favor of one party to this suit as to one alleged sale, and in favor of the other party to the suit as to the other sale. If you find for the plaintiff as to one or both of the alleged sales, you will find a verdict for the plaintiff and assess his damages in the verdict. If you fail to find in favor of the plaintiff as to either of the alleged sales by a fair preponderance of the evidence, you will find for the defendants."

The next and last contention of plaintiff in error is, that the verdict is against the clear weight of the evidence. The testimony was conflicting, and while the circumstances seem to support the theory of plaintiff in error as to his demand for at least a part of the amount claimed, yet the whole question of fact was fairly submitted to the jury, and as there was sufficient testimony to support the finding, it cannot be disturbed.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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19 687

ANTON CABON, PLAINTIFF IN ERROR, V. CHARLES
GRUENIG, DEFENDANT IN ERROR.

Transcript of Judgment. Any person having a judgment rendered by a county court, without reference to the amount of such judgment or whether rendered by the county court during a regular term or by the county judge when exercising the ordinary powers and jurisdiction of a justice of the peace, may file a transcript thereof in the office of the clerk of the district court in any county in this state and cause an execution to issue thereon.

ERROR to the district court for Pierce county. Tried below before CRAWFORD, J., sitting for TIFFANY, J.

H. C. Brome, for plaintiff in error.

L. F. Hale and *E. P. Weatherby*, for defendant in error.

REESE, J.

The only question presented for decision by this case is, whether or not the transcript of a judgment rendered by a county judge when exercising "the ordinary powers and jurisdiction of a justice of the peace," when filed in the office of the clerk of the district court of a county in this state other than the one in which the judgment is rendered, becomes a lien on the real estate of the judgment debtor in such county and whether an execution can be issued thereon.

Section 18 of chapter 20 of the Compiled Statutes is as follows:

"Any person having a judgment rendered by a probate (county) court may cause a transcript thereof to be filed in the office of the clerk of the district court in any county of this state, and when said transcript is so filed and entered upon the judgment record, such judgment shall be a lien on real estate in the county where the same is filed, and when

the same is so filed and entered upon such judgment book, the clerk of such court may issue execution thereupon in like manner as execution is issued upon judgments rendered in the district court"

It is insisted by plaintiff in error that this section only refers to such judgments as are rendered by the county court in its jurisdiction which is concurrent with the jurisdiction of the district court, and that it has no reference to judgments rendered by the county judge when in the exercise of the powers of a justice of the peace. While it is true there is a distinction between these two jurisdictions as to rules of practice, etc., yet it seems that this distinction has no reference to the judgments of such court after they are rendered, so far as may apply to the section under consideration. In some instances the legislature seems to have recognized this distinction, in others not. By section one of the act there is established in each organized county a probate (county) court which shall be held by the probate (county) judge and shall be a court of record, etc. Its proceedings out of term time shall be as valid and effectual as if had or made at a regular term. By section two it is provided that *county judges* shall have and exercise the ordinary powers and jurisdiction of a justice of the peace, and by the same section county judges have concurrent jurisdiction with the district court in the sum of \$1,000. The provisions of sections eight, nine, ten, eleven, sixteen, seventeen, nineteen, twenty, twenty-one, twenty-two, and twenty-six, seem to recognize all actions pending, or proceedings had, as being in the county court, but that the proceedings shall differ according to the amount involved in the action or proceeding.

We do not conceive that the views here expressed are in any degree in conflict with the decision in *Wilde v. Boldt*, 16 Neb., 539. While it is true, as there stated, that there is a distinction between the jurisdictions of the county judge and that of the county court proper, yet the judg-

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ments when rendered are all the judgments of the county court and are all enforced in the same way by the judge issuing execution as is provided by section 17 of the act.

The decision of the district court being in harmony with this opinion is affirmed.

JUDGMENT ACCORDINGLY.

.. THE other judges concur.

MARY E. HANSON, APPELLEE, v. L. C. LEHMAN AND
AMELIA LEHMAN, APPELLANTS.

1. **Pleading: ANSWER.** A denial must be direct and unambiguous and answer the substance of each direct charge. Such facts as are not denied are for the purposes of the action taken as true. *Harden v. A. & N. R. R. Co.*, 4 Neb., 521.
2. ———: ———: **SPECIFIC PERFORMANCE.** In an action for the specific performance of a contract to convey real estate, an answer alleging that plaintiff had agreed to construct a building upon the lot when she purchased it, but had failed to do so, no such condition being contained in the written contract, and no facts being alleged which would show that it would be to the advantage of the defendant to have such building constructed, constitutes no defense to the action.

APPEAL from Stanton county district court. Tried below before CRAWFORD, J.

Brome & Durland, for appellants.

No appearance for appellee.

REESE, J.

Plaintiff seeks the specific performance of a contract for the sale of certain real estate executed by the defendant to

her. The contract, an ordinary bond for a deed, is set out in the petition. The recital is, that plaintiff has agreed to purchase the property described, "as follows: Twenty-five dollars with interest from date at the rate of ten per cent per annum, the above amount and interest to be paid on or before the first day of April, 1882." No other reference is made to the time of payment nor to the performance or failure to perform the contract on the part of plaintiff. The contract was signed by defendant. The petition alleges that the time for payment was extended by defendant for a year or longer if desired by plaintiff, and that shortly after the expiration of the year she tendered the money due and demanded a deed, which was refused.

The answer admits the making of the contract, but denies that he did "on or about the first day of April, 1882, grant an extension of time for the payment of the \$25 and interest thereon, required by the terms of the agreement," and denies that plaintiff "has performed or offered to perform the conditions on her part of the contract to be done or performed." The answer further alleges that it was the duty of plaintiff to pay the taxes on the premises, but that she failed to do so, and that he has paid them, but fails to give the amount paid by him, and fails to ask any relief in that behalf. It is also alleged that at the time of the sale it was agreed that plaintiff should erect a building on the real estate in question to be used for the purpose of a laundry, and that the same was to have been constructed prior to the execution of the deed, but that plaintiff has failed to construct the building, and that thereby defendant is discharged from the contract.

To this answer a demurrer was interposed by plaintiff, upon the ground that the answer did not state facts sufficient to constitute a defense. The demurrer was sustained. Defendant appeals. Does the answer state a defense?

It cannot be claimed that by the terms of the contract

the *time* of payment is made an essential ingredient. Therefore it is doubtful if the allegation of the waiver or extension as alleged in the petition was a necessary allegation. But assuming that it was, the denial is insufficient. The answer does not deny the extension but denies granting it at the *time* alleged. In this the answer is ambiguous and not sufficient. *Harden v. A. & N. R. R. Co.*, 4 Neb., 521. Maxwell's Pleading and Practice (4th ed.), 126.

The same is true of the denial of performance of the contract on the part of plaintiff. None of the allegations of the petition are denied, but rather the conclusion to be drawn from them.

As to the payment of taxes it is apparent that nothing was claimed, or the facts would have been stated, and as the amounts paid, if any, were not alleged, no defense could be based thereon.

The last defense pleaded is, that it was agreed that plaintiff should erect a building on the premises. There is nothing alleged which would tend to show that it was a matter of any importance to defendant whether plaintiff built a house on the premises or not. The facts alleged constituted no defense.

• The ruling of the district court in sustaining the demurrer was right, and is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSEPH C. DE WITT, PLAINTIFF IN ERROR, V. ALONZO D. ROOT AND EMERSON F. ROOT, DEFENDANTS IN ERROR.

Statute of Frauds: PROMISE NOT WITHIN STATUTE. The mother of A. was taken sick. A physician was called, who began to treat her. Upon his second visit she became dissatisfied and desired another physician. A. instructed the physician to pay no attention to the complaints of his mother, but to continue the treatment, and he would pay him for his services. Whereupon the physician continued to treat her; *Held*, That the promise was not to answer for the debt of another, but was an original undertaking, and not within the statute of frauds.

ERROR to the district court for Saline county.. Tried below before MORRIS, J.

Abbott & Abbott, for plaintiff in error.

Duves, Foss & Stephens, for defendants in error.

REESE, J.

Defendants in error are physicians. This action was instituted for the purpose of collecting a balance due for medical services rendered in the treatment of the mother of plaintiff in error by and upon his employment and promise to pay. The defense was a denial of the allegations of the petition so far as the promise to pay was concerned, and an allegation that the services were rendered for his mother who was living upon her farm, and not with him, and that he was not liable even if such a promise was made, it being within the statute of frauds. The trial resulted in a finding and judgment in favor of defendants in error for the sum of forty-four dollars. A motion for a new trial was made upon the ground that the finding was not sustained by sufficient evidence and was contrary

to law, which being overruled, plaintiff in error brings the cause into this court for review.

It is insisted by plaintiff in error that the finding that he made the promise is not sustained by sufficient evidence. Upon this part of the case it is enough to say that the testimony was conflicting, and the finding of the trial court will not for that reason be molested.

The next question is, assuming the employment and promise to have been made as testified to by the witnesses of defendants in error, can the judgment be sustained or is the promise void for the reason that it was to answer for the debt of another and was not in writing? From the testimony of one of the defendants in error and one other witness it appears that the mother of plaintiff in error was sick, and defendants in error were called to treat her. One of them, the senior member of the firm, visited her once prior to the time when the alleged agreement was made. On the second visit the patient expressed some dissatisfaction, and desired to be treated by a physician in a neighboring town, when plaintiff in error called the physician out of the house and requested him to pay no attention to the complaints of his mother, that she was nervous and "fussy," but to take such care of her as was necessary, and that he would pay him to do so, and that upon this request and promise the services for which the judgment was given were rendered, and that at other times during the rendering of the services he urged the physician to be attentive to her as might be necessary, frequently promising to pay the debt. So far as this testimony goes, it appears that the undertaking was an original one. The patient knew nothing of it and it was in no sense an undertaking to answer for her debt. It is insisted by defendant in error that the case is identical with *Rose v. O'Linn*, 10 Neb., 364, but we cannot so view it. In that case Rose promised to see that the doctor was paid. In this, if the testimony of plaintiff's witnesses is true, and of that the trial court was the

Morehead v. Adams.

judge, the promise was direct and unconditional. In that case the patient was the hired laborer of the person making the promise, and in whom he had no special interest, while in this case the promise was prompted doubtless by the affection which a son is presumed to entertain toward a mother.

It is claimed the judgment is excessive. This question is not presented by the record and cannot be examined. The answer admits the rendition of the services, and no claim is made in the motion for a new trial that the judgment is excessive.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

18	569
27	620
18	569
62	569

**PHILIP C. MOREHEAD, SHERIFF, PLAINTIFF IN ERROR,
V. LE GRAND B. ADAMS, ASSIGNEE, DEFENDANT IN
ERROR.**

- 1. Bill of Exceptions.** Where an order of the district court extended the time forty days from the adjournment of the court in which to "present" a bill of exceptions, *Held*, To mean the time within which to prepare the bill and present the same to the adverse party or his attorney.
- 2. —: CONSTRUCTION OF STATUTE.** The statute relating to bills of exceptions being remedial in its nature will be liberally construed.
- 3. —: PAPERS in a bill of exceptions** marked by the initials of the judge, written by himself, will not be stricken out of the bill as not being identified.
- 4. Assignment for Creditors.** A creditor under the assignment law of 1877 is not precluded from suing the debtor and recovering judgment upon his claim, but the assigned property will

not be liable for the satisfaction of the judgment unless he can have the assignment set aside as being fraudulent against creditors.

5. ———: **INSOLVENT FIRM.** Where a firm is insolvent the partners cannot by a sale to one partner of their interest, three days before an assignment for the benefit of creditors is made, divest the property of its partnership character so as to defraud partnership creditors.
6. **Instruction to Jury.** An instruction that "you will assess to the plaintiff such damages as from all the evidence in this case you shall find he has sustained by reason of the illegal taking and detention of the personal property," is vague, and liable to mislead the jury. *Wasson v. Palmer*, 13 Neb., 376.

ERROR to the district court for Nuckolls county. Tried below before MORRIS, J.

Groff & Montgomery and Kaley Bros., for plaintiff in error.

Case & McNeny, for defendant in error.

MAXWELL, J.

The defendant in error has filed a motion to quash the bill of exceptions herein, "because the same was not presented within forty days from the adjournment of the court below, in accordance with the leave granted by said court."

The order of the court fixing the time in which to prepare the bill is as follows: "Defendant has leave to present his bill of exceptions in forty days from the adjournment of this court." The point made by the defendant is, that the word "present" used in the order means to present to the judge for his signature, and does not mean to prepare the bill. Without entering into a discussion of the meaning of the words prepare and present, it is apparent that the intention of the court was to grant forty days from the adjournment of the court in which to prepare the bill and

present or submit it to the adverse party for correction or amendment. It is not the policy of the law to place a narrow, technical construction upon a statute which provides the procedure to obtain a bill of exceptions. The statute is remedial in its nature, and should receive such a construction as will give effect to its provisions; and the court will, if possible, save the rights of the parties by sustaining the bill. Code, § 311. The motion must therefore be overruled.

2. The defendant's attorneys also move to strike out of the bill of exceptions certain papers relating to attachment proceedings, in which Reed, Jones & Co. were plaintiffs and the Beal Brothers defendants, and also where D. M. Steele & Co. were plaintiffs and Beal Brothers defendants, for the reason that "the same are not identified in or authenticated by, or in any manner made a part of, the bill of exceptions herein." It is also alleged that an "affidavit was not submitted to the attorneys of defendant in error within forty days from the adjournment *sine die* of the court." It appears from the certificate of the judge that the papers in question were offered in evidence, and they are identified by the initials of the judge written by himself on the margin. The papers are sufficiently identified, therefore, and will not be stricken out of the bill. The affidavit of the attorneys of the defendant in error accompanying the motion fails to allege that the affidavit for an attachment to which objections are made was not offered in evidence. So far as appears, the bill as signed is absolutely correct, and such is the presumption.

The question to what extent a judge, before signing a bill of exceptions containing the evidence, where it has been previously agreed upon by the respective attorneys, may add to the same, is not presented in this case. The motion to strike out is overruled.

3. It appears from the record that on October 6th, 1882, Asher Beal and Harlan Beal were partners doing a general mercantile business at Superior, in Nuckolls county;

that on that day Harlan Beal sold his interest in the firm to his brother Asher for the sum of about \$1,000, \$40 in cash, and a note for \$960, Asher to assume the firm debts; that at the time of this sale the firm of Beal Brothers was insolvent, and on the ninth day of that month Asher Beal made an assignment to the defendant for the benefit of his creditors. The assignee accepted the trust and complied with the requirements of the statute in regard to filing an inventory, etc., and seems to have been disposing of the goods at private sale. On December 18th, 1882, and on January 10th, 1883, Reed, Jones & Co. and D. M. Steele & Co., creditors of Beal Brothers, commenced actions by attachment in the district court of Nuckolls county against Beal Brothers, and levied upon a part of the goods in the hands of the assignee. Motions were afterwards filed to dissolve the attachment, which were overruled; and in October, 1883, Reed, Jones & Co. recovered judgment for the sum of \$729.17, and costs, and D. M. Steele & Co. for \$960.69, and costs, and an order to sell the attached property was made in each case. A sale of the attached property being about to take place, the assignee brought this action, and the goods were taken on an order of replevin. On the trial of the cause the jury returned a verdict in favor of the assignee for \$750, upon which judgment was rendered.

The case was tried upon the theory that the goods in question being in the hands of an assignee were in *custodia legis*, and therefore not subject to attachment. This would be true if the assignment was valid; but in this case the defendant below set up in his answer, and sought to prove, that the assignment was fraudulent, and intended to defraud the creditors of the firm, and that Harlan Beal was one of the creditors to be paid out of the proceeds. This was stricken out of the answer, and proof thereof excluded. This, we think, was error. Where a firm is insolvent the partnership property will be applied to the payment of the partnership debts, and an individual cred-

itor of a member of the firm cannot be paid out of the partnership funds to the exclusion of creditors of the firm. *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489. *Roop v. Herron*, 15 Id., 73. See cases cited in note to *Auley v. Ostermann*, 25 N.W. Rep., 662. And any scheme that would place the firm property out of the reach of such creditors, and apply it to the use of members of the firm, would be fraudulent as to such creditors. A judgment or award, if obtained by fraud, may be set aside, and held for nought; and an assignment, the object of which is not to apply the assigned property to the proper use, is open to the same objection. In other words, if the object of the assignment was to deprive the creditors of the firm of the proceeds of the partnership property, and bestow the same upon creditors of an individual partner, one of whom—and the most important apparently—was the retiring partner, and the property was being thus appropriated, the right of the partnership creditors to attach, under our former assignment law, is undoubted. The question of fraudulent intent, under our statute, is one of fact, to be determined by the jury on proper instructions by the court. Where, therefore, the validity of the assignment itself is put in issue by the pleadings and proof, it is the duty of the court to submit that question to the jury.

In *Lininger v. Raymond*, 12 Neb., 170, it is said: "When, instead of distributing his property among his creditors as far as it will go, the assignor places it beyond their reach by an assignment, for the purpose of preserving it for his own use or that of a friend, courts do not hesitate to declare such assignment void, because, under the pretext of an assignment, the debtor has concealed or prevented the application of his property to the payment of his debts. But where the debtor parts with all control of his property, and devotes it absolutely to the payment of his debts, without reservation, the advantage to creditors is clear and direct, and although there may

be delay in the payment of the debts, still the assignment is not fraudulent and will not be declared void." And an assignment which provides for an equitable distribution of the proceeds of the debtor's property among his creditors will be sustained, unless good cause exists for setting it aside.

4. The court instructed the jury as follows: "In this case you will find for the plaintiff, and you will assess to the plaintiff such damages as from all the evidence in this case you shall find he has sustained by reason of the illegal taking and detention of the personal property in this action."

The testimony tends to show that the goods in question had been held under the orders of attachment heretofore mentioned, for about nine months, when a sale of the attached property being about to take place under the orders of the court, the assignee brought this action to obtain possession of the goods. Without considering the unexplained delay in bringing the action, the instruction furnishes no guide to the jury to enable them to estimate the damages properly. It is similar in this regard to that in *Wasson v. Palmer*, 13 Neb., 378, which was held to be erroneous. The sole purpose of an instruction upon the question of damages is to furnish the jury a rule by which to estimate the same, otherwise they would be left entirely to their own guidance, and an erroneous verdict would almost invariably be the result.

In conclusion, it is evident that there are many facts and circumstances connected with this case that were not investigated on the former trial that should be fully examined on the next. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JAMES MILLS, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: LIBEL.** A libelous charge made by A against B contained in a letter written and mailed in this state to C, residing in another state, is sufficient to render A liable in this state for the offense.
2. ———: ———: **HUSBAND AND WIFE.** To render a husband liable for a letter containing libelous charges written by his wife, it must appear either that he aided in or authorized the writing of the libelous matter
3. ———: ———: ———: **EVIDENCE.** Where on an indictment for libel for matter contained in a letter signed in the husband's name he was found guilty, and the testimony tended to show that the letter was written by the wife, and that the husband did not aid in composing or authorize the use of the libelous words, the judgment was reversed.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

O. H. Ballou, for plaintiff in error.

Lee Estelle, District Attorney, and *John L. Kennedy*, for the State.

MAXWELL, J.

At the February, 1885, term of the district court of Douglas county an indictment was found against the plaintiff in error, wherein said jury present: "That James Mills, late of the county aforesaid, on the twentieth day of January, Anno Domini one thousand eight hundred and eighty-four, in the county of Douglas, and state of Nebraska aforesaid, being a person of an envious, wicked, and evil mind, and of a malicious disposition, and wickedly, maliciously, and unlawfully contriving, and intending, as much as in him lay, to injure, oppress, aggrieve, and

villify the good name, fame, credit, and reputation of Alice Daily, and to bring her into public scandal, hatred, infamy, and disgrace, and of his great hatred, malice, and ill-will towards the said Alice Daily wickedly, maliciously, and unlawfully did compose, write, and publish, and cause to be composed, written, and published, a certain false, scandalous, and defamatory libel of and concerning the said Alice Daily, containing therein among other things the false, malicious, and libelous words and matter following:" Then follows the libelous matter complained of, with proper innuendoes, "Which said false, malicious, scandalous, and defamatory libel he, said James Mills, afterward, to-wit, on the twenty-first day of January, in the year of our Lord eighteen hundred and eighty-four, at Omaha, in the county aforesaid, unlawfully and maliciously did send, and cause to be sent, to one John C. Heiskel, in the form of a letter addressed to the said John C. Heiskel, and did thereby, then and there unlawfully and maliciously publish and cause to be published the aforesaid libel," etc.

On the trial of the cause Mills was found guilty, and sentenced to imprisonment in the county jail for thirty days, and to pay a fine of one dollar and costs. The only ground of error assigned in this court is, that the verdict is not supported by the evidence.

It appears from the testimony that the Southwest Presbyterian Church, of Omaha, was organized in 1883, Mills, the plaintiff in error, and wife, and Howland Daily and Alice Daily, his wife, becoming members; that in the year 1884 charges were made against Mrs. Mills for circulating slanderous reports about Mrs. Alice Daily; that the session was composed of two members, of which Mr. Daily the husband of Alice was one. As a result of the trial Mrs. Mills was suspended for one year. The question of the correctness of that decision is not before the court, and as no appeal was taken to the presbytery it was no doubt correct; still it is very evident that Mr. Daily

Mills v. State.

was not in a situation to act impartially in the case, with his own wife as the accuser, and perhaps some of the slanderous words affecting himself. A church trial, like any other, should be had before an unbiased, impartial tribunal, and must be so held to do justice. Otherwise, while outwardly fair, there is danger that the decision will reflect the feelings or sympathies of those rendering it.

The result of the trial seems to have caused both Mills and wife to feel very much aggrieved, and he called upon several prominent members of the church asking them to sign a petition for a rehearing. He obtained but few if any signers, however. About this time (January 20, 1884) the letter to John C. Heiskel, of West Virginia, was written and signed "James Mills." Mr. Heiskel it appears was sheriff of one of the counties of West Virginia, and a stranger to Mills and wife. The letter was professedly written for information, but contains charges that no one with a proper sense of duty would make without proof. The charges are stated and repeated as though the subject was agreeable to the writer, and Mr. Heiskel is importuned and urged to look up proof in support thereof. And an offer is made to pay the expenses of a certain alleged witness. In effect the writer says to Mr. Heiskel: "I make these charges, now please look the proof up to sustain them." In our view the jury were fully justified in finding, as they must have done, that the charges were fabrications; and if the proof showed that the letter in question had been written by the plaintiff in error, the judgment would be affirmed. The plaintiff in error, however, denies writing the letter in question, and in this he is corroborated by a number of experts in writing, by the foreman under whom he was working at that time, showing that he was absent from Omaha, by the original letter itself, which is in evidence, and other letters and papers containing his signature, and by his wife who testifies that she wrote the letter complained of, and signed her hus-

band's name to it because of some of the language used therein. The letter itself bears evidence in various ways that it was not written by the husband, and there is no doubt it was written by the wife.

But it is said that even if the letter was written by the wife alone, still if he caused it to be written by her he will be liable. This would be true if it appeared that he had assisted in or authorized the composition of the libelous letter. *Miller v. Butler*, 6 Cush., 71. *Reg v. Cooper*, 15 L. J. Q. B., 206. *Parker v. Prescott*, Law Rep., iv. Ex., 168. Townsend on L. & S., 149. We find no testimony showing that the husband knew of the libelous matter contained in the letter at the time it was sent, the proof introduced by the state on that point merely showing that he admitted that they had written for information. A party should not be held liable for an offense that he did not commit or aid in committing, and the court will not infer co-operation in composing a libel from the mere request to write a letter of inquiry. There is no proof whatever that the plaintiff in error had seen the Heiskel letter at the time his statements were made or knew its contents. The proof, in fact, shows the contrary. There is not sufficient testimony, therefore, to sustain the verdict. While, however, the proof fails to show that the plaintiff in error either wrote or authorized the writing of the letter sent to Heiskel, it does show conclusively that he did write and send letters relating to the alleged scandal to other persons, and also that he had frequent conversations with certain citizens of Omaha in regard to the same; but as the indictment is based upon the Heiskel letter alone, the other letters and matters referred to cannot be considered. The impression created on the mind of the writer from reading the testimony is, that the plaintiff in error and his wife have yet much to learn in regard to respecting the good name and fame of others; and if the result of the trial shall be to cause them to recognize and respect such rights

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it cannot fail to add to the happiness of others as well as themselves. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ALBERT ROMBERG, PLAINTIFF IN ERROR, v. M. J.
HUGHES, DEFENDANT IN ERROR.

1. **Verdict.** Where the evidence on the part of the plaintiff and defendant in an action is nearly equally balanced, the verdict will not be set aside as being against the weight of evidence.
2. **Attorney and Client.** To make a communication from a party to an attorney privileged, the relation of attorney and client must exist between them.
3. **Replevin: DAMAGES.** In replevin, damages for the detention of the property are recoverable only in case of a return. If the property is not returned the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking. *Hainer v. Lee*, 12 Neb., 452.

ERROR to the district court for Cuming county. Tried below before POST, J., sitting for CRAWFORD, J.

M. McLaughlin and *N. H. Bell*, for plaintiff in error.

Charles J. Green, for defendant in error.

MAXWELL, J.

In August, 1882, Ludwig and Franze Herse rented the farm of the plaintiff for four years, commencing on the 1st day of November, 1882. The terms were that the plaintiff should "furnish one-half of all seed and one-half of all

18	579
19	532
20	86
20	94
21	79
24	655
18	579
27	144
18	579
33	370
18	579
39	533
18	579
45	282
18	579
50	729
18	579
61	285
18	579
62	280
62	261
62	262
62	263

machines," and be liable for one-half of the personal property tax and to receive one-half of all the grain raised on the farm, one-half of the increase of live stock, etc. The testimony shows that the plaintiff had two brothers in the neighborhood where he resided, and some or all of them had employed the Herses, for some time prior to the execution of the lease, to work on their respective farms. The Herses were in straitened circumstances, and this fact was well known to the plaintiff. In November, 1882, the plaintiff sold a large quantity of personal property at auction, the terms of sale being cash for all sums of \$5 or under, and on sums in excess of \$5, promissory notes with an approved surety was to be given, said notes to be due in one year with interest at 8 per cent. At this sale the Herses were the highest bidders for two horses, the harness for the same, and a lumber wagon and other property, in all amounting to from \$800 to \$1,000. The Herses were unable or at least did not obtain a satisfactory surety to sign their note and consequently no note was given; but the Herses claim that the plaintiff at the time of the sale well knew that they could not give security, and that he waived it, as they were on his farm, and the horses, wagon, and harness in controversy were necessary to enable them to carry on the farm. The sale is denied by the plaintiff, who claims that after the failure of the Herses to give properly secured notes that he leased the chattels in question to them. In April, 1883, the Herses abandoned the farm of the plaintiff and sold the horses, harness, and wagon to the defendant for the sum of \$280 cash. The plaintiff thereupon brought an action of replevin and obtained possession of the property. On the trial of the cause the jury returned a verdict in favor of the defendant, upon which judgment was rendered. There are three questions presented by the record which will be considered in their order:

First, Did the plaintiff sell the property to the Herses

either by an absolute sale or conditionally? Upon this point the testimony is conflicting. The plaintiff and some of his witnesses testify that there was no sale, while an equal number testify on behalf of the defendant that the Herses purchased the property and were holding it as owners. The attorney for the defendant contends that if there is any evidence to sustain the verdict it will not be set aside. The rule adopted by this court, however, is that where a verdict is clearly wrong it will be set aside and a new trial granted. *Mathewson v. Burr*, 6 Neb., 319. *Fisk v. State*, 9 Id., 66. *Smith v. Evans*, 13 Id., 316. *Victor S. M. Co. v. Day*, 13 Id., 408. *Gandy v. Pool*, 14 Id., 101. *Staman v. State*, 14 Id., 68. *Kuhns v. Bankes*, 15 Id., 92. *Shapleigh v. Dutcher*, 15 Id., 563. It is unnecessary, however, to invoke the rule in this case, as the testimony is nearly equally divided and is not very satisfactory on either side. That some arrangement was made by the plaintiff whereby the Herses were to retain possession of the property in question was clearly established, and in our view the jury would have been justified in finding a conditional sale—a sale with a condition that the title should remain in the plaintiff until the property was paid for. But under the statute, where such a sale is not evidenced by writing signed by the vendee, and a copy thereof filed in the office of the county clerk of the proper county, it is not valid against a purchaser from the vendee in actual possession. Comp. Stat., Chap. 32, § 26. If there was a conditional sale this was not done, and the defendant having so far as the evidence shows purchased without notice, is entitled to protection. The evidence covers 288 pages, and it would subserve no good purpose to review it at length. It is so nearly equally balanced that this court cannot say that the verdict is wrong.

Second, That the court erred in permitting one T. M. Franse, an attorney, to testify to communications made by the plaintiff to him. There is no claim that at the time

this conversation took place the relation of attorney and client existed between the plaintiff and Franse. The parties seem to have been on friendly terms, and it is evident that the communications were made not as clients, but as voluntary statements outside of the relation of attorney and client. Sec. 328 of the code prohibits an attorney from testifying where there is no waiver by the party in whose favor the prohibition is enacted, "concerning any communication made by him to his client in that relation, or his advice thereon," etc., or "any confidential communication properly intrusted to him in a professional capacity," etc. Code, § 333. To render the communication privileged the relation of attorney and client must exist, otherwise the communication is not privileged. As all the proof shows that the relation of attorney and client did not exist when the communications were made, they are not privileged, and the court did not err in admitting them in evidence.

Third, The jury found the value of the property to be the sum of \$285, and assessed the damages for the detention of the property at \$1 per day, in all \$584.

Whereupon the court rendered judgment as follows: "It is therefore hereby adjudged and determined by this court, that the defendant have a return of the property taken on said writ of replevin, or, in case a return of said property cannot be had, that he recover of said plaintiff the value thereof, assessed at \$285, and his damages for withholding the same, assessed at \$584, and cost of suit, taxed at \$431.83," etc.

It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself, and not its value. In such case, when the property is returned, the party to whom the return is made is entitled

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to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking. *Hainer v. Lee*, 12 Neb., 452. *Deck v. Smith*, Id., 389. The judgment in this case is clearly erroneous. For property of the value of \$285 the defendant is awarded a judgment for \$869 in case no return is had, and \$584 for the detention of property, if it is returned. Such a judgment ought not to be sustained, and the damages for the detention are excessive. These are simply for the use of the property. There is no claim that the property deteriorated in value during the time the plaintiff had possession of the same. It is not very probable that property of the value of \$285 produced during the time it has been in the plaintiff's hands profits of the net value of more than twice that sum. Such a verdict and judgment are greatly in excess of the actual damages sustained. The amount of recovery for the detention of property should ordinarily, where there is no deterioration, bear a reasonable proportion to the value of the same, otherwise the judgment cannot be sustained. The judgment of the district court is reversed, and the defendant has leave within twenty days to remit from the amount claimed for the *detention* of the property, all but the sum of \$200; and in case such remittance is entered as above provided, judgment will be entered in this court as follows: In favor of the defendant for a return of the property, and \$200 for the detention of the same; or, in case a return cannot be had, that he recover of the plaintiff the sum of \$285, with interest at seven per cent from the day of April, 1883. .

JUDGMENT ACCORDINGLY.

THE other judges concur. .

18 584
43 612

MOSES VAN BUSKIRK, PLAINTIFF IN ERROR, V. J. S.
CHANDLER, DEFENDANT IN ERROR.

Payment: EVIDENCE. A defendant relying upon payment as a defense must, where it is denied, prove the same.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

Hayes & Taggart, for plaintiff in error.

Batty & Ragan, for defendant in error.

MAXWELL, J.

This action was brought on a promissory note, of which the following is a copy:

"\$216. JUNIATA, NEB., Nov. 28th, 1879.

"One year after date, we promise to pay to the order of Moses Van Buskirk the sum of two hundred and sixteen dollars, for value received, to bear ten per cent interest per annum from date. If the interest is not annually paid, to become as principal, and bear the same rate of interest, payable without defalcation or discount.

"J. S. CHANDLER,

"IRA G. DILLON."

The defendants answer jointly, and allege: *First.* That Ira G. Dillon signed said note merely as surety. *Second.* Usury in the transaction, the sum of \$16.00 being retained by the plaintiff in addition to ten per cent interest. *Third.* Payment.

On the trial of the cause the defendant Chandler demanded and obtained the opening and closing. Proof was introduced, and the jury returned a verdict in favor of the defendant, upon which judgment was rendered. The prin-

cial ground upon which a reversal is sought is, that the verdict is against the weight of evidence.

Only the defendant Chandler appeared on the trial. He testified that the note in question was given for borrowed money, which he obtained from the plaintiff; that he received but \$200; that he paid the note by a check on C. R. Jones & Co.'s bank in Juniata. The check which he claims was given in payment of the note in question is as follows:

"No. 36. JUNIATA, NEB., October 20, 1880.

"*C. R. Jones & Co., Bankers:*

"Pay to Moses Van Buskirk, or bearer, two hundred dollars, \$200.

"J. S. CHANDLER."

It will be observed that this check was given more than a month before the note was due, and although the plaintiff had the note with him at the time the money was paid, there was no demand for the note or that the \$200 be credited thereon. These facts are significant in connection with the following testimony: The plaintiff testifies that Chandler and himself, on or about the date of the check, purchased at Kearney, of one Austin, "seven hundred and twenty-eight lambs and fifty old ewes," for the sum of "fifteen hundred and some odd dollars," and he loaned Chandler \$200 to pay on said sheep, taking the check in question therefor. In this he is corroborated by Mr. Austin, who sold the sheep, and a Mr. Thompson, to whom Chandler stated that he owned a part of them. Chandler admits in his testimony that he sold the wool and divided the proceeds. He claims, however, that the plaintiff was indebted to him, but fails to explain in what the debt consisted, or what right he had to take one-half of the proceeds of the wool, except as partner. There is other testimony in the record from which a partnership in the sheep in question may be inferred, but which need not be adverted to. Against this array of evidence we have the naked allegation of the de-

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fendant, unsupported either by facts or circumstances. This is not sufficient to sustain the plea of payment as against the array of testimony on the part of the plaintiff. As a new trial must be had, the court in the next trial should permit greater scope of inquiry, as considerable testimony offered and excluded on the former trial seemed calculated to throw additional light on the matter. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

18 586
56 293

SUSAN J. LYNCH ET AL., APPELLEES, v. PATRICK W.
LYNCH ET AL., APPELLANTS.

1. **Homestead.** A tenant in common is not entitled to a right of homestead on the common property as against a judgment in partition in favor of a co-tenant for the value of his interest.
2. **Partition: JURISDICTION OF COURT.** Where an action in partition is properly brought on a legal title, and the defendant sets up an equitable defense, the court has authority to determine the validity of such defense, and adjudicate upon the rights of the parties.
3. ———: **CASE STATED.** Where a certain lot of the value of \$2,500 was devised by will to six persons, two of whom conveyed their interests to the defendant, in an action of partition, *Held*, 1st, That where one of the shares was attached to the shares of the defendant without objection, a judgment making the value of such share a lien on the defendant's portion was not erroneous. 2d, That a balance due from the defendant for rents and profits appropriated by him might be enforced against his interest in the property.
4. ———: ———. Where the premises are incapable of a fair division, the court has power to award a pecuniary compensation to one of the parties for equality of partition.

APPEAL from the district court of Douglas county.
Tried below before NEVILLE, J.

George W. Ambrose and E. F. Smythe, for appellants.

A. Swartzlander and Burnham & Balliett for appellees.

MAXWELL, J.

This is an action of partition brought in the district court of Douglas county. It is alleged in the petition, in substance, that on the 17th day of October, 1870, one Mary Lynch departed this life seized in fee of lot 6, block 198, in the city of Omaha; that before her death, said Mary Lynch made a last will and testament, which was afterwards admitted to probate by the probate court of Douglas county, by which she devised said real estate in equal shares to her six children, viz.: Susan Lynch, Margaret Clary, Mary E. Michaelson, Patrick W. Lynch, James H. Lynch, and Daniel Lynch; that in April, 1882, Daniel Lynch conveyed his interest in said lot to Susan J. Lynch, and assigned to her the rents and profits thereof accruing since the death of said testator; that Susan J. Lynch is the owner of an undivided third of said lot, Margaret Clary an undivided one-sixth interest, Mary E. Michaelson an undivided one-sixth interest, Patrick W. Lynch an undivided sixth interest, and James H. Lynch an undivided sixth interest, and that Patrick W. Lynch has received the rents and profits of the same since the 17th day of October, 1870. The prayer is for partition, and to require Patrick W. Lynch to account.

In the answer of Patrick W. Lynch it is alleged "that, long prior to the death of said Mary Lynch the said property was purchased of Charles H. Brown with money belonging to Patrick W. Lynch, and at his request the title to said property was taken in the name of Mary Lynch,

Lynch v. Lynch.

the mother of said Patrick, and for the sole purpose of holding the same in trust for the said defendant Patrick Lynch. He also alleges that he had no notice of his mother's will, and claims to be entitled to the exclusive possession of said lot. He also pleads title by adverse possession for more than ten years. On the trial of the cause the court found that the interests of two of the heirs had been conveyed to the defendant, and that Susan J. Lynch was entitled in fee to an undivided one-third part of said lot, Margaret Clary to an undivided sixth part, and the defendant to an undivided one-half, and the interests of said parties as above found were confirmed. Referees were thereupon appointed to make partition of said lot, and a referee also to find the value of the use and occupation of the same since the 17th day of October, 1870, and the amount expended for repairs, permanent improvements, taxes etc.

The referee found that the defendant had expended for repairs and permanent improvements the total sum of \$598, and for taxes and assessments against said lot the sum of \$510.20, that the rents and profits amount to the sum of \$2,436.00, from which, after deducting the sum of \$1108.-20 expended by the defendant for improvements, repairs, and taxes on said lot, leaves a balance of \$1,327.80 for which the defendant is chargeable. No exceptions were filed to this report and it was confirmed. Thereafter the referees appointed to make partition made a report, in which they allot to Susan J. Lynch the west one-third of said lot, being 22 feet front and running back its entire length, and to the defendant the east two-thirds, being 44 feet front and running back the entire length. They also found the value of the entire lot to be the sum of \$2,500, and "that for equality of partition the said Patrick W. Lynch pay to the clerk of the district court, for the use of Mrs. Margaret Clary, plaintiff in the case, the sum of four hundred and sixteen $\frac{86}{100}$ dollars as her share and

Lynch v. Lynch.

portion of said lot." No objections were made to this report and it was confirmed. Afterwards a further decree was entered in said court as follows:

The court assigned to Susan J. Lynch the west one-third of the lot in question in severalty, and to the defendant the east two-thirds in severalty, subject, however, to the payment by him to Margaret Clary of the sum of \$416.66 in lieu of her one-sixth share or interest in said lot, which sum was decreed to be a specific lien on said two-thirds interest of the defendant, to be enforced by execution. Also that the defendant stand charged with one-half of the net rents and profits of said lot, of which sum \$442.60 was due Susan J. Lynch, and \$221.30 due Margaret McClary, and that said sums be a specific lien on said two-thirds interest of the defendant. There were certain other orders as to the payment of taxes and costs, upon which no issue is made and need not be considered. It is admitted in the abstract that the testimony offered by the plaintiff fully sustained the allegations of the petition, and that the report of the referee as to the value of the use and occupation of the premises is fully sustained.

The sole question presented by the appellants is, the power of the court to render judgment making the value of the interest of Margaret McClary a lien on the defendant's two-thirds of said lot, and to make the judgment for one-half of the net sum due for rents and profits a lien thereon. It is said the court had no jurisdiction.

1st. It is claimed that the premises in question are the defendant's homestead. It will not be contended that a tenant in common by taking possession of the common property can by claiming the property as a homestead divest the rights and interest of his co-tenant. The right of homestead is always subordinate to prior rights or interests of other persons in the property. *Gunn v. Barry*, 15 Wall., 623. *Homestead Cases*, 22 Gratt., 331. *Bowker v. Collins*, 4 Neb., 496. *State Bank v. Carson*, 4 Id., 502.

The defendant has no right of homestead in the premises, therefore, as against the rights of the plaintiffs.

2d. To sustain the allegation of want of jurisdiction the appellant has cited *Tabler v. Wiseman*, 2 Ohio State Rep., 210. *Greenup v. Sewell*, 18 Ill., 53. *Louvalle v. Menard*, 1 Gil. (Ill.), 39. The exact point intended to be brought to the attention of the court by these cases is not clear, but probably that partition was not a proceeding to decide title. In *Tabler v. Wiseman*, 2 O. S., 210, cited by the appellant, one Moudy died seized of the tract of land of which partition was sought, the whole of which had been assigned to the widow as dower, the widow being still alive when the proceedings were had. The parties to the suit were the heirs at law, and the question for determination was, could partition be had during the continuance of the dower estate? The court below held that it might, but as the lands could not be divided, and as one of the heirs elected to take the same at the appraised value, the court confirmed the election so made, and ordered a deed to be made upon payment of the purchase money. The supreme court held that the proceedings were erroneous, but as the plaintiff in error had received and still retained his part of the money paid for the estate in pursuance of the order confirming the election, it was a waiver of the error. In the discussion of the question there is a great deal said by Judge Ranney, who delivered the opinion of the court, that was not pertinent to the question at issue.

In this case the title of the plaintiffs was put in issue by the answer, and an adjudication had thereon, which being against the defendant is conclusive, no appeal having been taken. At common law partition lay only where the lands were held in coparcenary. The remedy was afterwards extended by statutes 31 and 32, Henry VIII., to joint tenancies and tenancies in common. The writ, however, lay only against the tenant in possession, and as partition was made by the sheriff by actual division, in case

the interests were incapable of exact apportionment a court of law possessed no power to make compensation for the inequality. Hence, in consequence of the inadequacy of the legal remedy, partition became a matter of equitable cognizance, the remedy being extended to all persons interested in the estate. *Brook v. Hertford*, 2 P. Wms., 518. *Gaskell v. Gaskell*, 6 Sim., 643. *Wills v. Slade*, 6 Ves., 498. Under the former chancery practice if the plaintiff's legal title was disputed the court refused to proceed until he had established his right at law. *Wilkin v. Wilkin*, 1 Johns. Ch., 111. In the case cited, Chancellor Kent says (page 118): "The jurisdiction of chancery in awarding partition is not only well established by a long series of decisions which are noticed by Mr. Hargrave (N. 23 to Lib. 3, Co. Lit.), but it has been found by experience to be a jurisdiction of much public convenience. *Calmady v. Calmady*, 2 Ves., Jr., 570. The court, however, does not sustain a bill of partition unless the title be clear; and in case of the *Bishop of Ely v. Kenrick* (Bunb., 322) the bill for partition was dismissed because the title was denied. In another case (*Cartwright v. Pultney*, 2 Atk., 380) Lord Hardwick observed, "that where there were suspicious circumstances in the plaintiff's title the court would leave him to law," etc. That this was the rule under the former equity practice there is no doubt, and may perhaps be the same under our present procedure where the titles relied upon are purely legal. But that question is not before the court. But where equitable titles are in dispute a court of equity has jurisdiction to determine the rights of the parties and grant partition in the same action. *Hitchcock v. Skinner*, Hoff. Ch., 21. *Cartwright v. Pultney*, 2 Atk., 380. *Coxe v. Smith*, 4 Johns. Ch., 271. In the case last cited the defendants in their answer alleged that the deed from Coxe to Redman was in the nature of a trust, but the court held otherwise and ordered partition. It is essential, however, that the

legal title should be before the court, otherwise if the equitable title only was presented to it, the power to cause the execution of conveyances might be greatly abridged. *Miller v. Warmington*, 1 Jac. & Walk., 484.

In partition in equity the court will take the necessary steps to protect the rights of the parties by the equal division of the estate. In other words, the court does not act in a merely ministerial character, in obedience to the call of some or all of the parties, but administers relief in such manner as to do equal and exact justice as far as possible. Therefore, where premises are incapable of a fair division the court has power to award a pecuniary compensation or charge upon the land. *Smith v. Smith*, 10 Paige, 470. *Larkin v. Mann*, 2 Id., 27. *Phelps v. Green*, 3 Johns. Ch., 303. Story's Eq. Juris., § 656a. In order to enable the court to make an equitable distribution between the parties the statute authorizes it, where the property cannot be divided "without great prejudice to the owners, to enter an order directing the referees to sell the premises," etc. Code §§ 814, 815. So far as the share of Mrs. McClary is concerned, being but a sixth interest, a strip eleven feet in width, it would be of very little value. As to her, therefore, a division could not be made without great prejudice, and it remained with the referees either to recommend a sale of the lot or that the share be attached to the portion assigned either to Susan J. Lynch or the defendant. No objection was made by the defendant to attaching the same to that portion of the lot assigned to him. Had objection been made no doubt the court would have required the referees to make a new allotment or recommend a sale of the premises. The interest of Mrs. McClary being assigned to the defendant, the consideration for the same was properly made a lien on the portion of the lot assigned to him. The right to make the balance due to the plaintiffs from the defendant for rents and profits a lien on his interest in the premises is

Hand v. Phillips.

not so clear, but no particular objection on that ground seems to have been made. No error is apparent in the proceedings, and the judgment is in all things affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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31	492
18	593
36	513
18	593
389	769

ELBERT O. HAND, APPELLANT, v. G. WALTER PHILLIPS ET AL., APPELLEES.

Attorney Fee. Under a statute which authorizes the allowance of an attorney's fee in certain cases, proportioned to the amount of recovery, the debtor cannot, by paying a considerable portion of the debt immediately preceding the rendition of judgment, defeat the recovery by the attorney of fees upon the entire sum for which, but for the payment, judgment would have been rendered.

APPEAL from Platte county district court. Heard below before POST, J.

A. W. Crites, for appellant.

George G. Bowman, for appellees.

MAXWELL, J.

This action was brought in the district court of Platte county to foreclose a mortgage upon certain real estate executed by Minerva A. Bailey and Gurdon B. Bailey, on the 18th day of February, 1879. The mortgage contains this provision: "And in case of a foreclosure of this mortgage a sum equal to ten per cent of the whole amount due shall be awarded in addition to the judgment, as an attorney's fee." It is alleged in the petition, in substance,

that Phillips purchased the mortgaged premises after the execution of the mortgage. No answer was filed by any of the parties, but on the day on which the decree was rendered the attorney for Phillips announced in open court that he had paid into court the sum of \$220 to apply, first, on taxable costs for clerk's and sheriff's fees, and second, on the amount found due on the note and mortgage. The court thereupon found "that all the facts stated in said petition are true; that at the time of the payment of the sum aforesaid into open court there was due from the defendant Gurdon B. Bailey to the plaintiff, upon the note and mortgage set forth in said petition, the sum of two hundred and ninety-five dollars for principal and interest;

* * that there still remains a balance of eighty-eight and $\frac{8}{100}$ dollars of the sum so found due as aforesaid to said plaintiff, still unpaid; that a sum equal to ten per centum of said last named sum should be allowed as an attorney's fee, and that the plaintiff is entitled to the relief prayed for by him as to the residue of said two hundred and ninety-five dollars, after deducting the sum so paid into court," etc. The sum of \$8.08 was allowed as attorney's fee. From the decree refusing to allow an attorney's fee on the entire sum due, the plaintiff appeals. This mortgage was executed before the act of 1879, p. 78, repealing the law providing for attorneys' fees took effect, consequently the contract is in full force. *White v. Rourke*, 11 Neb., 519. The question for determination, therefore, is, did a payment of a part of the mortgage debt immediately preceding the entering of the decree of foreclosure defeat the right to recover attorneys' fees?

The act of February 18th, 1873, providing for attorneys' fees was as follows: "That in all actions for the foreclosure of a mortgage or upon a written instrument for the payment of money only, there shall be allowed to the plaintiff, upon the recovery of judgment by him, a sum to be fixed by the court in addition to the judgment, not ex-

ceeding ten per cent of the recovery, as an attorney's fee, in all cases wherein the mortgage or other written instrument upon which the action is brought shall in express terms provide for the allowance of an attorney's fee." In a number of cases this court has decided that the attorney's fees allowed by the act were in the nature of costs and to be taxed as such and kept separate from the judgment. *Rich v. Stretch*, 4 Neb., 186. *Hendrix v. Ricman*, 6 Id., 516. *Heard v. Bank*, 8 Id., 10. *Dow v. Updike*, 11 Id., 95. Being in the nature of costs a portion of them accrued when the petition was filed. The proceedings to foreclose were then instituted. The defendants by failing to answer admitted that the cause of action had been correctly stated and that they had no defense. This being so, could they come into court immediately preceding the entering of the decree with the cause of action confessed upon the record, and pay the entire claim and costs, except the attorneys' fees? It will be observed that the contract is, that "in case of foreclosure of this mortgage a sum equal to ten per cent of the whole amount due shall be awarded in addition to the judgment as an attorney's fee. This contract is to receive a fair construction, one that will carry out the intention of the parties as far as it can be ascertained. The ten per cent is to be computed upon the amount due on the note and mortgage. This presumably is to be determined by the decree, as the facts as to the indebtedness as they existed when the petition was filed are presumed to continue until after the rendition of judgment. If, therefore, the defendant was indebted on the note and mortgage when the petition was filed to foreclose he ought not to be permitted to take advantage of his own default by then making part payment to defeat the attorney's fee *pro tanto*. In *Dakin v. Dunning*, 7 Hill, 30, Dunning brought an action of assumpsit against Dakin, who immediately after issue joined paid into court a certain sum of money, claiming that was all that he owed the plaintiff. At the trial, how-

ever, the indebtedness was found to exceed the amount paid into court; the defendant insisted that the sum thus paid should be deducted by the jury and a verdict found for the balance only. The case was such that the deduction would have reduced the recovery below the amount necessary to entitle the plaintiff, under the statute, to costs. The court say (page 31): "The consequences that follow from the payment of money into court in a proper case is well settled in England. If the amount brought into court is accepted by the plaintiff in satisfaction of his demand, his costs are to be paid by the *defendant*, and the cause will thus be ended. But the plaintiff may insist that the amount paid is less than the actual indebtedness, and proceed in the cause to recover the residue. In such case if the sum paid into court is equal to what was due at that time the verdict is to be for the defendant, but if the sum paid is short of that amount the payment is to be allowed as a credit and a verdict found for the balance only,

* * * * The former practice of the English courts may have been well enough there and worked no injustice to either party, and it might be proper here if our law as to costs was the same as that of England. The sum brought into court belongs to the plaintiff in any event, and in England if he recovers anything beyond that sum he is entitled to costs. But it is otherwise in this court and in the courts of common pleas of the several counties. The plaintiff's right to costs in these courts often depends upon the amount of the recovery, and that right ought not to be impaired or affected by a payment into court unless the amount thus paid is equal to the whole sum due at the time." And it was held that the verdict and judgment should be for the whole amount of the plaintiff's claim, but that the defendant would be entitled to the benefit of the payment. In other words, that as the statute allowed attorneys certain fees in the nature of costs, proportioned to the amount of recovery, that the debtor by paying a part of

the debt after the action was commenced could not prevent the attorney from recovering fees upon the entire sum. See also *Hand v. Dinely*, 2 Stra., 1220. *Sheriff v. Hull*, 37 Iowa, 176. This, we think, is the correct rule to be applied in cases of this kind. The payment, so far as the attorneys' fees are concerned, is to be applied as though the decree had been rendered, and this will dispose of the objection that the fees were to be fixed by the court upon the recovery of judgment, as the court at that time determines the amount due from the defendant to the plaintiff. But it may be said that the court has a discretion in the premises, and having fixed the fees that this court cannot review the order. In answer to this objection we will say that it clearly appears from the record that the court only allowed fees upon the balance remaining unpaid, and refused to allow the same upon the amount paid immediately preceding judgment. In this we think the court erred. The decree as to attorneys' fees is reversed, and as 10 per cent does not appear to be an unreasonable fee where the sum recovered is less than three hundred dollars, the plaintiff is allowed a sufficient sum with that heretofore awarded to amount to ten per cent on the decree, and the decree as thus modified is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

STATE, EX REL. ANTHONY REED, v. JOSEPH SCOTT,
COMMISSIONER OF PUBLIC LANDS AND BUILDINGS.

1. **Leasing State Lands:** MANDAMUS. The board of educational lands and funds will not be compelled by mandamus to award a contract of lease to a particular bidder, unless the sum bid is in excess of that fixed by statute, and is at least the full rental value of the land, and there is an abuse of discretion on the part of the board in refusing to execute the lease.

2. ———: PUBLIC LETTING: BIDS. Where a party at a public letting of educational lands was the highest bidder, but afterwards refused to accept the lease and pay the amount due thereon and perform the contract on his part, the board will not be compelled to accept a lower bid afterwards made by him for the same tract of land.

ORIGINAL application for mandamus.

Mason & Whedon, for relator.

William Leese, Attorney General, for respondent.

MAXWELL, J.

This is an original action brought to compel the defendant to execute a lease in the name of the state for the southwest quarter of section No. eight, in township ten north, range eight east, in Lancaster county.

The relator alleges in his application, in substance, that the land in question is a part of the endowment of the normal school of this state; that on the 29th day of June, 1871, one D. J. McCann purchased said land at public vendue for the sum of \$1,120; that McCann thereupon gave his note to the state for said sum of \$1,120, due ten years after date with interest at ten per cent, payable semi-annually in advance, and that he paid the interest on said note for one year in advance, and received from the superintendent of public instruction a certificate showing these facts, that in July, 1871, McCann assigned his interest in said land to one Murphy, who about the year 1872 assigned to one Cook; that the interest was paid on said note for the years 1871, 1872, 1873, and 1874, and no more; that in June, 1884, the board of educational lands and funds, after due notice to the parties interested, declared said contract forfeited and set aside, and notified the treasurer of Lancaster county of said forfeiture, and that said lands would be subject to lease in July, 1884; that prior to the 6th day of

July, 1884, said land had been appraised at \$7 per acre, and on that day the relator made his application to the county treasurer of said county to lease said land, and paid to the treasurer of the county \$38.60, that being six per cent on the appraised value of said land to the 1st day of January, 1886; and also paid said treasurer a bonus of \$50, making in all the sum of \$83.60, and at that time there was no other person who had made application to lease said land; that the treasurer of said county thereupon transmitted to Joseph Scott, commissioner, etc., said application and a duplicate receipt for the money paid by the relator, and requested said Scott to issue a lease for said land to the relator, which without reason and without any good or sufficient cause he refused and still refuses to do. It is also alleged that the relator is not the owner of 640 acres of state educational lands and would not be if he secured the land in question, etc. To this application the attorney general has filed an answer in which he alleges:

“That on the 7th day of June, 1884, the relator, with several other persons, each made application to lease for himself the land described in relator’s application. That bids as high as 700 per cent were there bid by other parties on the appraised value of said land. That the relator did then and there offer to pay 1,000 per cent on the appraised value of said land. And in accordance with said bid of relator, it being the highest rate per cent on the appraised value of the land, the contract of lease for said lands was awarded to the said relator, and the commissioner of public lands and buildings did then and there prepare and sign a lease in duplicate to the relator, for said lands, and transmitted the same to the county treasurer of Lancaster county, and the relator, without any just cause or excuse, failed, neglected, and refused to make the first payment and sign the said lease, and after the expiration of thirty days the said lease in duplicate was by the said county treasurer returned to said commissioner. A copy of said relator’s

application is hereto attached and filed herewith, and marked 'A.' Exhibit A is as follows :

"LANCASTER COUNTY, NEBRASKA, June 7th, 1884.

"To the Board of Educational Lands and Buildings :

"The undersigned desires to lease the following described school lands of the state, viz.: S. W. Qr. Sec. 8, Town. 10, range 8, Lancaster county, for which I will pay 1,000 per cent on the appraised valuation.

"ANTHONY REED,

"Post Office, Lincoln."

There are other allegations, to which it is unnecessary to refer. The case is submitted on the application and answer.

The relator does not allege in his application that the sum bid by him was the full rental value of the land, or that there were not higher bids than his for the board to act upon. The allegation is, "that at the time this affiant made his said application to lease said land there were no other parties desiring to lease said land, and no person had made application to lease the same." This is not sufficient to show that the relator was entitled to a lease. The board of educational lands and funds is a trustee for the sale and leasing of the land set apart for the support of educational institutions, and to justify the interference of a court there must be an abuse of the trust. This question was before this court in *State v. Scott*, 17 Neb., 686, and it was held that a writ would not be granted against the board unless there was an abuse of discretion, which, in our view, there was not in this case. It is the duty of the board to sell or lease the educational lands of the state for the highest price possible to be obtained, and increase and protect by all honorable means the funds for the support of the educational institutions; and so long as the board is faithfully performing its duty in that regard, this court will refuse to interfere.

2. The allegations of the answer, if true, are sufficient to debar the relator from the relief prayed for. A party bidding must act in good faith, and if, being the highest bidder at a public letting, the contract is awarded to him, he must perform on his part, and cannot be permitted to let his bid lapse, and afterwards, when competition has ceased, put in a lower bid and compel the board to accept it. If, therefore, the allegations of the answer are true, the board on that ground alone should have rejected the relator's bid. The question whether normal school lands are subject to lease is discussed somewhat in the brief of the respondent, but as the question has not been very fully presented, and a determination not necessary to a decision in this case, it will not be considered. The writ must be denied.

WRIT DENIED.

THE other judges concur.

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24 601
18 601
37 287

THE STATE, EX REL. THE ATTORNEY GENERAL, v.
THE COUNTY COMMISSIONERS OF DOUGLAS COUNTY.

1. **Constitutional Law: TAXES FOR INSANE.** The provisions of chapter forty of the Compiled Statutes of 1885, requiring the several counties in the state to pay the expense of the support and maintenance of insane persons having a legal settlement in the counties from which they are sent, are not in violation of the constitution, but are valid and binding upon the counties to which they apply.
2. **Insane: LIABILITY OF COUNTY.** A county is not chargeable with the support and maintenance of insane persons sent to the hospital therefrom, unless the legal settlement is found to be in such county.
3. ———: **TAX FOR SUPPORT.** The levy of a tax, under the pro-

State v. Douglas County.

visions of section 47 of chapter 40 of the Compiled Statutes of 1885, for the support of the insane having a legal settlement in such county, is a county tax, to be levied by the proper county officers; and if levied upon all the taxable property of the county alike, is not void for want of uniformity.

ORIGINAL application for mandamus to compel the board of county commissioners of Douglas county to allow the amount claimed to be due the state for the care and protection given to insane patients from that county. It was submitted to the court on the following agreed statement of facts:

"In this case it is stipulated and agreed by the relator and respondent, acting through their respective attorneys, Wm. Leese, attorney general, for the state, and J. C. Cowin for the respondents; that it is true as matters of fact:

* * * * *

"*Second.* There is no record or other evidence showing that the board of trustees of the insane hospital at any time fixed the sum to be paid per week for the board and care of patients. When the asylum burned down all records were destroyed, but the sum of \$4.00 per week was charged and demanded by the hospital up to February 29th, 1880. On that day the board of public lands and buildings adopted the following resolution:

"*Resolved,* That the secretary be and is hereby instructed to notify the auditor and superintendent for the hospital for insane that the board of public lands and buildings has reduced the price of board of patients at the hospital for insane to \$3.00 per week, to take effect December 1st, 1879.

"A certified copy was served upon the superintendent and thereafter \$3.00 a week was charged, to take effect December 1st, 1879.

"There was no other action taken by the board of pub-

lic lands and buildings with respect to fixing the sum to be paid per week, and \$3.00 per week is charged and demanded by the hospital in accordance with said resolution for all patients in the hospital.

“Third. From the year 1873 to the year 1885, inclusive, the state board of equalization and the state officers in that behalf provided, in deciding upon and fixing the rate of the general state tax (based upon the appropriation made each year by the legislature, which included all expenses of insane, including board and care of patients) to be levied for each current year, included in the rate for general state tax each current year, a sufficient amount to meet all expenses and expenditures of whatever nature connected with the maintenance of the insane hospital, and including the cost of board and care of patients, as fixed and demanded according to the facts agreed in the foregoing statement No. 2, and such sum was levied for that purpose as a part of the general state taxes each year, and was collected and appropriated and used for defraying said expenses, including the board and care of all patients, and there is no deficiency in that regard. The respondent Douglas county paid said general state tax, which included said expenses.

“Fourth. In addition to the foregoing levy, the state auditor each year notified the county clerk of respondent county of the amount charged against the county according to the second paragraph of this statement of facts, and demanded that such amount be added to the general state tax, which already included such costs and expenses as stated in paragraph three hereof, and such amount was levied in Douglas county for 1873 to 1876, inclusive, as an insane hospital tax, and the amount paid by Douglas county under the last mentioned levy into the state treasury from November 30th, 1873, to the present time was \$4,227.75 and no more. And the amount certified by the superintendent to the auditor, and by the auditor to the

respondent from November 30th, 1873, until November 30th, 1876, was the amount of \$7,035.33.

"*Fifth.* The rate of general state levy which included said insane hospital expenses was sufficient, exclusive of the tax and levy provided by section 47 of chapter 40 of the Compiled Statutes of Nebraska, to meet the appropriations made by the legislature for each year, which included all expenditures and expenses for the insane hospital, including the board and care of all patients.

"*Sixth.* It is further agreed that if the court shall finally determine that the county respondent is under obligations to levy a tax as provided by section 47, chapter 40, entitled 'Insane,' and shall further determine that the county respondent is entitled to be credited for the amount it has paid toward the support of the insane, by reason of the amount for the support of the insane being included in the general state tax according to paragraph three of this agreement and stipulation, and paid by the county and used in the support of the insane inmates in said hospital, then and in that case the case may be referred for the purpose of ascertaining the amount of such credit to which said county would be entitled."

William Leese, Attorney General, and T. M. Marquett, for the State.

The validity of the tax has been determined. *B. & M. R. R. v. Cass County*, 16 Neb., 137. *Same v. Saunders County*, Id., 125. The levy of the tax is directed by Laws 1885, Ch. 70. Neglect of county board for previous years no defense. *State v. Franklin County*, 35 Ohio State, 468. *State v. Harris*, 17 Id., 615. *People v. Supervisors*, 8 N. Y., 330. *Same v. Same*, 10 Wend., 366. The remedy is by mandamus. *Clark v. Buffalo County*, 6 Neb., 463. *Elmore v. Zeigler*, 52 Ala., 227. *State v. Wilson*, 17 Wis., 709.

J. C. Cowin, for respondents.

From the agreed statement of facts it will be seen that respondent is not resisting this writ to evade the payment of the expenses and costs of the board and care of the insane patients having legal settlement within its boundary, or any part of its just proportion of the expenses of the government. The state officers, thereunto authorized by law, themselves added to the general state tax all these expenses levied for these expenses, and the tax has been yearly collected by the county, paid into the state treasury, and used to defray such expenses. By this levy Douglas county has probably paid more than it would have paid under a levy made under section 47. So that Douglas county appears here to resist a new levy for a tax it has once paid and discharged in full. The great civil war, which put our constitution to the severest test, never in its most critical and trying period, when every means within constitutional authority were resorted to for the purpose of raising a revenue to carry on a gigantic war, never even then, or any time, subjected the constitution and the people to the test of a measure so monstrous as to require a tax to be twice paid, either by direction or indirection; and yet it is sought to be enforced in enlightened Nebraska, against citizens always willing to bear their just proportion of the burden of the government, and in a time of profound peace, and in the most summary proceeding. Such a proceeding is not taxation but confiscation. Excess of taxation is void. *Cooley Cons. Lim.*, 644. *B. & M. v. York County*, 7 Neb., 487. *Hammett v. Philadelphia*, 65 Penn. State, 151. Referring to the constitution, Art. 5, § 19; Art. 9, §§ 1, 5, 6, 7, and Art. 3, § 19; *Comp. Stat.*, chaps. 40, 83; *Comp. Stat.*, Ch. 77, §§ 74, 75, 76, the respondents claim:

1. That the revenue provided for board and care of the insane is a "State Tax." *Cooley Cons. Lim.*, 496. *Mur-*

ray v. Lehman, 61 Miss., 283. *State v. Liedtke*, 9 Neb., 468. *Dundy v. Richardson Co.*, 8 Neb., 508.

2. As such it must be levied under Const., Art. 9, § 1. And see *Turner v. Althaus*, 6 Neb., 77. *Clothier v. Maher*, 15 Id., 6. *Covell v. Young*, 11 Id., 511. *Fletcher v. Oliver*, 25 Ark., 289. *People v. McCreery*, 34 Cal., 432.

3. It is incompetent for the legislature to authorize a local tax for a general state purpose. *Cooley Taxation*, 104. *Dorgan v. Boston*, 12 Allen, 223. *Hammett v. Philadelphia*, 65 Penn. State, 146, 151.

4. The tax is illegal, for it is not competent for the legislature to impose a county tax for county purposes. *Cornell v. People*, 107 Ill., 372. *Hasbrouck v. Milwaukee*, 13 Wis., 42. *Pope v. Phifer*, 3 Heisk., 682.

5. The tax is a violation of the 14th amendment to the constitution of the United States. The revenue sought to be enforced taxes a part of the tax payers twice. *Durkee v. Janesville*, 28 Wis., 464. This tax would make a different rate for the general fund tax in the different counties. *Burroughs Taxation*, Ch. 5.

William Leese, Attorney General, and *T. M. Marquett*, in reply.

The county is simply a political division of the state, organized as a part of the machinery of the state for the performance of functions of a public nature. *Barton Co. v. Walser*, 47 Mo., 189. *Laramie Co. v. Albany Co.*, 92 U. S., 307. The state may require counties to take care of its insane, etc. *Poor Commissioner v. Detroit*, 28 Mich., 234. *City of Alton v. Madison Co.*, 21 Ill., 115. The power to determine what shall be the taxing district for any particular burden is purely a legislative power, and not to be interfered with by the judiciary. *Cooley on Taxation*, 110. *People v. Supervisors*, 20 N. Y., 252. *People v. Lawrence*, 41 N. Y., 137. *People v. Central R. R.*, 43 Cal., 398.

REESE, J.

The questions involved in this case are of great importance to the state and to the people of the several counties, as they involve, among others, the question of the *power* of the legislature to impose upon the people of the several counties the expense of the maintenance of insane persons at the state hospital, in addition to the general state tax levied for the purpose of maintaining this institution.

While we have carefully investigated all the questions presented, yet, for want of sufficient time at our disposal to discuss each one with that degree of care to which it seems to merit, we must be content with a very brief statement of our conclusions, without any elaboration.

From the agreed and stipulated facts it appears that the amount of tax levied by the state authorities has been sufficient to maintain the hospital, paying all the expense of board, etc., of all the patients, so that it has not been a matter of absolute necessity for its maintenance that any further burdens should be imposed upon counties having patients there under the provisions of section 47 of chapter 40 of the Compiled Statutes of 1885. It must be borne in mind that the question here is simply one of the *power* of the legislature to impose this tax. All suggestions as to its expediency must be banished from the case. The legislative department, being one of the co-ordinate branches of the government of the state, cannot be controlled by the courts so long as it acts within its jurisdiction and the limitations of the constitution. In fact, within those limits it is the supreme and controlling power of the state, and both the executive and judicial must yield a willing obedience to its mandates.

It is insisted that as a levy of tax has been regularly made for the maintenance of the hospital, it is not within the power of the legislature to again tax the people of the several counties for the maintenance of the insane sent to

it from such counties; that it is double taxation, and in effect a confiscation of the property of the citizen, and that all such taxation must necessarily be void. It must be conceded that if the tax is in excess of the power of the legislature it is void, and if it is a double tax for the same purpose it is in excess of the legislative power, and therefore void. While our judgment may not, and does not, approve the method adopted for the support of the hospital for the insane, and while it would seem that the burden is made unnecessarily heavy, yet, as we have suggested, the question of propriety is for the legislature.

By the statement of facts agreed upon, it appears that the taxes imposed by the state at large are, and have been, sufficient for the support and maintenance of the hospital, and that in addition thereto each county is required to impose a tax sufficient to pay the expense of its patients who are there confined.

It is clearly within the power of the legislature to provide for the maintenance of the insane by general taxation of the state, and to relieve the several counties from the burden, except as they bear their proportion with the other counties of the state; or to require each county to maintain its own insane in hospitals provided by them; or to pay the expense of the maintenance of their insane in a hospital provided by the state. In this each state has adopted the course which to its legislature has seemed most judicious. And we think it is clearly within the legislative power to provide by law and taxation, in the first instance, for the support of the insane by the state, and then require the counties, which otherwise would have to support the insane having a residence within their borders, to repay the state the amount thus expended. Any other view would leave the care of this, the most unfortunate class of our citizens, to the will and caprice of the county boards of the several counties in the state, which would result in anything but a harmonious system of caring for them. We

have carefully examined all the authorities cited by the respondent, and are unable to arrive at any other conclusion. This seems to be the policy of our state, and we think the right to adopt such a policy cannot be successfully questioned. The wrong, if any exists, seems to be an error of judgment in the amount of tax necessary to be levied by the state to insure the carrying out of the purpose of the law. This may be in part the result of oversight, or it may have become necessary by the failure of the several counties to collect and pay over the amounts required by the section (47) above referred to. Perhaps the latter. Again, there are many patients whose residence cannot be ascertained, and for whom provision must be made. It would be clearly unjust to require the county in which the insane person is apprehended to pay the expense of his maintenance; this must be done, if at all, by state taxation. It is very properly provided by section 48, Id., that the estates and relatives of insane persons, when able to do so, shall reimburse the county for the money paid, thereby making the counties the losers only to the extent of money paid out for those who are unable to support themselves.

Other questions are presented by the very able brief of counsel for the respondent which require attention, and will be briefly noticed.

It is claimed that the tax required to be levied by section 47 is a state tax, and therefore the county has no authority to make the levy, and further, that such levy would be a violation of the fundamental requirement that taxation shall be uniform throughout the state. While it is true that the hospital for the insane is, as argued by the respondents, a state institution, yet, as we have seen, the maintenance of the insane is not necessarily a state burden, and therefore it is within the power of the legislature to require that the tax may be levied and collected by each county for the purpose of reimbursing the

state, and we think it is also within the power of the legislature to require the tax so levied to be placed with other taxes going to the state in order that it may be withdrawn from the control of the county officers, and set apart at the outset to the use for which it is levied. This being true, the requirement of uniformity is not violated, as the tax is uniform throughout the taxing district in which it is levied. This is all that is required.

Again, it is claimed that if the tax is a county tax, it is not competent for the legislature to make the levy, that such tax can only be imposed by county authority. This is true, but by an examination of the law it will appear that the tax is not levied by the state or its officers. The state auditor is required to notify the county clerk of each county the amount due from it to the state. The county is charged with the amount in gross. The proper estimates of the amount of tax necessary to pay the indebtedness are made by the county officers, and when the percentage of levy is ascertained by them, it is their duty to levy the tax and place it against the property in the county. The *tax* is not levied by the state but by the county, for the purpose of paying an indebtedness due the state and ascertained by its officers.

The suggestion that the imposition of the tax provided for in section 47 is in violation of the fourteenth amendment of the constitution of the United States has, we think, been sufficiently noticed by the foregoing. There are no unequal exactions or burdens imposed by the section.

It is urged that if the writ is allowed as prayed for in this case, and the other counties of this state are required to pay the amounts charged to them, it will enforce the payment of a large amount of money into the state treasury which is not necessary, and has, virtually, already been paid in the form of taxation under the general tax levy of the state, as many other counties, like the relator, have failed to levy the tax, or if levied and collected, to pay

the same to the state treasurer. This fact may account for the high rate of taxation made necessary for the support of the hospital for the insane. If the tax had been levied, and the money paid over by the county treasurers as required by law, it would have materially affected the levy by the state board of equalization, for we must presume they were governed by the actual necessities of the case, and by their official oaths. Section 75 of the revenue law (Chapter 77, Compiled Statutes of 1885) provides that the rate of general state tax shall be sufficient to realize the amount necessary to meet appropriations. It cannot be supposed that the state board of equalization will impose an unjust or oppressive tax, or that they would levy the full amount necessary to meet all the expenses of the state institutions. if a large amount of money was in the treasury to the credit of the funds from which the appropriations were made, but, in the language of the statute, "an amount necessary to meet the appropriations" would be the full measure of their duty. An unreasonable excess could and should be controlled by the courts. We fully agree with counsel that it is not in accordance with the spirit of the institutions of this country that large amounts of money should be wrung from the people by taxation and placed in the public treasuries, for such a condition is universally followed by extravagance in public expenditures. But this must, in the first instance at least, be left to the wisdom of the proper department of the government.

By the stipulation of facts it is shown that a number of patients are, and have been, in the hospital, the charges for whose keeping are made to Douglas county, while the records show that the legal settlements of such persons were not in the county named. By section 23 of the act under consideration it is made the duty of the commissioners of insanity of each county to ascertain the legal settlement of insane persons, and certify the same to the

superintendent of the hospital. If it is not in the county, the expense of his maintenance should not be charged to it. It is also provided that if the legal settlement is in another county in the state, the expense should be charged to such county; and by section 27, it is provided that if the insane person has no legal settlement, or if the settlement cannot be ascertained, the person shall be supported at the expense of the state. By this the county commissioners of insanity are the judges of the place of legal settlement. There is no suggestion of want of good faith on their part, or a failure to honestly decide the questions before them, yet we find that these provisions of the law have been ignored, and Douglas county is called upon to answer for the maintenance of persons for whose support they were, and are, in no sense, legally bound. Of this class we notice the following:

Fred Larson, legal settlement, unknown.....	\$ 113 72
Immanuel Harrison, same as above.....	37 15
Boraora Evans (or Homar), same as above.....	601 68
Cristina Halquist, legal settlement, unknown.....	1564 10
Marietta Albra (or Aubray), legal settlement, unknown, and so stand in commission's warrant..	1537 23
Patrick Bickman, legal settlement found by the commissioners of insanity to be in Chicago..	770 86
Amos B. Dunn, legal settlement found by commissioners of insanity to be at Minneapolis, Minn	50 29
Amos Robinson, legal settlement, unknown, and so stated in warrant of admission	89 16
Cornelius Morse, legal settlement, unknown, and so stated in warrant of admission	68 58
N. S. Minor, legal settlement, Erie county, Penn., and so stated in warrant of admission	188 10
John Johnson, agreed to be erroneous.....	22 29
John Bunse, legal settlement, Germany, and so found by the commissioners of insanity.....	14 15
Making a total of.....	\$5057 31

Which is sought to be imposed upon Douglas county by the management of the hospital, without any authority of law. The fact that the examining physician may have certified that the legal settlement of some were in Douglas county can afford no authority for the charge. The law makes it the official duty of the commissioners, and their finding and certificate must control, unless it should be made to appear that they were untruthful upon a further investigation of the facts.

We therefore hold that under the law, as it now exists, each county in the state is liable to the state for the support of all insane persons sent to the hospital from such county, having a legal settlement therein, and that it is the duty of the county officers to levy, collect, and pay over to the state treasurer the amount necessary to pay the same, and that it is the duty of the respondents to levy the necessary taxes within the constitutional limit to pay the same, which is found to be \$31,499.03, unless by agreement of parties, or upon reference, if so desired, a different sum shall be found to be due. But that no county is legally held for the support of those sent to the hospital by its officers, whose legal settlement is not in such county,

As respondents have signified their willingness to abide the determination of this case and levy such tax as may be ordered without a writ being issued, the writ of mandamus will be withheld and not issued unless in case of a refusal to comply with the judgment of the court.

JUDGMENT ACCORDINGLY.

MAXWELL, CH. J., dissenting.

I am unable to give my assent to the conclusion reached by the majority of the court and will state the reasons for my dissent. Sec. 46 of the act for the government of the hospital for the insane provides that, "The board of trustees shall from time to time fix the sum to be paid per

week for the board and care of patients, and to arrive at such sum shall estimate the total outlay as far as possible from the sums actually paid per annum, and the weekly sum so fixed shall be the sum said hospital shall be entitled to demand for the keeping of any patient, and the certificate of the superintendent, attested by the seal of the hospital, shall be evidence in all places of the amount due as fixed."

Sec. 47 provides that, "The superintendent shall certify to the auditor of state on the first days of March, June, September, and December the amount (not previously certified by him) due to said hospital from the several counties having patients chargeable thereto, and said auditor shall pass the same to the credit of the hospital. The auditor shall thereupon notify the county clerk of each county so owing of the amount thereof and charge the same to said county, and the board of county commissioners shall add such amount to the next *state tax* to be levied in said county, and pay the amount so levied into the *state treasury*."

Under these provisions the sum of \$4.00 per week for each patient sent to the hospital was charged to the county sending the same, and this continued till December 1st, 1879, and since that time the charge has been \$3.00 per week. It is conceded that the sums thus charged, if collected, will pay all expenses of the hospital. In *B. & M. R. R. Co. v. Saunders County*, 16 Neb., 123, and *B. & M. R. R. Co. v. Cass County*, 16 Neb., 136, this tax was held to be a valid charge against a county. So far as this case is concerned it can make no difference whether it is a county or state tax. It is in fact a charge against each county based on the number of patients sent to the hospital. It is not material whether called a state or county tax, as the money paid by the tax payers is levied and collected for the support of the hospital.

By the third paragraph of the stipulation of facts in this

case it appears that, "From the year 1873 to the year 1885, inclusive, the state board of equalization, and the state officers in that behalf provided, in deciding upon and fixing the rate of the general state tax (based upon the appropriation made each year by the legislature, which included all expenses of insane, including board and care of all patients) to be levied for each current year, included in the rate for general state tax each current year a sufficient amount *to meet all the expenses and expenditures of whatever nature connected with the maintenance of the insane hospital*, and including the cost for board and care of all patients as fixed and demanded according to the facts agreed in the foregoing statement No. 2, and such sum was levied for that purpose as a part of the general state tax the same as other general state taxes each year, and was collected and appropriated and used for defraying said expenses, including the board and care of all patients, and there is no deficiency in that regard. The respondent Douglas county paid said general state tax, which included said expenses."

It will be seen that the state officers in fixing the rate of taxation added to the general state tax the whole amount required each year for the support of the hospital for the insane. This tax has been collected each year and paid into the state treasury, and drawn out on the warrants of the auditor to defray the expenses of the hospital. The amount thus paid by Douglas county, so far as can be ascertained, is about equal to the aggregate of the charges against it for patients sent from that county to the hospital. That county, therefore, has, at least to the extent of the taxes above referred to, already paid and discharged the tax for the support of hospital for the insane. It is conceded that no part of the money now sought to be collected *is necessary* for the support of the hospital; but that as the statute makes the counties liable for patients sent by them to that place, that notwithstanding the expenses have

been paid by a levy on all the property of the tax payers in the state, still the counties are liable to the state upon this claim. In answer to this objection we must consider that all appropriations made by the legislature are of a specific sum for a specific purpose, of which only "so much thereof as may be necessary" is to be expended.

Only so much, therefore, as was necessary to supply any deficiency that may have arisen from inability to collect some portion of the sum charged against each county for patients sent by it to the hospital should have been levied as a general state tax for the support of the hospital. This would have been a very small sum. If any of the counties failed to levy the tax to pay the charges, proceedings by mandamus in a proper case would have compelled action. As the most of the counties of the state failed to levy taxes to pay the charges for patients sent by them, and from uncertainty no doubt as to the validity of the provision making patients a county charge, the state board have caused a sufficient amount to be levied each year to pay all expenses of the hospital. No doubt, under the circumstances, they were justified in doing this. But the tax thus levied and collected from a county for the support of the hospital should be credited to it against the charges for patients sent by it to the hospital. The legislature never intended that the amount charged against each county for patients should be collected, and *also* an equal amount for the same purpose—the support of the hospital—by a general tax. And the legislature, under our constitution, has no authority to impose double taxation. Sec. 1, Art. 9 of the constitution provides that, "the legislature shall provide such revenue as may be needful by levying a tax by valuation," etc. And Sec. 19, Art. 3, provides that, "each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter. And when-

ever it is deemed necessary to make further appropriations for deficiencies, the same shall require a two-thirds vote of all the members elected to each house, and *shall not exceed* the amount of revenue authorized by law to be raised in such time." That is, the legislature is absolutely prohibited from making appropriations beyond "the expiration of the first fiscal quarter after the adjournment of the next regular session."

Sec. 22, Art. 3, provides that, "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon, and no money *shall be diverted* from any appropriation made for any purpose, or *taken from any fund whatever*, either by joint or separate resolution," etc.

The constitution limits the power of the legislature in imposing taxes to such as may be necessary, and limits the time for which they may be imposed so that no appropriation can be made for a longer period than two years and a quarter. Sec. 9, Art. 3, also provides that bills appropriating money "shall originate only in the house of representatives." Now, will it be seriously contended that as the legislature is restricted by the constitution to such appropriations as are *needful*, and possesses no power to divert money raised for one purpose to a different one, and has no authority to make an appropriation beyond the first fiscal quarter after the adjournment of the next regular session, that it can evade the law by indirection and impose twice the amount of taxes necessary for any specific purpose. If so, a sufficient amount may be raised by direct tax to support the penitentiary, and a charge *per capita* against each county for the prisoners sent by it sufficient in the aggregate to pay all expenses, and the same rule may be applied to the deaf and dumb and blind asylums and other institutions of the state, and the treasury be filled with money for which there was no use whatever.

There is no power of government more liable to abuse than the taxing power; hence the constitution limited and restricted it. The effect of this decision, however, will be, I fear, to break down the barriers, and under various subterfuges fill the treasury with funds not required by the necessities of government. It may be said, however, that Douglas county sent a large number of patients to the hospital and is indebted to the state for their support. The answer to this is, that the charges against Douglas and other counties were for the support of the hospital—the tax to be levied for that purpose, a state tax for that identical purpose was levied on Douglas and other counties, and has been collected and paid. If Douglas county had not paid this state tax there would be force in this argument, but having paid the tax and thereby contributed its full proportion to the support of the hospital it has performed its full duty in that regard. The fact that the taxes were levied and collected—not as a charge against the county for patients sent to the hospital, but as a direct tax for its support, can make no difference where the money when collected in either way is to be applied to the same purpose—the support of the hospital. In either way the money is levied and collected by the counties and paid over by them to the state treasurer. The burden in either case must be borne by *the tax payers*, and having discharged their obligations once in that regard the legislature possesses no power to impose the same duty in a different form for the same purpose.

But it is said some of the counties have paid this tax, and others not, and it would be unjust to such counties as have paid to permit the others to avoid paying the tax. It appears that but a very small proportion of the counties have paid the per capita charge, there being less than \$150,000 in all collected. This the legislature can readily adjust by giving such counties credit upon the tax to be hereafter collected, so that there is no difficulty in that regard.

Stettinsche v. Lamb.

So in regard to any inequality in the burden in the different counties, as where the direct tax will amount to more or less than the charges for patients sent from that county. But to the extent of the direct taxes levied and paid by a county for the support of the hospital it should be credited as against any liability for patients sent from that county.

The attorney general has done well to call attention to these matters, in order that the validity of law may be tested and the proper steps taken to prevent double taxation. The writ should be denied.

AUGUSTE STETTINSCHKE, APPELLANT, V. WILLIAM LAMB,
APPELLEE.

1. **Adverse Possession: TITLE.** Adverse possession of real estate, if continued without interruption for the length of time prescribed by the statute for the enforcement of the right of entry, is evidence of a fee.
2. ———: **CASE STATED.** Where the purchaser of a lot upon receiving a deed therefor erects a building thereon, and enters into possession, and afterwards sells and conveys the premises, a number of transfers of the property being thereafter made, and the building at times being vacant, but no interruption by an adverse claim to the title of the occupant, *Held*, That the possession was continuous, and after the expiration of ten years the occupant possessed the fee.
3. **Real Estate.** Possessions may be tacked if one comes in under the other and the possessory estates are connected and continuous.
4. ———: **PRINCIPAL AND AGENT: PURCHASE BY AGENT.** A party will not be permitted to purchase property and hold it for his own benefit, when he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account. *Columbus Co. v. Hurford*, 1 Neb., 146.

APPEAL from Gage county. Heard below on report of N. K. GRIGGS, referee.

18	619
21	689
28	747
18	619
27	63
18	619
31	800
18	619
33	868
18	619
36	875
18	619
49	377
50	517
18	619
60	97
60	868

J. R. Webster, for appellant.

1. We contend possession once established in *Mrs. Towle* by material acts of visible and notorious ownership must be presumed to continue until open, notorious, adverse is proved to have taken place in some one else. *Clements v. Lampkin*, 34 Ark., 598, 602. *Marston v. Rowe*, 43 Ala., 271, 285. *Rayner v. Lee*, 20 Mich., 384, 386. No attempt is made to prove adverse possession in any one else save Wallis' own agent, and only by hearsay evidence of his declarations.

2. Reasonable lapse of time between successive tenancies (as in this case, from April 24 to May 1st or May 15th) does not break the continuity of adverse possession. *De La Vega v. Butler*, 47 Tex., 529, 534.

3. Possession must be suitable to the character of the *locus quo*, and the use to which the premises are put, and such possession is proven. *Webb v. Richardson*, 42 Vt., 473, 465. *Holdfast v. Shepherd*, 6 Iredell, 361. *Draper v. Shoot*, 25 Mo., 197, 199. *Brumagim v. Bradshaw*, 39 Cal., 24, 45-6. *Beaupland v. McKeen*, 28 Pa. St., 124, 134. *Ewing v. Burnet*, 11 Peters, 41, 53. *Stephens v. Leach*, 19 Pa. St., 262, 265. These premises being leased to parties for business purposes, vacancy for a short time at change of tenancies is not abandonment. By holding the premises out for rent, and soon renting the same, dominion is asserted, possession maintained. The hostile flag was kept flying. Without proof of actual ouster, that is enough. The evidence shows that T. O. Wallis obtained his possession, under employment of plaintiff, for purpose of controlling and renting the premises, he being a real estate agent. That being so, his occupation was not adverse to plaintiff. He could not set up an adverse possession upon a possession so acquired. So that his possession and Spoerri's was that of plaintiff, and not adverse to plaintiff, and plaintiff's

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possession continued to November 16, 1877, when Lamb received attornment of plaintiff's tenant.

L. W. Colby, for appellee, argued the cause on the facts, and upon the law relative to adverse possession cited *Sedgwick and Wait on Trial of Title to Land*, §§ 731, 737, 738, 740, 745.

MAXWELL, J.

This action was brought in the district court of Gage county by the plaintiff against the defendant to cancel certain tax deeds on lot 1, block 66, in the city of Beatrice, and to cancel a quit-claim deed executed in 1881 by one G. W. Mumford to said defendant for said lot. The defendant claimed title under certain tax deeds and the deed from G. W. Mumford. The cause was referred to a referee, who found the facts as follows:

"1. That the site of the town of Beatrice, of which lot one in block sixty-six, now in controversy, is a part, was entered by Herman M. Reynolds, as mayor of said town, on the 12th day of August, 1859, and the same was afterwards, to-wit, on the 28th day of January, 1862, patented to said Herman M. Reynolds, as such mayor, such conveyance being made by the government of the United States.

"2. That on the 30th day of March, 1860, George W. Mumford became the legal owner of the lot in controversy, by deed of conveyance made out, executed by the said Herman M. Reynolds as such mayor aforesaid.

"3. That on the 28th day of November, 1881, the said George W. Mumford, who had not previously parted with the title to said lot, conveyed the same by deed of quit-claim to the defendant William Lamb.

"4. That on the 21st day of June, 1865, one I. P. Mumford conveyed the lot in controversy by warranty deed to Catherine Towle.

"5. That on the 12th day of September, 1867, said Catherine Towle and Albert, her husband, conveyed the said lot by warranty deed to Joseph Saunders.

"6. That on the 8th day of July, 1869, said Joseph Saunders and Emmers, his wife, conveyed the said lot by warranty deed to D. S. Jones and L. C. Reinbold.

"7. That on the 25th day of September, 1869, said D. S. Jones conveyed the undivided one-half of said lot by warranty deed to Chas. Vogt.

"8. That on the 28th day of August, 1870, said Charles Vogt conveyed the undivided one-half of said lot by warranty deed to L. C. Reinbold.

"9. That on the 14th day of October, 1871, J. L. Webster, register in bankruptcy, conveyed the said lot to C. P. Patterson, assignee of the estate of L. C. Reinbold and Caroline Vogt.

"10. That on the 25th day of December, 1872, said C. P. Patterson, as assignee as aforesaid, conveyed said lot by deed of quit-claim to Henry N. Shewall.

"11. That on the 27th day of December, 1873, said Henry N. Shewall conveyed the said lot by deed of quit-claim to the said plaintiff, Auguste Stettinische.

"12. That on the 9th day of September, 1875, defendant William Lamb purchased the said lot at tax sale for the taxes assessed thereon for the year 1874, and that at the time of such purchase by said Lamb the taxes assessed upon the said lot for the years 1872 and 1873 were delinquent and unpaid, and were not included in the amount for which said lot was sold as aforesaid to said defendant William Lamb.

"13. That on the 16th day of November, 1877, Hiram P. Webb, treasurer of Gage county, Nebraska, conveyed the said lot by treasurer's tax deed to said defendant William Lamb under and by virtue of said tax sale of September 9th, 1875, but said tax deed fails to show where the said lot was sold by the said treasurer of said Gage county.

"14. That on the 28th day of January, 1879, John Ellis, as treasurer of Gage county, Nebraska, conveyed the said lot by treasurer's tax deed to said defendant William Lamb under and by virtue of the said tax sale of September 9th, 1875.

"15. That on the 9th day of August, 1875, said defendant William Lamb began an action in this court against Charles Vogt and William Vogt, to have the lot now in controversy held to be the property of said Charles Vogt, and to have the same ordered to be sold to pay certain indebtedness owed by said Charles Vogt to said William Lamb.

"16. That on the 12th day of Oct., 1876, said William Lamb made the plaintiff herein a co-defendant with said Charles Vogt and William Vogt, by the filing of an amended petition in the cause last above mentioned. The object of the said cause was not, however, changed by the filing of said amended petition.

"17. That I. P. Mumford, who made the conveyance of the lot in controversy to Catherine Towle, was never in possession of said lot.

"18. That after said conveyance by said I. P. Mumford, the said Catherine Towle took actual possession of said lot either in the years 1865 or 1866 (the evidence does not show which), and erected a store building thereon, and continued in the actual possession and occupation thereof until she conveyed the same to Joseph Saunders.

"19. That immediately after the conveyance last mentioned, the said Joseph Saunders took actual possession of the said lot, and continued actual occupation and possession thereof until the date of the conveyance to D. S. Jones and L. C. Reinbold.

"20. That the evidence does not disclose when, if at all, D. S. Jones and L. C. Reinbold took actual possession of the lot in controversy under the conveyance from said Joseph Saunders and wife, nor does the evidence disclose

how long, if at all, they were in the actual possession of said lot prior to September 28th, 1869, the date of the conveyance by said D. S. Jones to Charles Vogt.

"21. That the evidence shows that Jones and Vogt paid the taxes assessed upon said lot for the year 1870; but it fails to disclose what portion of the time, if any, said Charles Vogt and L. C. Reinbold were in the actual possession of said lot prior to August 28th, 1870, the date of the conveyance by said Charles Vogt to L. C. Reinbold."

The referee further finds that the evidence fails to show when L. C. Reinbold & Co. took possession, or that C. P. Patterson, assignee, or Henry N. Shewall were ever in actual possession. He also finds that the premises "became vacant April 1st, 1874, and so remained for a short time; that thereafter T. O. Wallis had the actual possession thereof, and claimed to be the owner of said premises; that said T. O. Wallis then rented the premises to movers for a number of nights; the said T. O. Wallis while claiming to be the owner of said premises, and on the 15th day of May, 1874, rented them to one Agatha Spoerri, and collected and received from her two months rental therefor; that during the said two months the said Agatha Spoerri remained in actual possession of said premises as tenant of said T. O. Wallis; that after the expiration of the said two months the said Agatha Spoerri paid rent for a time, but how long the evidence does not disclose, to Charles Vogt, upon his demand; that owing to a controversy in regard to the title of said premises the said Agatha Spoerri declined to pay rent to any one thereafter; that said Agatha Spoerri and Jacob, her husband, paid for said Charles Vogt certain taxes assessed upon said lot." The referee found that the defendant had been in the actual possession of the premises ever since the 16th day of November, 1877, and that I. P. Mumford, and those claiming under him, had not been in actual possession continuously for ten years prior to November 16th, 1877, consequently that the

defendant was entitled to judgment. Exceptions were filed to the report, which were overruled, and the report confirmed. The plaintiff appeals.

The testimony of George W. Mumford was taken by deposition. He testifies that in March, 1864, he gave his "brother Isma Mumford a power of attorney to sell any property I then had in Gage county, Nebraska, which included any and all lots I then or since have held or owned in Beatrice." There is no power of attorney on the records of Gage county from George W. Mumford to I. P. Mumford, and it is claimed that the last named person is dead, hence it is impossible to determine upon what authority I. P. Mumford made the deed to the lot in question to Mrs. Towle. And as George W. Mumford, who is a non-resident of the state, seems to have entrusted his brother I. P. with full power and authority to dispose of his real estate in Gage county, he was unable to state the facts in regard to the conveyance. This link being wanting in the plaintiff's chain of title, she does not attempt to supply it, but claims that she has a full and complete title by adverse possession.

The doctrine is now well established that what the law deems a perfect possession, if continued without interruption for the length of time prescribed by the statute for the enforcement of the right of entry, is evidence of a fee. Angell on Lim., § 380. The reason is, such possession supposes an acquiescence in all persons claiming an adverse interest, and upon this acquiescence is founded the presumption of the existence of some substantial reason for the assertion of the claim of title. *Id.* To constitute adverse possession it must be open, notorious, exclusive, and continued without interruption for the statutory period. *Gatling v. Lane*, 17 Neb., 77. *Haywood v. Thomas*, *Id.*, 237. *Horbach v. Miller*, 4 *Id.*, 32. *Stokes v. Berry*, 2 Salk., 421. *Graffins v. Totenham*, 1 W. & S., 488. There must be an actual entry in order that an ouster may

be made and an adverse possession begun. *Miller v. Shaw*, 7 S. & R., 129. *Altamas v. Campbell*, 9 Watts, 28. *Nepean v. Doe*, *Taylor v. Hord*, 2 Smith L. C., 583, and notes. And such possession must be continued for the full statutory period. The character of this continued possession necessarily must be governed to some extent by that of the real estate. It is unnecessary to discuss that question in this case, a building having been erected on the lot and possession thereof taken by the party under whom the plaintiff claims title. The weight of authority in this country sustains the doctrine that possessions may be tacked if one comes in under the other, and the possessory estates are connected and continuous. *Brandt v. Ogden*, 1 Johns., 156. *Jackson v. Thomas*, 16 Id., 293. *Winslow v. Newell*, 19 Vt., 164. *Ward v. Bartholomew*, 6 Pick., 410. *Overfield v. Christie*, 7 S. & R., 173. *McCoy v. Trustees*, 5 Id., 254. That is, the possession need not be continuous for the period of limitation in any one occupier. It is sufficient that the possession during that period be in the occupier and those under whom he claims, *McNeeley v. Langan*, 22 O. S., 32.

Let us apply these principles to the case at bar. The testimony clearly shows that in 1865 or 1866 I. P. Mumford conveyed the lot in question to Mrs. Towle; that soon thereafter they erected a building on the lot, and entered into possession of the same; that this building continued in the possession of Mrs. Towle, and those claiming title through her, until November 16th, 1877, when the defendant took possession under a tax deed. The testimony shows that at times, varying between a few days to, in one instance, some months, the building was vacant, but there is no proof whatever that the possession of the plaintiff, or those under whom she claims, was *interrupted*. The hearsay statement purporting to have been made by T. O. Wallis will be noticed hereafter. Where a party erects a building on a lot, and takes actual possession of the same

as his own, the fact that afterwards he, or those claiming under him, rent the property, or, in case it is unoccupied, have and claim the right to the possession of the same where there is no abandonment, is not an interruption to the possession. *De La Vega v. Butler*, 47 Texas, 529. The reason is, the building at least belongs to the claimant. He may use it in any manner he sees fit; and so long as no one enters into possession thereof claiming adversely to him his possession is not interrupted; and possession being once established in Mrs. Towle by the erection of a building on the lot in question, and taking possession of the same, such possession will be presumed to have continued until an interruption therein is proved. *Rayner v. Lee*, 20 Mich., 384. *Clements v. Lampkin*, 34 Ark., 598. This is illustrated by the case of *Haywood v. Thomas*, 17 Neb., 237, where certain lots in the town of Tekamah were inclosed with a fence. In 1870 the fence on the west side was burned down, and afterwards, in 1871, replaced, but the destruction of the fence did not interrupt the running of the statute.

Two witnesses testify that in March or April, 1874, T. O. Wallis informed them that he had purchased the property, and owned it, and that Wallis rented the property to certain parties as his own. Without discussing the question of the admissibility of this hearsay testimony, it is clearly proved, and not denied, that Wallis had been, and then was, the agent of Vogt for the leasing and care of this property, and his possession was, therefore, that of his principal. The rule is well settled that a party will not be permitted to purchase an interest in property and hold it for his own benefit where he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account. *Van Epps v. Van Epps*, 9 Paige, 237. *Blake v. B. C. R. R. Co.*, 56 N. Y., 485. *Michoud v. Girod*, 4 How., 503. *Ringo v. Binns*, 10 Pet., 269. *Krutz v. Fisher*, 8 Kas., 90. *Grumley v.*

Stettinsche v. Lamb.

Webb, 44 Mo., 444. *Lytle v. Beveridge*, 58 N. Y., 592. *Columbus Co. v. Hurford*, 1 Neb., 146. If an agent, by merely alleging that he was the owner of property intrusted to his care as agent, could divest the title of the owner by whom he was employed to serve, property rights would indeed be held by a slender thread, but such is not the law.

In regard to the deed executed in 1881 by George W. Mumford to the defendant for the lot in question, Mumford testifies as follows: "My brother, Jacob Mumford, sent me out the deed in question, and a letter with it, stating that the old conveyance was so imperfect that he wished my signature for the purpose of correcting it. I only received one letter concerning this matter, that being from my brother, Jacob Mumford, which was just prior to the execution of the deed. I did not receive any consideration for the conveyance whatever." This is not denied, and as the defendant had not had a deed from Mumford before this time, it will not be contended that his equities in the case are very strong. As the plaintiff and those from whom she derives title to the premises were in actual, open, notorious, and continuous possession of the same for more than ten years before the 16th day of November, 1877, when the defendant took possession, the statute of limitations has run in her favor, and she has a valid title to the property by adverse possession. The judgment of the district court is reversed, and judgment will be entered in this court in favor of the plaintiff. The parties may agree, if they can, upon the amount due the defendant for taxes paid by him on the property, and the interest thereon, and also the amount due from him for four years before the commencement of this action, for the use and occupation of the premises. In case they are unable to agree, the court will appoint a referee to compute the same and strike a balance. One-half of Mr. Griggs', the referee, allowance is to be paid by each party.

JUDGMENT ACCORDINGLY.

THE other judges concur.

HERMINE LEPIN, APPELLANT, V. C. N. PAINE & CO. ET
AL., APPELLEES.

18	629
24	870
18	629
43	888

Mechanic's Lien: APPEAL: EQUITY JURISDICTION. One S. brought an action to foreclose a mechanic's lien against L. & L. the owner of the fee, P. & Co., material men, being made parties. P. & Co. answered setting up the amount due to them, and claiming a lien. The court found in favor of S. and against P. & Co., and rendered a decree accordingly. P. & Co. appealed, and on the hearing their claim was held to be valid, and the cause was remanded to the court below to enter judgment in conformity to the opinion. *Held*, 1st, That as the interests of the parties were inseparably connected the appeal brought up the entire case, and the court must enter a new decree; 2d, That the court should adjust the equities between S. and L. & L., and if necessary take additional evidence for that purpose.

REHEARING of case reported in 15 Neb., 326.

Brown & Ryan Brothers, for appellant.

Batty & Ragan, for appellees Paine & Co.

Dilworth & Smith, for appellee Scales.

MAXWELL, J.

This case was before this court in 1882, and is reported in 13 Neb., 521, and again in 1883, and is reported in 15 Neb., 326. In the case last cited it is said that the Lepins were entitled as against Scales to set off the judgment in favor of Paine & Co. against the judgment recovered by Scales against them. A rehearing was granted, and the cause again submitted.

After the decree, so far as Paine & Co. were concerned, was reversed in 1882, upon the cause being remanded to the district court, a motion was filed on behalf of the plaintiff in error the effect of which would be to set off the judg-

ment in favor of Scales against the amount due Paine & Co. for material. No facts were stated in the motion showing the right of Mrs. Lepin to equitable relief.

Mrs. Lepin also filed a motion asking among other things that she be permitted "to pay into the court the sum of \$690 and interest thereon from the commencement of this action at 7 per cent, and that upon such payment being made within sixty days from date of the order, that the defendant and her property be entirely relieved and discharged of any and all liens and claims, and that such payment shall operate as a discharge of all mechanics' liens now in controversy, and of all decrees entered by this court against the defendant and her property in any and all proceedings taken or had in this case." The motions were overruled in the court below, we think properly.

Scales claims in his petition in the original action that Hermine Lepin and Harmon Lepin became indebted to him in the sum of \$6,098.06 for work and labor performed by him and his servants and employes, and for material furnished in the erection of the hotel in question. A considerable portion of this is for labor performed and material furnished under various modifications of the contract. A number of these changes are admitted and the price to be paid not questioned. The court below seems to have found the very lowest sum possible, under the evidence, in favor of Scales. To what extent this included the claims of Paine & Company involved in this action does not appear. In other words, this court found the claim of Paine & Co. to be a valid claim, and that they were entitled to a mechanic's lien on the property to secure said debt. But there is nothing in the record to show that the court below considered the claim valid or allowed the same in the decree. It is therefore impossible for this court to say that the decree of \$690.00 in favor of Scales included the claim of Paine & Co., which this court has held to be valid. The interests of the parties are inseparably connected in this

State v. Cain.

case, and the appeal took the case up as to all. *McHugh v. Smiley*, 17 Neb., 626. *Glass v. Greathouse*, 20 Ohio, 503. *Hocking Valley Bank v. Walters*, 1 Ohio St., 201. *Emerrick v. Armstrong*, 1 Ohio, 513. *Taylor v. Courtney*, 15 Neb., 196. Max. Pl. & Pr. (4th Ed.), 454, note.

The decree, therefore, being changed in a material part, which affected both Scales and the Lepins, should have been left open so far as they were concerned for the court below to adjust the equities between them, and if necessary for that purpose to hear further evidence in the case. The case must therefore be remanded for that purpose, and the case in 15 Neb., so far as it is in conflict with this opinion, is modified.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE, EX REL. JAMES T. KINZER ET AL., RELATORS,
v. JAMES R. CAIN, TREASURER OF RICHARDSON
COUNTY, RESPONDENT.

Taxes: COLLECTION. It is not the duty of a county treasurer, nor has he the power, under the statutes of this state now in force, to seize or sell personal property for real estate taxes.

ORIGINAL application for mandamus.

E. W. Thomas, *A. J. Weaver*, and *Frank Martin*, for relator, cited: *Johnson v. Hahn*, 4 Neb., 143. *Blackwell Tax Titles*, 172-177. *Cooley*, 302.

C. Gillespie, for respondent, cited: *Comp. Stat.*, Ch. 77, §§ 89, 138, 139.

Isham Reavis, on same side, cited: *Kittle v. Sherwin*, 11 Neb., 67. *Cooley*, 34. 2 *Desty*, 746. *Ham v. Miller*, 20

18	631
35	123
18	631
55	517

Iowa, 450. *Annapolis v. Harwood*, 32 Md., 471. *Shaw v. Pickett*, 25 Vt., 482.

COBB, CH. J.

This is an original application for writ of mandamus to compel the respondent, who is the county treasurer of Richardson county, to levy upon the personal property of certain owners of real estate in said county, and sell the same for the purpose of collecting the real estate taxes due from such owners upon said real estate owned by them respectively.

The respondent appeared and demurred to the relation, thus presenting an issue of law, which may be stated as follows:

Is it the duty of the county treasurer to seize and sell the personal property situated in his county of the owner of real property, also situated in his county, for the purpose of collecting the taxes on such real property which are unpaid and delinquent?

I think we may safely say that it will not be held to be his duty to seize and sell as above, capable of being enforced by mandamus, unless it be found that such duty is enjoined upon him by statute. The duty of paying taxes by the owners of property, as well as the duty and power to collect them by the constituted authorities when their payment is neglected or refused, rests solely in this state upon constitutional and statute law, and in no degree upon the principles or authority of the common law of England. In this connection I yield to the inclination to say, that with the most profound respect for the court as constituted at the date of the judgment in the case of *Johnson v. Hahn*, 4 Neb., 139, and especially for the writer of the opinion in that case, and while it is not my purpose to criticise that case as a fair construction of the statutes then in force, yet, in so far as it invoked the authority of the common law and of general principles, I have failed in my efforts to

bring my mind to its approval. No doubt in England, or from an English standpoint, real or landed property is, and has always been, invested with a quality superior to that of personal property. This is traceable to two causes: *First*, Their insular position and limited territory, rendering it impossible for many outside of the hereditary class of noble and wealthy persons to own land, hence the law of primogeniture and entailment, devised for the purpose of preventing the division of estates and of preserving the lands intact in the family; and *Second*, To the principles of the feudal law, which originally made each holder of landed estate a knight and a gentleman, a quality which did not attach to the owners of chattels alone, however wealthy. Neither these facts, the laws founded upon, nor the principles or prejudices which follow them, have ever prevailed in America; certainly not in Nebraska. Here there has never been any quality of superiority ascribed to one species of property over another. It has been and is the policy of our government and people to favor the free, original distribution of landed property among all who would avail themselves of it. With a continent instead of an island at their disposal, the American governments and people have always favored the free and untrammelled transfer of titles of real estate from man to man. And recognizing the accumulation of large bodies of land in the hands of one owner as a great evil, they have always looked to the taxing power, as well as to the equal distribution of the lands of intestate decedents equally among the heirs, as potent guarantees against its becoming a threatening one.

I think, therefore, that if we are to consider anything besides the letter and true intent and meaning of the statute as controlling the decision of the question in hand, and we find it necessary to guard one species of property more than another from the tax gatherer, we will find the object of our solicitude rather in the useful and necessary articles of personal property, than in his real estate.

The act of 1871 was in force at the date of the decision and opinion above referred to. By the first section of said act it was declared to "be the duty of the county treasurer

* * * to proceed, as soon after the first day of May as practicable, to make such delinquent tax out of the personal property of such delinquent, if such property can be found; and this provision shall apply as well to the taxes assessed on real estate, and remaining unpaid, as to delinquent taxes assessed on personal property, and the remedy to be pursued shall be the same as provided in sections forty-nine and fifty-two of said act" (meaning the act of February 15, 1869, to which said act was an amendment), etc. General Statutes, 916. The above provision was passed as an amendment to section 50 of the act of February 15, 1869, and remained in force until the taking effect of the general revenue law of 1879; although my recollection is that it was generally understood to have been superseded by other provisions of statute at an earlier date. But be that as it may, there can be no doubt that the act of February 15, 1869, "and all acts and parts of acts supplemental to and amendatory thereof," including the act of June 6, 1871, were repealed by the act of 1879, which went into force September 1st of that year. Comp. Stat., Ch. 77. It was, no doubt, the intention of the legislature in the latter act to make it perfect and complete in itself, without depending in any degree upon the provisions of the former statutes, at least up to the point of seizing and selling chattels for personalty taxes, and of offering lands for sale for the delinquent taxes remaining unpaid thereon. From a careful examination of the provisions of said act, I am unable to find any authority—certainly no duty—devolving upon a county treasurer to seize and sell personal property for taxes due on real estate; and the careful elimination therefrom of all provisions of former statutes which had been held or supposed to impose such duty or confer such authority must, upon well-known principles of con-

State v. Cain.

struction, be held to indicate the will and intent of the legislature to withhold such authority, and not to impose such duty. While it is made the duty of the county treasurer, under certain and well-defined circumstances, to seize and sell chattels for personalty taxes unpaid and delinquent, quite different, and, as I think, exclusive duties are imposed upon such officer in respect to real estate taxes.

The demurrer to the relation is therefore sustained, and the application dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

SAME V. SAME.

Tax Sales: PURCHASE BY COUNTY COMMISSIONERS. At all tax sales, public or private, the county commissioners of the proper county may purchase for the use and benefit of their respective counties any real estate therein which has been offered at public sale for delinquent taxes and remains unsold for the want of other bidders.

ORIGINAL application for mandamus.

E. W. Thomas, A. J. Weaver, and Frank Martin, for relator.

C. Gillespie and Isham Reavis, for respondent.

COBB, CH. J.

This is an application for a peremptory writ of mandamus to be issued to the respondent, who is the county treasurer of Richardson county, commanding him to sell certain lands in said county at private tax sale to the relators, the board of county commissioners of said county.

It is alleged in and by the relation that upon certain real property therein described, from the year 1865 to the year 1880, inclusive, the taxes have not been paid, although the same is owned by a private owner therein named, and though the said real property was regularly and lawfully assessed for each year within said period, and that there now stands on the treasurer's books of said county a large amount therein stated of delinquent taxes regularly and lawfully assessed thereon for the years between the dates aforesaid. And that for each of said years the taxes not being paid on said real property, the same was offered at public sale for said taxes by the county treasurer of said county, as required by law, but not sold for want of bidders, and for each of said years the county treasurer made return of public tax sale and filed the same in the office of the county clerk as provided by law. That on the day of October, 1885, the county commissioners applied to the defendant as treasurer of said county to purchase for the use and benefit and in the name of said county the real property thereinbefore mentioned and described, the same remaining unsold for the want of bidders as aforesaid, and requested said treasurer to issue certificates of purchase of said real property, in the name of said county, but that the said treasurer refused and still refuses to do so, and that again, after the respondent as treasurer had held the public tax sale for the present year (1885) and made his return thereof as provided by law, the board of county commissioners made application to the respondent as county treasurer to purchase said real property for said county, and requested the said treasurer to issue a certificate for the purchase of said real property as provided by law, and that the said treasurer again refused and still refuses so to do, alleging as an excuse therefor that the county cannot purchase at private sale, etc.

To this relation the respondent interposed a general demurrer.

The law granting to the board of county commissioners the power to buy in for taxes in the name of the county such delinquent lands as might remain unsold for want of bidders is one of the remedies devised by the legislature for the great and growing evils of delinquency on the part of tax payers, and is necessary to the enforcement of the remedy by foreclosure of tax liens. As such, the provisions of the law will be liberally construed.

Section 1 of the act approved February 27, 1879, provides as follows: "That at all tax sales provided for by law the county commissioners of the several counties of this state may purchase for the use and benefit and in the name of their respective counties any real estate therein advertised and offered for sale when the same remains unsold for want of other bidders," etc.

Section 109 of the general revenue law of 1879 provides that, "on the first Monday of November in each year, between the hours of nine o'clock A.M. and four o'clock P.M., the treasurer is directed to offer at public sale at the court-house or place of holding court in his county, or at the treasurer's office, all lands on which the taxes levied for state, county, township, village, city, school district, or any other purpose, for the previous year still remain unpaid, and he may adjourn the sale from day to day until the lands and lots have all been offered," etc. Section 113 provides that, "After the tax sales shall have closed, and after the treasurer shall have made his return thereof to the county clerk as provided in the preceding section, if any real estate remains unsold for the want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale at his office to any person who will pay the amount of the taxes, penalty, and costs thereof for the same," etc. Comp. Stat., Ch. 77. Here are two tax sales provided for by law, one public the other private, and these the law-makers doubtless had in view when they provided that "at all tax sales," etc., the county commis-

sioners may purchase, etc. It was not the purpose of the legislature nor is it within the policy of the laws to permit the county commissioners to enter into competition with private purchasers, but only to purchase such as remains unsold for want of other, that is to say private, bidders or purchasers. But in order to give effect to the language of the statute it must be held that they may purchase at the public sale, yet at that sale they must wait until the private bidders have had an opportunity to purchase and the lands remain unsold for want of other bidders. So also at the private sale, while it is not required that the treasurer wait for the appearance of other or private bidders, yet if they do appear before the sale is made to the county commissioners they will be entitled to the preference. But in the absence of such private purchasers the county commissioners may purchase for the use and benefit of their respective counties, at private sale, any such delinquent real estate as remains unsold for the want of other bidders.

The demurrer to the relation is therefore overruled, and a peremptory mandamus will be issued as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

18 638
20 636
21 860

18 638
31 790
32 304

18 638
35 691
36 698

18 638
37 43

18 638
46 157

18 638
48 307

18 638
51 257

52 675
53 262
55 234

18 638
61 884

UNION PACIFIC RAILWAY, PLAINTIFF IN ERROR, V.
LYULPH OGILVY, DEFENDANT IN ERROR.

1. Appeal from County Court: AMENDMENT OF PETITION.

Where an action was brought in the county court to recover \$990, and on appeal to the district court the petition was amended to claim \$1,390, and judgment rendered for that sum, *Held*, That the petition could not be amended to claim more than \$1,000, and accrued interest, being the limit of the civil jurisdiction of the county court.

2. Instructions must be applicable to the testimony, and must be restricted to the actual questions at issue.
3. An Instruction upon a material point which is not based upon evidence, tends to obscure the real issue, and is erroneous.

ERROR to the district court for Lincoln county. Tried below before HAMER, J.

A. J. Poppleton and J. S. Shropshire, for plaintiff in error.

Neville & Heist, for defendant in error.

MAXWELL, J.

This action was brought in the county court of Lincoln county by the defendant in error against the plaintiff to recover the sum of \$990.00 damages, for injury to and killing twelve head of horses and mules by a train of the plaintiff. An appeal was taken to the district court from the judgment of the county court, and the plaintiff below thereupon amended his petition claiming damages therein in the sum of \$1,380. The answer of the railroad company consists of certain denials of the facts stated in the petition, and an allegation of contributory negligence on the part of the plaintiff below. On the trial of the cause the jury returned a verdict for \$1,380.00, upon which judgment was rendered.

The first objection of the plaintiff in error is to the amendment of the petition beyond the jurisdiction of the county court, which is limited in civil actions to sums not to exceed \$1,000. The rule is well settled that if the court in which the action is brought has no jurisdiction of the subject matter, the appellate court will acquire none by the appeal. *Brondberg v. Babbott*, 14 Neb., 517. *Cooban v. Bryant*, 36 Wis., 605. *Stringham v. Board of Supervisors*, 24 Id., 594. *Felt v. Felt*, 19 Id., 208.

Malone v. Clark, 2 Hill, 657. *Stephens v. Boswell*, 2 J. Marsh, 29. And this, too, even if the appellate court would have jurisdiction of the subject matter had the action been commenced there. The reason is, an appeal is a mere continuation of the original case, a proceeding in the action. *Aulanier v. Governor*, 1 Texas, 653. *Hough v. Leonard*, 12 Ill., 456. *Hatch v. Allen*, 27 Me., 85. The want of jurisdiction of the subject matter in the court where the action was brought continues in every court to which the action may be appealed, for the reason that it is the same action, and an appeal is authorized only where the court from which the appeal is taken, in case of the failure to appeal, would have authority to enforce its judgment. It will not be claimed that the county court of Lincoln county could render judgment for more than \$1,000. That is the limit of its jurisdiction. Comp. Stat., Chap. 20. The plaintiff below, in bringing his action in that court, well knew that in no event could he recover a greater sum. This was the limit of the power of the court. When appealed, therefore, it is the same case, and to be tried upon substantially the same issues as in the county court. If this were not so all actions might be brought in the county court or before a justice of the peace, and upon appeal to the district court the real cause be stated and tried.

To call such a proceeding an appeal would be an incorrect use of language, and the proceeding itself the abuse of a right. We hold, therefore, that the power of amendment of the appellate court is limited to the highest sum which the court from which the appeal was taken was authorized to render judgment, and accrued interest.

2. The testimony shows that on the morning of the 11th of March, 1884, one Louis Bryant left North Platte with about 60 head of mules and ponies belonging to the defendant in error, intending to drive them to an irrigating ditch then being constructed at or near O'Fallons.

The public road on which he was driving these animals for several miles west of North Platte runs north of and nearly parallel with the Union Pacific Railway. From four to six miles west of North Platte—the exact distance does not appear, a stream of water (called a slough in the testimony) crosses the railway and public road. There was no bridge over this stream on the line of the public road, and on the morning in question the stream was covered with ice, the character of which does not appear. The stream crosses the railway a few rods west of the point where it crosses the public road, and there was also a ditch $2\frac{1}{2}$ feet wide, filled with water, between the public road and the railway. The stream or slough at the point where the public road crosses it is forty-two feet in width. This stream, the map introduced in evidence shows, flowed north of and nearly parallel to the public road for some distance east of the point of crossing. Bryant seems to have had no trouble in driving the animals in question, but when near the point of crossing,—the exact distance does not appear,—on looking back he saw a freight train going west on the railroad at a speed of fifteen to eighteen miles per hour, the train being less than half a mile away. To this point there is no material conflict in the testimony. In regard to what was done by Bryant upon seeing the train there is a conflict. Bryant testifies that the mules refused to cross the ice and the drove split in two, part going upon the railroad track, and that he followed and got ahead of them to drive them off, but that he was unable to do so because of the approach of the train. Mr. Brown, the fireman on the engine, testifies :

“We were about a mile from the mules when we first saw them ; Mr. Crusen, the engineer, asked me what they were, I told him I thought they were mules that belonged to the ditch company ; as soon as the man that was with them saw us he started up on the outside of them and rushed across the track just ahead of the engine.”

U. Ry P. v. Ogilvy.

Q. Did you see him rush up on to them with his whip?

A. I saw him ride up on the outside of the herd and whip his horse up.

Q. Did the head end of the train of mules start for the track before he commenced whipping them up?

A. No, sir, it was after.

Q. About how far behind the mules was the engine when he commenced to whip them up?

A. I could not say; I should judge about fifty yards.

Q. You saw them as they started for the track?

A. Yes, sir.

In this he is substantially corroborated by the engineer. When the mules and ponies reached the track the testimony shows that the engine was but a few yards from them. The engineer then reversed his engine, put on a full head of steam, and sand on the track, and brought the train to a stop a few rods beyond where the injury occurred. There is considerable testimony in the record tending to show that Bryant was intoxicated at the time the injury occurred. Upon this and other testimony of like nature the court instructed the jury as follows:

“That the plaintiff, by his employe, was driving the mules and ponies near the railroad track cannot of itself be regarded as negligence or carelessness for which he was in any degree responsible. It was his right to drive along the highway or to let his mules and ponies run at large near the defendant's railway track, and if any of the animals so driven accidentally strayed upon the track, because it was not fenced, and without fault of the plaintiff in driving them there, were killed, then the defendant company is liable; but if the plaintiff, by his employe, drove the animals upon the track in front of an approaching train, either carelessly, negligently, or willfully, and the train ran upon them and injured or killed them or any of them, in spite of the efforts of the engineer and others in charge to clear the track and stop the train, then the company is not

liable. In other words, if the injury and death of the stock was owing to the plaintiff driving it on the highway near the track, and the stock then going upon the track because it was not fenced, the death and injury would seem to be the direct result of the company neglecting to fence its track, and it is proper the company should pay for the consequences of such negligence, but if the plaintiff was driving the stock near the railroad, and a train was approaching, and plaintiff negligently, carelessly, or willfully drove the stock on the track, and it was then run over and injured and killed, the injury and death would seem to be not the immediate result of the company neglecting to fence, but the immediate result of plaintiff driving it upon the track."

It will be observed that the jury were told that it was the right of the plaintiff "to let his mules and ponies run at large near the defendant's railway tracks." This would have been proper if there had been testimony tending to show that the animals mentioned were running at large, but there was none. The object of instructions is to enable the jury to apply the law to the testimony in the case, and so determine the rights of the parties. The law, as stated by the court in the instructions, must be applicable to the testimony, or it can scarcely fail to mislead the jury; and particularly is there great danger of this in cases where the right to recover depends upon the conduct of one or both of the parties. Where an instruction is given which assumes the existence of certain facts not in evidence, the effect usually is to convince the jury that in the opinion of the judge there is testimony upon the points named, hence the real issue is obscured or lost sight of, and an erroneous verdict is the result. In a number of cases this court has held that it was error to give an instruction where there was no evidence to base it upon. *Holmes v. Boydston*, 1 Neb., 346. *Walrath v. State*, 8 Id., 91. *Smith v. Evans*, 13 Id., 316. *Steele v. Russell*, 5 Id., 216. As there was no evidence upon the point named, the instruction in ques-

State v. Palmer.

tion was erroneous, and evidently prejudicial to the plaintiff in error. There were other instructions given and refused, to which it is unnecessary to refer. We adhere to the former decisions of this court as to the liability of a railway company, under the statute (Comp. Stat., Ch. 72), in case of a failure to fence its track; but that question, on the testimony in the record, is not involved in this case, and, in any event, each party is entitled to a fair submission of the case to the jury. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

18	644
25	407
18	644
25	401
18	644
54	172
55	717

STATE, EX REL. BARTHOLOMEW DONAVAN, V. THOMAS
PALMER ET AL., SCHOOL BOARD DISTRICT No. 7,
COLFAX COUNTY.

1. **Schools: ATTACHING PARTS OF TERRITORY TO DISTRICT.** Where, on petition of the parent to the county superintendent, stating that it is impracticable, on account of streams of water, for his children to attend school in the school district in which he is situated, the superintendent has authority, and it is his duty if he finds the statements true, to attach to an adjoining district so much territory as may be necessary to give such children school privileges.
2. —: **JURISDICTION OF COUNTY SUPERINTENDENT.** An order of the county superintendent as to the formation, division or change of school districts where he has jurisdiction cannot be attacked in a collateral proceeding.

ORIGINAL application for mandamus.

M. B. Hoxie, for relator.

C. J. Phelps, for respondent.

MAXWELL, J.

This is an application for a mandamus to compel the defendants to permit the children of the relator to attend the public school in district No. 7 of Colfax county, of which the defendants are officers. The relator served notice on the defendants, as required by the rules, and the defendants appeared by attorney and contested the right of the relator to the relief sought.

The relator alleges in his petition that he "is the head of a family, and is now, and was at the times hereinafter mentioned, the father of seven children of school age, to-wit: John W., eighteen years old; Clarabel, fifteen years old; Charles L., thirteen years old; Anna, ten years old; Addie, eight years old; James B., seven years old; and Sophronia, over five years old, all of said children at said times, and now are, living at home with the plaintiff, and under his care and custody.

4. That plaintiff was a resident and tax payer of school district number nine of said Colfax county prior to September 12, 1885.

5. That plaintiff is a farmer, and has been for several years last past, and owns the farm and lands herein mentioned; that prior to the last mentioned date, Sept. 12, 1885, 160 acres of his farm were in said district number seven, and part—to-wit, the south half of the north-east quarter, and the north-west quarter of the south-east quarter of section sixteen in township eighteen north, of range four east of the 6th principal meridian—was in said district number nine; that his residence is on the lands last described, and was situated about four rods from the imaginary line dividing said districts. That his said house was, and is, nearly four miles from the school-house in said district nine; that at times, in wet seasons, it was, and is, impracticable for his said children to attend school in said district nine, there being six streams and branches of

streams, subject to overflow at times, to cross in going from his house to said district school-house; that his said residence was, and is, about two miles and a half from the school-house in said district seven, with no streams or low places to cross.

6. That upon the proper showing made by plaintiff, W. T. Howard, the superintendent of public instruction for said Colfax county, did, on the 12th day of September, 1885, detach the said south half of the north-east quarter, and the north-west quarter of the south-east quarter of said section sixteen from said district nine, and attach the same to and made it a part of said district seven.

7. That after the said action taken by the said county superintendent, the said defendants, with three other residents, tax payers of said district number seven, presented their protest to said superintendent protesting against his said action in attaching plaintiff to said district seven.

8. That the said superintendent thereupon appointed a day, to-wit, the 5th day of October, 1885, at one o'clock P. M. of said day, for a hearing of all the parties interested in said matter, at which time the parties appeared in person and by counsel; that the said superintendent heard all the evidence offered by the parties, the argument of counsel, and after visiting the residence of plaintiff and the said district, and making personal examination, found that it was impracticable for plaintiff to send his said children to the school in district number nine, and made an order allowing his said order of September 12th, 1885, to stand, and the said south half of the north-east quarter and the north-west quarter of the south-east quarter of section sixteen, township eighteen north, of range four east of the 6th principal meridian, to be and remain a part of said district number seven.

9. That by reason of such action this plaintiff is now, and has been, a resident tax payer in and of said district number seven since the said 12th day of September, and

his said children living with him and are entitled to all the rights and privileges of school in said district.

Then follows an allegation that the defendants refuse to permit the relator's children to attend school. The justification of the defendants is an order made by themselves as the school board of said district 7, wherein "it was ordered that the children of Barth. Donovan be excluded from attendance of the school, it being believed, upon counsel had, the said Donovan is not within the lawful bounds of our school district." There is also a copy of the order of the county superintendent, as follows:

"SCHUYLER, NEB., Sept. 12th 1885.

"Barth. Donovan having this day certified before me that Dry Creek, a branch of Maple Creek, renders it impracticable during wet seasons of the year for his children to attend school in their own district (No. 9 of Colfax Co.), therefore, according to section 4, subdivision 1 of school law, I have detached the S. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sec. 16, and N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 16 of said district, and joined the same to district No. 7 of Colfax county."

The defendants in their answer admit that this order was made, but allege that it was obtained by fraud, and they seek to put in issue in this proceeding errors in granting the order. The provision of the statute under which the order was made is as follows:

"*Sixth.* No new district shall be formed containing less than four sections of land, nor shall any district be reduced by subdivisions or otherwise so as to contain less than that amount, unless the district so formed, or the part of the district remaining after division, shall have an assessed valuation of property of not less than twelve thousand dollars. No district shall be formed extending more than six miles in one direction on section lines; *Provided*, That when streams of water or water-courses make it impracticable to form districts containing four sections,

then the county superintendent may form districts with less than four sections without regard to valuation. Where streams of water make it impracticable for children to attend school in their own district, the county superintendent shall have authority, and it shall be his duty when requested by the parents of such children, to attach to adjoining districts such territory as *he* may deem necessary for the purpose of giving said children school privileges." Comp. Stat., Chap. 79, Subdv. I., § 4.

The statute clothes the county superintendent with power, when certain conditions are complied with, to form new districts, and, when necessary, to make changes in those already existing. Where streams of water render it impracticable for children to attend school in their own district, he is not only authorized, but required, on the application of the parents of such children, and the truth of the statement being established, to attach to an adjoining district such territory as he may deem necessary to give such children school privileges. The policy of our law is to have every child in the state between the ages of five and twenty-one years attend school. For this purpose every organized county in the state, where the number of settlers will justify it, is divided into school districts, which are to a large extent supported by the school fund of the state. And to secure efficiency in the system, the school districts and schools of each county are placed under the general supervision of a county superintendent. He is invested with power, upon proper petitions being filed in his office, to create, divide, or change a school district or districts, and if he acts within the scope of his authority his orders are not subject to collateral attack. No doubt such an order is final within the provisions of section 580 of the Code, and subject to review.

The county superintendent may reasonably be supposed to be familiar with the topography of the several school districts in his county, and the consequent necessity for a

Nessler v. Neher.

change, if one is desired. Hence the statute has conferred original authority upon him; and his orders, where he has jurisdiction, are final until modified, vacated, or set aside in a proper proceeding. This is decisive of this case. A peremptory writ must be awarded as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LOUIS D. NESSLER, APPELLEE, V. M. NEHER ET AL.,
APPELLANTS.

Judgment: LIEN. A judgment in the district court is not a lien upon an equitable interest in real estate of the debtor.

APPEAL from the district court of Saline county. Heard below before POUND, J., sitting for MORRIS, J.

Ryan Brothers, for appellant.

Abbott & Abbott, for appellees.

MAXWELL, J.

An opinion was filed in this case in 1885, which is reported in volume 23, page 245 of the N. W. Rep.* A rehearing was afterwards granted, and the cause again submitted.

The only question involved is, does a judgment lien attach to an equitable interest of the debtor in real estate?

In *Rosenfield v. Chada*, 12 Neb., 25, it was held that an equitable interest in real estate, coupled with actual possession, could be sold under an ordinary execution. That,

*This opinion withheld from publication in regular series of reports by direction of its writer.—REP.

18	649
25	730
18	649
38	764
18	649
40	768
18	649
43	79
18	649
49	302
54	387
18	649
57	424

however, referred to a case where an execution could be levied on such equitable interest, coupled with possession. The question now presented is entirely different.

Sec. 477 of the Code provides that, "the lands and tenements of the debtor, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgment by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution."

Sec. 561 provides that, "In all cases in which judgment shall be rendered by a justice of the peace, the party in whose favor the judgment shall be rendered may file a transcript of such judgment in the office of the clerk of the district court of the county in which the judgment was rendered, and thereupon the clerk shall, on the day on which the same shall be filed, enter the case on the execution docket, together with the amount of the judgment and the time of filing the transcript.

Sec. 562 provides that, "such judgment if the transcript shall be filed in term time shall have a lien on the real estate of the judgment debtor from the day of the filing; if filed in vacation as against the judgment debtor, said judgment shall have a lien from the day of the filing, and as against subsequent judgment creditors, from the first day of next succeeding term, in the same manner and to the same extent as if the judgment had been rendered in the district court."

Blackstone defines the words "land and tenement" as follows: "*Land* comprehends all things of a permanent and substantial nature, being a word of very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet in

its original, proper, and legal sense it signifies everything that may be *holden*, provided it be of a permanent nature, whether it be of a substantial and sensible or of an unsubstantial ideal kind." "Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements." The word "tenements," when applied to property on which a judgment lien will attach, is evidently used only in the common acceptation of the word, viz., houses and other buildings.

In *Lawrence v. Belger*, 31 O. S., 180, the statutes of Ohio being similar to our own, it is said: "While we admit that they do not embrace mere equities in lands or tenements, it is difficult to perceive why they should not include remainders vested under legal titles as well as legal estates in lands and tenements in possession of the debtor."

In *Bogart v. Perry*, 1 Johns. Ch., 52, it was held that a judgment at law was not a lien upon a mere equitable interest in land. To the same effect are *Jackson v. Chapin*, 5 Cowen, 485. *Ellsworth v. Cuyler*, 9 Paige, 418. *Roddy v. Elam*, 12 Rich. Eq., 343. *Powell v. Knox*, 16 Ala., 364. *Gentry v. Allison*, 20 Ind., 481. *Jeffers v. Sherbrom*, 21 Ind., 112. *Davis v. Cumberland*, 6 Ind., 380. *M. & St. L. R. R. Co. v. Wilson*, 25 Minn., 382. *Van Cleve v. Groves*, 4 N. J. Eq., 330. This, we think, is a correct construction of our statute. We therefore hold that a judgment is not a lien upon an equitable interest in real estate. The judgment of the district court declaring such liens to bind the real estate in question is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE W. HOMAN, PLAINTIFF IN ERROR, V. STEELE,
JOHNSON & Co., DEFENDANTS IN ERROR.

1. **Consideration: PROMISE FOR A PROMISE.** Where several promise to contribute to a common object desired by all, the promise of each is a good consideration for the promise of the others, and can be enforced by suit when the corporation or person to whom the subscription runs has incurred obligations on the faith of such subscriptions, and has complied with the conditions on which they were made.
2. **Contract: TIME.** Where a time is fixed in which certain work is to be done, it is not, in general, so far of the substance of the contract that if the work is done, but not until some days later, no compensation can be recovered. In such case an action for the price will be sustained, leaving the defendant to show any injury he may have sustained by the delay.
3. ———: **PRACTICE: AMENDMENT IN SUPREME COURT.** Where an action is brought upon a contract instead of a *quantum meruit*, and all the proof introduced without objection, showing the right of the plaintiff to recover, the supreme court will, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for such amendment.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

G. W. Ambrose, for plaintiff in error.

George B. Lake, for defendant in error.

MAXWELL, J.

The action is based on a subscription, of which the following is a copy:

“OMAHA, NEBRASKA, March 17th, 1880.

“We, the undersigned, agree to pay to Messrs. Steele, Johnson & Co., of Omaha, Neb., the sum set opposite our respective names, upon the completion and occupancy by

18	652
36	800
18	652
40	808
18	652
44	53
44	95
18	652
45	730
18	652
61	838

Homan v. Steele, Johnson & Co.

them, as wholesale grocers, of a three-story brick building, 66 feet by 120 in size, on lot 4, block 150, in Omaha, Douglas county, Nebraska; said building to be completed and occupied by them on or before the first day of November, 1880; said building to have an outside appearance equal to the Burlington & Missouri R. R. building on the corner of Farnam and 10th streets, Omaha, Neb.

J. Strickler.....	\$100.00
G. W. Homan.....	200.00
J. S. McCormick.....	250.00
Elnathan Mills.....	75.00
Geo. B. Lake.....	75.00
Geo. W. Doane.....	75.00
First National Bank, by H. W. Yates.....	50.00
W. W. Lowe.....	50.00
C. C. Housel.....	50.00"

The plaintiffs below (defendants in error) allege in their petition, in substance, that on the 17th of March, 1880, they were wholesale grocers in Omaha, and that the defendant below was the owner of certain real estate situate near lot 4, block 150, in said city; that said plaintiffs were about to erect a large and expensive building, but had not then decided on a location; that the defendant, on that day, in order to induce the plaintiffs to locate said building on lot 4, block 150, and in consideration of like agreements of and subscriptions of other parties, also lot owners or interested in real estate in said city, subscribed and promised to pay the plaintiffs the sum of \$200 for that purpose, and that, relying upon said subscriptions, the plaintiffs located and erected said building on said lot, and have duly performed all the conditions of said contract on their part to be performed; and that after said building was completed and occupied by the plaintiffs they demanded payment of said sum, which was refused.

The answer of the defendant below admits the partner-

ship of the plaintiffs; that the defendant was interested in certain real estate near lot 4, block 150; admits that defendant signed the contract sued on, and denies all other allegations of the petition. On the trial of the cause the court directed the jury to return a verdict for the plaintiff, which was done, and judgment rendered on the verdict for the sum of \$248.50. In the motion for a new trial the following points were made:

1st. That the verdict is not sustained by sufficient evidence.

2d. That the verdict is contrary to law.

3d. That the court erred in refusing to give the instructions asked by the defendant.

4th. That the court erred in instructing the jury to find for the plaintiffs.

In the briefs of the plaintiff in error no mention is made of error, either in giving or refusing instructions. That ground, therefore, may be considered as abandoned. The only question, therefore, to be considered is, whether or not the evidence sustains the verdict. There is no conflict in the testimony, and it shows the following facts: That in the spring of 1880 the plaintiffs below were looking for a location; that they had three in view, viz., lot 4, block 150, a lot on the corner of 10th and Harney streets, and one on the corner of 9th and Farnam streets; that the price asked for lot 4, block 150, was \$8,000. The lot, it seems, was owned by parties in New York, and as Mr. Johnson was going thereon business, he seems to have been authorized by his firm to purchase it, at not to exceed \$6,500. The testimony of a member of the firm upon that point is as follows: "I think we made an offer first of six thousand dollars. Mr. Johnson went to New York on business, and expected to see the administrator of the estate while there. It was understood between him and his partners that we were to go as high as \$6,500. We thought that was the full value of the property; and if we failed to get that, we had those

other two pieces in view that we were negotiating for." The subscription paper upon which this action is brought was thereupon prepared by property owners, including the defendant, and signed by them; that the defendant had a livery stable immediately across the alley south of said building, and also other real estate near that point; that the plaintiffs below actually paid \$7,700, and paid certain taxes for the lot, in all more than \$8,000; that they erected a building thereon 66 by 128 feet, and three stories high above the basement. It is admitted that the size and appearance of the building are all that are required by the subscription paper. The testimony also shows that in October, 1880, the plaintiffs stored a quantity of canned goods and raisins in the building, and that from that time until the 15th of December, 1880, they stored more or less goods there, and sold some from that building, but that they did not complete the removal of the stock, and move their office there, until December 15, 1880.

It is claimed on behalf of the plaintiff in error that there is no mutuality in the contract, and certain cases are cited to sustain the position, which will be noticed in their order. *First, Turnpike Co. v. Collins*, 8 Mass., 292. In that case a recovery was defeated upon the sole ground that the promisee, the corporation, had neither accepted nor authorized the subscription.

In *Academy v. Davis*, 11 Mass., 114, the action failed on the grounds, 1st, That the action should have been brought by the trustees and not the corporation; and 2d, That as there was no corporation in existence when the promise was made there was no promisee.

In *Academy v. Gilbert*, 2 Pick., 579, nothing had been done by the promisee on the faith of the promise, and in *Trustees of Hamilton College v. Stewart*, 1 Comst., 581, the plaintiff failed because there was "no engagement whatever upon the part of the plaintiffs or any other person to do or forbear to do anything as a consideration for

the promise of the defendant." That is, it was a promise to make a gift, which not being performed, no action would lie thereon. In this case, however, the allegations of the petition are, and the proof shows, that in consequence of the promise of the defendant and others the plaintiffs were induced to purchase the lot in question and erect the building thereon. They acted upon the faith of these subscriptions, and that is a sufficient consideration. In 2 Kent Com., *465, it is said: "A valuable consideration is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of a right will be sufficient to sustain the promise." That is, a benefit or advantage accruing to the party who makes the promise or some inconvenience or injury sustained by the party to whom the promise is made is sufficient to support a contract. *Powell v. Brown*, 3 Johns., 100. *Carr v. Card*, 34 Mo., 513. *Clark v. Sigourney*, 17 Conn., 511. *Lawrence v. Fox*, 20 N. Y., 268. *Odineal v. Barry*, 24 Miss., 9. *Warren v. Whitney*, 24 Me., 561. *Doyle v. Knapp*, 4 Ill., 334. Many other cases to the same effect might be cited.

In *Commissioners v. Perry*, 5 Ohio, 57, the contract was as follows:

"We, the undersigned subscribers, do hereby promise to pay the commissioners of the canal fund of the state of Ohio, for the use of said fund, the sums severally annexed to our names, in three several equal installments, the first on January 1, A.D. 1827; the second on January 1, A.D. 1828, and the third and last on January 1, A.D. 1829, upon condition that the canal be located on the east side of the Cuyahoga river from the lower rapids to the village of Cleveland.

"*Cleveland, December 6, 1825.*"

The contract was held to be valid. In that case the legislature had authorized the commissioners to receive

such proposals, but the decision seems to be based on the general rule.

In *Fremont Bridge Co. v. Fuhrman*, 8 Neb., 99, it was held that where a corporation or person to whom a subscription runs has incurred obligations on the faith of such subscription, and has complied with the condition on which it was made, the same may be enforced by suit. It is said (page 103): "While there is some conflict in the authorities, the clear weight of authority seems to sustain the rule that where several promise to contribute to a common object desired by all, the promise of each is a good consideration for the promise of the others and can be enforced by suit when the corporation or person to whom the subscription runs has incurred obligations on the faith of such subscriptions, and has complied with the conditions upon which they were made." In that case the location of the bridge was changed after the subscription was made without the assent of Fuhrman, therefore the court held that he was not liable.

But it is said that the building was not completed and occupied November 1st, 1880, and therefore the defendant below is not liable. An examination of the contract shows that the sums were to be paid on "the completion and occupation of the building." In the next sentence it is stated that the building is to be completed and occupied on or before November 1st, 1880. The rule in regard to time appears to be this: That where there is nothing special in the nature of the property or of the purposes for which it was intended, although a particular day may be fixed for the completion of the contract, yet the general object being the accomplishment of the purpose for which the promise was made, viz., the completion of the contract, the particular day named is merely formal.

A different rule obtains where the nature of the property or the purpose for which it was intended is of such a character as to make time material. In this case the ob-

ject of the subscribers was to benefit their property by inducing a large wholesale firm to establish its business on Harney street and thus induce others to erect business houses thereon and make it a business street, thereby greatly enhancing the value of their property. The building erected was larger than required by the stipulation, and in all respects was fully equal to the requirements of the contract. The benefit so far as it appears was equally as great to the defendant as though the building had been actually completed and occupied on Nov. 1st. And the defendant below when asked for his subscription, in January, 1881, made no objection either to the building or the time of its completion, and promised to pay the amount subscribed. About a month afterwards he made a similar promise, and afterwards sent a friend to try and induce the plaintiffs to take \$100 in satisfaction of the demand. The plea as to time evidently is an after-thought.

3d. It is claimed that the action should have been to recover on a *quantum meruit* and not upon the contract, that when the suit is upon the contract alleging compliance therewith everything is essential in the contract to authorize a recovery. Parsons states the rule in such cases as follows: "If the time be set in which certain work is to be done it is not in general so far of the substance of the contract that if the work be done, but not until some days later, no compensation will be recovered; but an action for the price will be sustained leaving the defendant to show any injury he has sustained by the delay, and use it in reduction of damages by way of set-off," etc. 2 Parsons on Contracts (5 Ed.), 660. This, we think, states the law correctly. The few days which elapsed after the time fixed for the completion and occupation of the building and the time in which it was actually completed and occupied do not in our view affect the right to recover. The defendants' attorneys in their brief virtually admit this, but say the action should not have been upon the contract. This

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objection should have been made on the trial to be available here. Where proof has been introduced without objection which would entitle a plaintiff to recover, this court would, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for that purpose.

It is apparent that substantial justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

AUGUST BENZON, PLAINTIFF IN ERROR, v. THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY, DEFENDANT IN ERROR.

Verdict. Where in an action to recover damages for injury to property, and the cause of the injury is a matter of conjecture, a verdict in favor of the plaintiff will not be set aside at his instance because the verdict is not as large as it probably would have been had the cause of the injury been fully proved.

ERROR to the district court of Douglas county. Heard below before WAKELEY, J.

Congdon, Clarkson & Hunt, for plaintiff in error.

T. M. Marquett and *Charles J. Greene*, for defendant in error.

MAXWELL, J.

This is an action for damages growing out of an alleged trespass upon the plaintiff's real estate. The plaintiff alleges in his petition that at the time the injuries were com-

mitted he was the lessee and in possession of lots 3 and 4, in block 125, in Omaha, and the owner of an ice-house thereon; that on the 1st day of March, 1882, such ice-house was stored with ice belonging to the plaintiff; that said lots are situated to the east of and at the foot of a high bluff, and the slope of the land from the ice-house is from the west to the east, and the natural flow of water in that direction; "that on or about the 1st day of May, 1882, defendant, its agent, and servants wrongfully, willfully, and injuriously entered upon the east 66 feet of said lots, and hauled, dumped, and deposited thereupon a large quantity of earth, and thus formed a barrier which obstructed the flow of water across said lots, prevented its escape from in and about said ice-house, and caused it to collect, stand about, and flow into said ice-house to the height of several feet, thereby wetting and displacing the ice of plaintiff and injuring his building," in all to his damage in the sum of \$15,000.

The defendant in its answer alleges that it is the owner of the lots upon which the grading was done; that the work was performed to raise the grade of said lots to the established grade of Farnam and Douglas streets; that said grading was properly and skillfully done by competent engineers. It is denied that the plaintiff is the lessee of said lots, or that he had stored therein the amount of ice he claims. There is also an allegation that the injury was caused by his own negligence.

On the trial of the cause the jury returned a verdict in favor of the plaintiff for \$75, interest and costs. The principal objection made in this court is, that the verdict is against the clear weight of evidence. It appears from the evidence that in the spring of 1882 the attorneys for the plaintiff, after being informed by Mr. Holdrege, the superintendent of the defendant, that Mr. Calvert was the proper person to whom to apply, addressed to him the following letter:

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"OMAHA, NEB., April 21st, 1882.

T. E. Calvert, Esq., Chief Eng. B. & M. R. R., Omaha, Neb.:

DEAR SIR—Mr. Aug. Benzon, who owns lots 3 and 4, in blk. 125, lying at S. E. cor. of 8th and Douglas Sts., and who has over 4,000 tons of ice stored there, requests us to write you in reference to putting in a culvert from his ice-house through the adjoining lots which you are now filling. On account of filling your lots water already stands in his house to the depth of six inches, and the first rainfall will work him great damage. A culvert 100 feet long would stretch from his house through your lots to the culvert recently put in by the Con. Tk. L. Co., whose permission he has to effect a juncture with them. To do this would be comparatively inexpensive to you, and save him much threatened damage. We would be pleased to receive a communication from you in reference to the matter at your earliest convenience," etc.

To this communication Mr. Calvert, on April 27, 1882, replied as follows: "Yours of the 21st received during my absence. Hence the delay. We certainly do not intend wantonly to harm the property of Mr. Benzon. But in order to put the property lying east of him in shape for R. R. purposes it must be graded up some 8 feet, which will raise it considerably above base of ice-house, and ground around there can only be kept free from water by a drain. A drain through our property is of no value whatever to us and we should not therefore be asked to put it in. We will, however, gladly give Mr. Benzon every facility for placing it. The claim that ditch dug to let water out from ice-house is, I think, without foundation." The testimony tends to show that the ice-house in question is situate on the bottom lands near the Missouri river, but close to the base of the bluffs; that the land upon which it is built is quite low, and even before the grading complained of, the drainage imperfect; that the building was erected in 1876

and was considered a good building of that class; that during the overflow of the Missouri river in 1881 the water had been several feet in depth around the building for some time, which had the effect of causing the building to lean over to the east, and but for heavy props placed against it then it would have burst; that some of the props had been removed prior to the spring of 1882, and there was danger, even while the grading complained of was being done, that the building would burst on the east side and south end. The insecure condition of the building seems to have induced the plaintiff to bank the earth up against the east side and south end of the building to about the height of six feet. On cross-examination he testifies in answer to the question, "What did you bank this up for with dirt that was there?"

A. It was filled up within ten or fifteen feet of the house on the east side; it was filled up to Douglas street. I threw it against the house to keep the sills from falling out. The ice would not have stayed there three days if I hadn't put dirt against the house to hold it together. I would have lost every pound of ice I had if I hadn't put dirt there. If it had once caved it would have been gone.

This it must be remembered was while the grading complained of was being done. The plaintiff made a drain across the grading of the defendant to the sewer of the Tank Co.; but as the ice-house seems to have been lower than the sewer the drainage was still imperfect. This, however, is not claimed to have been the fault of the defendant. There is a conflict in the testimony as to whether or not this drain across the defendant's grade was kept open, the plaintiff testifying that the employes of the defendant filled it in order to have a passage way for teams, while other witnesses testify that it was not filled up, but remained open during the entire summer of 1882 as well as that of 1883.

During the summer of 1882 the west side of the ice-house burst for a distance of about fifty-five feet from the south-west corner. This caused a considerable loss of ice from melting, which is the principal ground of damage in this case. The testimony, however, fails to show with any degree of certainty that the bursting of the ice-house was caused through the fault of the defendant. The ice is shown to have melted at the south-west corner of the building, and not evenly around the outside courses as it necessarily would have done had it been caused by stagnant water surrounding the building. It is more probable that the injury was caused by defective packing, and the insecure condition of the building. But, however this may be, these questions were submitted to the jury and considered in their verdict, and unless the verdict is clearly wrong it will not be set aside. In the 263 pages of testimony in the record a very large proportion is devoted to the value of ice, the quality, mode of packing, degree of waste, etc., questions proper to be inquired into, but the real cause of action—the cause of the injury—for want of evidence, no doubt, is left almost entirely to conjecture. The case was one proper to be submitted to a jury under proper instructions. Objections are made to some of the instructions, but as we see no error in them they need not be noticed here. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSHUA COX, APPELLEE, v. FRANCIS M. ELLSWORTH
ET AL., APPELLANTS.

1. **Death: PRESUMPTION OF, FROM ABSENCE.** The death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing his exposure to danger which probably resulted in his death. *Tisdale v. Connecticut Mutual Life Ins. Co.*, 26 Ia., 170.
2. ———: **PRESUMPTION OF, FROM CIRCUMSTANCES.** Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred without regard to the duration of such absence. *Ibid.*

APPEAL from Hamilton county. Tried below before NORVAL, J.

Austin J. Rittenhouse and *William P. Hellings*, for appellants, cited: *Burr v. Sim*, 4 Wharton, 150. *Eagle's Case*, 3 Abbott, 218. *Proctor v. McCall*, 23 Amer. Decisions, 135. *Holmes v. Johnson*, 42 Pa. State, 164. *Miller v. Beates*, 8 Amer. Decisions, 658. *Abbott's Trial Evidence*, 74.

Alfred W. Agee, for appellee, cited: *Jamison v. Smith*, 17 Rep., 300. *John Hancock v. Moore*, 34 Mich., 41. *Best Evidence* (Morgan's Ed.), § 409. *Tisdale v. Insurance Co.*, 26 Iowa, 170. *Ryan v. Tudor*, 31 Kan., 366. *Hancock v. Insurance Co.*, 62 Mo., 29.

COBB, CH. J.

This is an action in equity brought in the district court of Hamilton county, by Joshua Cox, plaintiff, against

Francis M. Ellsworth and wife, defendants, to reform an error or mistake in a deed of real estate executed by said defendants to one Mitchel Clement, under whom the plaintiff claims. The alleged error or mistake consisted in a misdescription of the land intended to be described in and conveyed by the deed. The defendants answering denied that there was a mistake or error in the deed, and denied the death of Mitchel Clement, their grantee. The deed under which the plaintiff claims his right in the premises was executed by Sarah J. Clement, widow or wife, and Minnie L. Clement, only child of said Mitchel Clement. This land was purchased and deed received by said plaintiff, and executed by said Sarah J. Clement and Minnie L. Clement on the theory that said Mitchel Clement was deceased prior to the date thereof—November 21, 1881.

The cause was tried to the court, which found all of the issues for the plaintiff, and adjudged, decreed, and ordered the said deed reformed and corrected as prayed by the plaintiff in his petition, etc.

The cause is brought to this court by the defendants by appeal. The case presents two questions:

1. Was there a mistake in the description of the land sought and intended to be conveyed by Francis M. Ellsworth and wife to Mitchel Clement under date June 9, 1875?

2. Was Mitchel Clement deceased prior to November 21, 1881?

The deed as recorded describes the land conveyed as "the south half of the north-west quarter of section 34, in township 10, range 5 W. It was amply proved on the trial that this land was entered under the homestead law prior to any of the transactions between Ellsworth and Clement by one Thomas C. Klumb, who continued to own and occupy it until long after the date of said transactions. The defendant F. M. Ellsworth presented his own deposition, taken in Washington Territory, as evidence on the part of the

defendants. In his deposition he does not claim that he ever owned the land actually described in the deed to Clement; but he does swear that he did *not* intend by the said deed to convey to Clement the south half of the north-west quarter of section 34, in township 11, range 5 W., the only tract of land that he is proved to have owned in Hamilton county at that time. On the other hand, Mr. Agee, a witness on the part of the plaintiff, testified that he was intimately acquainted with the defendant Francis M. Ellsworth in the fall of the year 1874, and for three or four years thereafter; that in the fall of 1875 he had a correspondence with said defendant (defendant residing at Seward, and witness at Aurora, Hamilton county) in reference to this land; that one Hyatt came to witness, who was then a law partner of said Ellsworth, and inquired if Ellsworth would sell the said tract of land, the south half of the north-west quarter of section 34, in township 11, R. 5 W.; that at the request of said Hyatt witness wrote to Ellsworth in regard to said tract of land, whether it was for sale, and the price and terms; that Ellsworth wrote a letter to witness in reply. Said letter having been destroyed at the time of the closing up of the partnership business between witness and defendant, witness was permitted to state the contents of the letter, and testified as follows: "In reply to my letter he wrote me that he did not own the land at all, that he had sold it. I saw Mr. Ellsworth, and we had frequent conversations about it. After he wrote that, I saw Mr. Hyatt, and Mr. Hyatt told me that the record showed it was his, and I went and examined the record, and found that so far as the record showed that the title was still in Ellsworth, and at the first time I saw Ellsworth, I think, at any rate after that time, I spoke to him about it, and told him that the record showed he still owned the land. 'Well,' he said, 'it is a mistake in the record.' He said he had sold the land, and that there was some mistake about it. I think that we went to

the court-house and examined the records in reference to the matter, and took the index and looked through, and we found that the title was still in Ellsworth, and that he had never made any conveyance of it after he received the conveyance from Lewis, and on searching the index we found where a deed from Ellsworth to Clement (I can not say that I now remember what the name was), but I know that we traced out this deed from him to another party, and we found that it appeared of record that the deed covered the south half of the north-west quarter of sec. 34, town. 10, range 5, instead of town. 11, range 5; and Ellsworth said that undoubtedly there had been a mistake made in the deed in recording it, and that he was sure if the party looked up the original they would find it was all right, and it would describe the piece of land as in town. 11, instead of town 10. I had several conversations with Mr. Ellsworth about the matter, and I told Mr. Ellsworth what Mr. Johnson claimed about the matter, and he still insisted that the deed would be found to be all right, and that it must have been a mistake in the record. The last conversation I had with him occurred since he moved out to Washington Territory. He came back here, and that is, I believe, the first time he claimed to still own the tract of land out here in town. 11."

Upon this and other testimony I do not think that the court could have found otherwise than that "there was an error and mistake inadvertently made in the description of the premises intended to be made," etc. Some stress is laid in the deposition of defendant on the assertion made by him that if there was a mistake in the description of the land in the deed it was not his mistake, but the mistake of Mills, the agent of the grantee. I do not think it would make any difference whose mistake it originally was. By executing and acknowledging the deed he adopted its terms, and if there was a mistake in it, though made by the draftsman, whoever he might be, so that the deed did

not express the true intention of the grantor, a court of equity will reform it so as to comply with such intention.

On the second point, it appears from the record that about five years previous to the date of the conveyance by Sarah J. and Minnie H. Clement to the plaintiff, Mitchel Clement was a man of about sixty-three years of age, married, and had been married about 17 years, his family consisting of his wife and an only daughter, a bright and intelligent girl of about fifteen; he being of sober and industrious habits, greatly attached to his family and home, in easy pecuniary circumstances. He resided with his family in his own house in the village of Forrest, Livingston county, Illinois. His business had been for many years that of purchaser of corn. At this time the active season for that business was just about to commence. He had just finished repairing his cribs and putting in new scales for the purpose of weighing corn. Under these circumstances, in the early part of the month of December, after eating his breakfast in the morning, he as usual left his house and went into the village without expressing his intention of going away anywhere, and without taking anything with him but his every-day clothes on his back. He never returned, nor did his family or friends or any of the citizens of Forrest ever see or hear of him so far as is known, except to learn from the bankers, where it seems he had some money on deposit, at the neighboring city or town of Fairbury, about five miles distant, who stated to the wife of the missing man that he came into the banking house on that day and drew out his money which he had on deposit there, amounting to about \$1,800. All of his relatives and connections known to his wife and daughter were corresponded with for news of the missing man, and extensive search made by the people of Forrest for his body in case any accident or casualty had befallen him, but all without effect.

Now then, was this evidence sufficient, after the lapse of

five years, to sustain the finding of the court that Mitchel Clement was dead? By reference to the text-books and cases, it seems to be the settled rule both in England and this country that seven years is the period at which the presumption of continued life ceases. But this period may be shortened by the proof of such facts and circumstances connected with the person whose life is the subject of the enquiry as, when submitted to the test of reason and experience, would force the conviction of death within a shorter period. Under the rule above stated, if any person domiciled in the city of Lincoln leaves the place of his residence on a journey of business, health, or pleasure, or simply disappears and does not return, nor is heard of by any person at said city or elsewhere, so far as is known to the authority making the enquiry, until after the lapse of the period of seven years, the presumption that such person is still in life ceases to exist and he is presumed to be dead, without regard to any fact connected with the circumstances, life, or habits of such person. But when the enquiry arises before the expiration of seven years, and the facts and circumstances of the person are proved to have been such as to compel the thoughtful and experienced mind to believe that, if still living, such absent person would have returned to or communicated with his home, wife, children, relatives, or friends left behind, or to the care and enjoyment of property abandoned, and that he has never returned—in such case, although the period of seven years has not elapsed, the presumption of continued life may be held to have ceased.

The case of *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Ia. R., 170, is a strong case and quite in point to the case at bar. This was an action by Mrs. Tisdale against the life insurance company upon a policy of insurance on the life of Edgar Tisdale, her husband. Of course, the leading fact to be proved by her was the death of Edgar Tisdale. The case does not show the date of the com-

mencement of the suit, but as the opinion of the supreme court was filed December 12, 1868, it is fair to presume that the suit was commenced in the district court as early as the first of that year. The evidence tended to prove that Edgar Tisdale "was a young man of exemplary habits, excellent character, of fair business prospects, respectably connected, and of the most happy domestic relations. He had the fullest confidence of his friends, and the entire affection of his wife, and was living in apparent happiness, with no cause of discontent with his condition which would have influenced him to break the domestic and social ties with which he was so pleasantly bound to life. Visiting Chicago, September 25, 1866, upon business, he was last seen by any acquaintance on the corner of Lake and Clark streets in that city about 3 o'clock of that day. No trace of him was afterwards discovered, though his friends made every effort to find him and ascertain the cause of his mysterious disappearance. A large reward was offered through the newspapers for information that would lead to his discovery either dead or in life. The detective police were employed to search for him, without results. No tidings have been received of him, and not the faintest trace of the cause or manner of his disappearance has been discovered. The district court instructed the jury that "the law presumes the existence of a person, when duly proved, to continue until the contrary is shown by some sufficient proof, or, in the absence of such proof, until a different presumption arises. Such presumption arises in law after the expiration of seven years without any intelligence concerning such person; but upon the issue of the life or death of such person, a jury may find a presumption of death from the lapse of a shorter period than seven years, provided other circumstances concur. These other circumstances must be facts proven or presumed to be true, the existence of which being so established, gives reasonable ground for the presumption of such

death ; such as, for instance, that such person is proven to have sailed on a voyage which should long since have been accomplished, and the vessel in which he sailed has not since been heard from, from which fact the loss of the vessel and those on board will reasonably be presumed ; or that such person is shown to have last been in a house destroyed by fire, or a tornado, at or so near the time of its destruction as to furnish a reasonable presumption that he perished in it. But in the absence of proof of some such circumstances no amount of probabilities arising from continued absence or neglect to write, or from confidence in the character or habits of the person alleged to be dead, or in his previous declaration of intention, will be sufficient to warrant the presumption of death within seven years, because the law fixes that period for a presumption of death to arise from such circumstances." The jury found for the defendant. In the supreme court, Beck, J., in delivering the opinion of the court reversing the judgment of the district court, said : "The first instruction, announcing the rule that the death of an absent person cannot be presumed, except upon evidence of facts showing his exposure to danger, which probably resulted in death before the expiration of seven years from the date of the last intelligence from him ; and that evidence of long absence without communicating with his friends, or character and habits, making the abandonment of home and family improbable, and of want of all motive or cause for such abandonment which can be supposed to influence men to such acts, is not sufficient to raise a presumption of death. The instruction is not in accordance with the true rule of evidence, and is erroneous." * * "Any facts or circumstances relating to the character, habits, condition, affection, attachments, prosperity, and objects in life, which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration

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of such absence. A rule excluding such evidence would ignore the motives which prompt human actions, and forbid inquiry into them, in order to explain the conduct of men," etc.

The above case was cited with approval in *Hancock v. Amer. Life Insur. Co.*, 62 Mo. R., 26; also, by the supreme court of Kansas in *Ryan v. Tudor*, 31 Kan., 366, all cases cited by counsel for appellee.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**JOHN C. MORRISSEY ET AL., PLAINTIFFS IN ERROR, V.
ANTON SCHINDLER, DEFENDANT IN ERROR.**

1. **Trial:** DISMISSAL OF ACTION AS TO ONE DEFENDANT DURING TRIAL. The action was brought against the appellants and the Burlington & Missouri River Railroad Company in Nebraska as defendants. Pending the trial plaintiff asked and obtained leave of the court to dismiss his case as to the railroad company, with costs; *Held*, No error, and that the trial was properly allowed to proceed as against the remaining defendants, plaintiffs in error, without re-empaneling or reswearing the jury, although the answer of defendants contained a paragraph in the nature of a plea in abatement for the misjoinder of the railroad company as a party defendant.
2. ———: ———: EVIDENCE. The contract set out in the pleading was properly admitted in evidence against the remaining defendants after the dismissal of the cause as against the railroad company, although the said railroad company was not a party to said contract.
3. **Petition Against Partnership.** The defendants, Morrissey Brothers, being described in the petition as "John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers," they were sued as a firm to all intents and purposes.

18	672
36	730
18	672
42	353
18	672
44	643
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4. **Contract: PAROL EVIDENCE OF MODIFICATION.** It is competent to prove by parol a change or modification in the terms of a written contract made by the parties to such contract at a time subsequent to the execution thereof. And the consideration for the contract may be a sufficient consideration for such change or modification.
5. **Work and Labor: EVIDENCE IN CASE STATED.** Under the peculiar facts and circumstances of the case at bar; *Held*, That the evidence which tended to prove plaintiff's claim for extra compensation for performing the work set out in the petition tended also to disprove and controvert defendants' counterclaim for damages alleged to have been sustained by them by reason of said work not having been performed in accordance with the terms of the original contract.
6. **Action for Work and Labor: VERDICT SUSTAINED.** Action brought by defendant in error against "John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers, and the Burlington and Missouri River Railroad Company in Nebraska," for labor and mechanical skill in the erection of certain elevator buildings under a certain written contract, and for certain extras and expenses claimed under an alleged modification of the terms of said contract. The verdict, as follows:

"Anton Schindler,	} In district court Nebraska.
vs.	
Morrissey Brothers, et al.	} Verdict for plaintiff.

"We, the jury duly empaneled and sworn in the above entitled cause and to try the issues joined therein, do find for the plaintiff, and assess his damages at the sum of three hundred and fifty dollars."

[Signed by the foreman.]

Sustained both as to form and substance.

ERROR to the district court for Cass county. Tried below before POUND, J.

Crites & Ramsey, for plaintiff in error, cited: 1 Tidd's Pr., 641. *Myers v. Erwin*, 20 Ohio, 382. *Alling v. Sheldon*, 16 Conn., 436. *Sweet v. Tuttle*, 14 N. Y., 465. *Manahan v. Gibbons*, 19 Johns., 427. *Detroit v. Houghton*, 42 Mich., 459. *Williams v. State*, 6 Neb., 334. *Miller v. Jewett*, 5 Pac. Rep., 652. *Stearns v. Barnet*, 2 Mason, 173. *Ross v. Austill*, 2 Cal., 183.

M. A. Hartigan, for defendants in error, cited: *Puterbaugh's Practice*, 144. 2 *Broom & Hadley's Blackstone*, 253. 4 *Kan.*, 37. 9 *Id.*, 104. 15 *Id.*, 495. 33 *Mich.*, 248. 34 *Id.*, 4.

COBB, CH. J.

This action was brought in the district court of Cass county by Anton Schindler, plaintiff, against John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers, and the Burlington and Missouri River Railroad Company in Nebraska, defendants. The action is brought on a written contract for the erection of certain grain elevators by the plaintiff for the defendants. Also claiming, in addition to the contract price for the erection of said elevators, an amount for extra work rendered necessary by reason of changes of the plans of said buildings after the execution of the said contract.

The defendants Morrissey Brothers answered, making a general denial of the allegations of the petition, and especially denying any contract or liability jointly with their co-defendant the Burlington and Missouri River Railroad Company in Nebraska. As a second answer and defense to the said petition the defendants alleged the making and executing of a contract in writing between themselves, in their firm name of Morrissey Brothers, and the plaintiff, a copy of which contract is attached to the said answer, and is the same as that mentioned in the petition of the plaintiff. In their said answer the defendants "aver that neither at the time of the execution of the said contract or subsequently did the said defendant railroad company have any interest whatever in said contract or in the subject matter thereof, which said contract these answering defendants aver the said plaintiff is now seeking to enforce in this action as the joint contract of these answering defendants and said defendant railroad company with said plain-

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tiff, wherefore these answering defendants aver that there is a misjoinder of causes of action herein, and also an improper joinder of defendants herein." The said defendants then, as a third defense, set out at length the making of the said contract by the plaintiff with them for the furnishing of the necessary labor and mechanical skill and the erection and completion of nine grain elevators at different points along the line of the road of said defendant company, according to the terms and specifications of said written contract, for which work, when fully performed and finished according to the terms of said contract, the answering defendants were to pay the plaintiff the sum of fifteen hundred and fifty dollars. That after the performance of part of said work, and on or about the first day of September, 1882, the said plaintiff, without any just cause, abandoned the same and discontinued the work on said grain elevator buildings, and has never since completed the same, though often requested. That during the part performance of said work the said defendants from time to time paid the said plaintiff on account of said work and contract the sum of seventeen hundred dollars, at his request, etc. Defendants further aver that certain of said buildings were not built and finished in accordance with the said contract, and specify what ones and in what respects the same fail to comply with the terms of the said contract, to the loss and damage of the said defendants over and above the services rendered by the plaintiff in the sum of one thousand seven hundred and thirty-eight dollars.

There are also two more defenses plead by defendants, but they are substantially repetitions of the third defense. The answer concludes with a prayer for judgment against the plaintiff in the sum of three thousand dollars and costs. The plaintiff filed his reply denying all allegations of new matter contained in said answer, and alleging "That the defendants received and accepted said elevators with-

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out claim of rebate, damages, or fault in particular. That they never made any claim of damages until the filing of the answer in this cause," etc.

The cause was tried to a jury. The record contains the following journal entry: "Pending which testimony the plaintiff dismissed said railroad company out of court, with costs. The court permits the same to be done and ordered the trial to proceed against the remaining defendants by themselves. To which ruling and order they each duly object and except."

Upon the consent of parties in open court the court delivered an oral charge to the jury, and no written instructions.

The jury returned their verdict for the plaintiff in the sum of three hundred and fifty dollars.

Upon the denial of a new trial by the district court the cause is brought to this court on error.

Thirty-nine errors are assigned. They are not all insisted upon by counsel in the brief; the more important of those which are, will be examined and disposed of in their order.

"1. The district court erred in allowing said defendant in error to dismiss out of court the Burlington and Missouri River Railroad Company in Nebraska, a defendant named in his petition, after a plea in abatement for a misjoinder of parties defendant and causes of action had been pleaded as a defense to said petition and an issue joined on said plea in abatement, and after a jury had been empaneled and sworn to try the issues joined in the pleadings therein," etc.

It is quite obvious, upon an examination of the record, that the railroad company should not have been joined as a defendant, but under the strict rules of the common law it was unnecessary for the defendants to plead such misjoinder in abatement. A plaintiff having sued several defendants in an action *ex contractu*, must in general have

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recovered against them all or be non-suited upon the trial. See Chitty's Pleadings, Vol. 1, 51. But all of this is changed by the Code, and it may be said that the necessity for a reform in the system of practice which resulted in the new system of pleading and practice in New York and other states, including our own, was more sharply illustrated in the provision of the common law above stated than in any other.

Section 429 of the Code provides that, "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. It may determine the ultimate rights of the parties on either side as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper," etc. It will therefore be readily seen that no defense on the part of "the answering defendants" could be predicated upon the misjoinder of the railroad company as a party defendant.

The above also applies to the second error assigned, which is, that "The court erred in proceeding to a trial of the issues joined between said defendant in error and these plaintiffs in error after said railroad company had been dismissed out of court without empaneling another jury and swearing them to try the issues mentioned in this assignment of error against the objection and exception of these plaintiffs in error." In this I do not think the court erred, but on the contrary, to have done otherwise would have been to sacrifice substance to form, to increase expense, and cause unnecessary delay; three things to be avoided.

Under this head also, the plaintiffs in error in their brief claim that, "The court erred in admitting in evidence

plaintiff's exhibit 'A,' it being the contract for the erection of these elevators in question, because it was not the joint contract of all of these defendants, and because it appeared on its face to have been executed by Schindler and the firm of Morrissey Brothers, under their firm name, the existence of no firm having been alleged in the petition."

It does not appear from the record whether the exhibit referred to was introduced before or after the dismissal of the case as against the railroad company. If afterwards, then certainly it was no objection to its introduction, that under the former or original condition of the pleadings it may not have been admissible. If before then, though probably not admissible, the error of its admission, if any, was cured by the elimination from the record of the name of the party whose presence there rendered its admission objectionable. As to the latter clause of the objection, it is deemed sufficient to say that in the title of the petition the defendants are described as "John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers," etc. So that the defendants were sued as a firm although the word "firm" may not have been used.

"3. The court erred in allowing defendants in error to ask questions numbered in the bill of exceptions as follows," etc. The first group of questions objected to under this head is set out in the bill of exceptions as follows: But that it may be understood I will commence a few questions and answers back of those objected to—the plaintiff as a witness in his own behalf being examined in chief.

Q. 52. I will ask you to state if the contract was changed or modified between you and the Morrisseys?

A. Yes, sir.

Q. By Crites, counsel for defendants: Was the change in writing?

A. No.

Q. Was that all the writing that you made in the contract?

A. Yes, sir.

Q. By the court: Changed by talk?

A. Yes, sir.

Q. You may state what change was made in regard to the size of the buildings?

A. The first time it was 24x24 and 20x20, being all 24x24.

Q. All there was said, if anything, and what change if any made in regard to your lost time, going to Plattsmouth and back, and your railroad fare?

Q. By the court: Was there any such a change made about the transportation?

A. Yes.

Q. By the court: Was that in writing?

A. No, sir. Just the same way; I told him I had to come here twice a week. [*Crites objects. Incompetent, immaterial, and irrelevant. Overruled and exception.*] I had buildings here, Goos', etc. I had to attend to them, and he said sure we will let you in here twice a week and pay what it costs you. I told him we had more trouble on that elevator; he said, I don't want you to lose in there; he said I will pay you every cent that you lose on those buildings. I could not say whether it would cost more, but he said I don't want you to lose any.

Crites objects to this testimony. Incompetent, immaterial, and irrelevant, tending to change and alter a written contract without consideration, and I move to strike it out. Motion overruled and exception.

Q. State what was the value of your time and fare coming from Waco to Plattsmouth?

Crites makes the same objection. Overruled and exception.

A. I guess it was about seven dollars. Six ninety-five or seven dollars I paid.

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It is deemed sufficient to say of these objections, that it is believed to be the law as now settled, and in the absence of authorities to the contrary it will be so held, that it is competent to prove by oral testimony a change in or a modification of a written contract made subsequent to its execution, and that in a proper case such change or modification may rest upon the consideration upon which the original contract is based.

It is not deemed necessary to go over the other points raised in the brief on the reception and rejection of testimony, as none of them are deemed to be of controlling importance in the case.

4. Upon consent of parties the court instructed the jury orally. Consequently the charge is very lengthy and not separated into paragraphs or numbered. I will therefore only speak of the charge as a whole. Plaintiffs in error, in their brief, object to the charge on the ground that the court told the jury that they might consider the evidence before them tending to prove the plaintiff's items of extra work and expense under the head of lost time and car fare in traveling from point to point between the sites of the several elevators, and between any of them and Plattsmouth, the common base of operations and supplies. Now I think that there is sufficient in the petition as a foundation for the evidence introduced and admitted to prove these items; there certainly is evidence tending to prove them, that the time was lost and the expense incurred traveling on the cars; also tending to prove that defendants agreed to pay for it, consequently it became and was proper matter for the consideration of the jury.

There was also evidence tending to prove the defendants' counter-claim. This counter-claim is for damages alleged to have been sustained by the defendants by and on account of the failure and refusal of the plaintiff to erect and complete the elevators in question according to the original contract and the plans and specifications upon which

the same were based. Now it is not only alleged in the plaintiff's petition, but there is evidence tending to prove, that by mutual consent and agreement between the parties the original plans and specifications were in the main abandoned, and the elevators neither built by plaintiff or desired to be built by defendants in accordance therewith. The least that can be said of this evidence is, that it tends to disprove the defendants' counter-claim. Hence it, as well as the evidence tending on the other hand to prove the counter-claim, was, as I think, properly submitted to the jury by the charge of the court.

By the terms of the contract the plaintiff was to furnish the labor and mechanical skill for the construction of these elevators, the lumber and other material to be furnished by the defendants. On the subject of the defendants' claim for damages on account of the work not having been done in accordance with the contract, the court in the charge said: "In respect to any damages which may have occurred to the buildings in consequence of their not being erected according to the contract, I will say this, that for any defects in the buildings, any departure from the plans and specifications that have been occasioned through the plaintiffs' fault, in failing to erect them and do the business in a workmanlike manner, as the contract requires, he ought to be responsible, but for any defects in the buildings which have been occasioned in consequence of defective lumber, as to the kind of lumber which the defendants should have furnished, he should not be responsible. He was only bound to use such lumber as they furnished him, in a proper and judicious manner. The defendants furnished the lumber; he should be held only responsible for the proper use of the lumber furnished him. If he did do that and did the best he could under the circumstances, that is all that could justly be required of him." The exception of plaintiffs in error to this portion of the charge cannot be sustained.

Plaintiffs in error, in the brief, except to the form of the verdict, and particularly to the title, the same being "*Anton Schindler v. Morrissey Bros. et al.*" While I do not think that any caption or title at all was necessary to the validity of the verdict, yet one being used, I doubt that counsel could improve it. All the purpose which a title could serve in a verdict would be to identify it with the case. The true title of the case being "*Anton Schindler v. John C. Morrissey and Michael Morrissey, doing business under the name and style of Morrissey Brothers, and The Burlington & Missouri River Railroad Company in Nebraska,*" it serves all purposes of identification and is quite within the practice to use the abbreviated form here used. The title of the case was not changed by the dismissal of it as against the railroad company. As to the substantial part of the verdict, I think it correct. Counsel are in error when they speak of this as an action of debt on a written contract. It was an action for damages for a breach of contract, and a verdict for damages was correct.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

W. D. POST, PLAINTIFF IN ERROR, V. ALEXANDER GARROW ET AL., DEFENDANTS IN ERROR.

1. **Contracts: TIME OF PERFORMANCE.** When the day of performance of contracts other than instruments upon which *days of grace* are allowed, falls on *Sunday*, that day is not counted, and compliance with the stipulations of the contract on the next day (*Monday*) is deemed in law a performance. *Satter v. Burt*, 20 Wend., 205.

18	688
25	518

18	682
31	579

18	682
36	641

18	682
38	184

18	682
42	844

18	682
47	411

18	682
49	94
55	160

18	682
57	601

2. ———: PETITION IN SUIT ON. Where in an action on a written contract a copy of the contract is attached and referred to in the petition, a statement of the terms of the contract in the body of the petition will not be stricken out, on motion, as redundant nor as irrelevant matter.
3. ———: FORFEITURE. For the purpose of effecting a forfeiture of money advanced on a contract which has not been performed, the party claiming such forfeiture must show a readiness and willingness on his part to keep and perform the contract in every particular.
4. Instructions considered and approved.
5. Contract for Sale of Cattle: EVIDENCE: TENDER. In the case of a contract for the sale and delivery of cattle at so much per lb. or cwt., when, upon the day appointed for the execution of the contract, the seller refuses to weigh and deliver the cattle and declares the contract at an end, in an action by the buyer for damages for the non-delivery of the cattle, *Held*, Not incumbent on the plaintiff to prove a *tender* of the purchase money.

ERROR to the district court for York county. Tried below before NORVAL, J.

France & Harlan, for plaintiff in error, cited: 2 Benjamin on Sales, § 1054. *Metz & Albrecht*, 52 Ill., 491. *Clark v. Dales*, 20 Barb., 42. *Porter v. Rose*, 12 Johns., 209. *Garret v. Gonter*, 42 Penn. State, 143. *Kitzinger v. Sanborn*, 70 Ill., 146.

M. L. Hayward and *Scott & Gilbert*, for defendants in error, cited: *Avery v. Stewart*, 2 Conn., 69. *Barrett v. Allen*, 10 Ohio, 426. *Salter v. Burt*, 20 Wend., 205. *Barnes v. Eddy*, 12 R. I., 25. 2 Parsons on Cont., 178 and 179—4th Ed. 2 Hill, 378, note b. *Brooklyn Oil Refinery Co. v. Brown*, 38 How., 449.

COBB, CH. J.

The principal question in this case is, whether a contract for the sale of cattle, "to be delivered at Bradshaw station on or before May 20, 1883," May 20, 1883, being

Sunday, became due and terminated on that day, or did it continue alive and capable of being executed during the whole of the following Monday.

The cases cited by counsel for defendants in error seem to settle, to my satisfaction at least, the law to be, "That," in the language of Gould, J., in the leading case of *Avery v. Stewart, Sup.*, "as Sunday cannot, for the purpose of performing contracts, be regarded as a day in law, it is as to that purpose to be considered as stricken from the calendar, though *intervening Sundays* are, doubtless, to be counted as in all other computations of time, because they are not appointed for the performance of any act. And this rule applies to all time contracts except those where, under the statute or the law merchant, days of grace are allowed."

The day for the performance of the contract sued upon, then, being Sunday, the true day for its performance and termination was Monday, the 21st day of May, 1883.

The contract contains a further provision in the following words: "Said steers to be weighed at feed lots any time in afternoon before 6 o'clock." Upon this provision and the evidence applicable thereto the plaintiff in error, in his brief, raises the question that, even if the defendants in error had all of the 21st day of May in which to receive and pay for the cattle, the terms of the contract providing that the cattle should be weighed before 6 o'clock being also applicable to Monday the 21st, the plaintiffs were not in time to claim the benefit of said contract. It is probably sufficient to say upon this point that the evidence being conflicting as to the precise point of time at which the agent of the plaintiffs arrived at the place where the cattle were, ready to witness the weighing, and the jury having found for the plaintiffs, it must, for the purposes of this opinion, be assumed that said agent arrived there and met the defendant at five minutes before 6 o'clock of the 21st day of May, by railroad time, which, in 1883, was some-

what faster than sun time. The only possible ground, then, upon which plaintiff in error can claim a forfeiture of the contract is, that at the time of the arrival of the agent of the plaintiffs at the place where the cattle were, there did not remain sufficient time to complete the weighing of the cattle before 6 o'clock. It is not clear, in any event, whether the true meaning of the contract is that the weighing of the cattle should be completed before 6 o'clock. Probably its terms would be fully complied with upon the weighing being commenced before 6, to be completed in good faith. And that construction would certainly be given it, when, as in this case, the former construction would involve a forfeiture. According to the evidence it would take from a half to three-quarters of an hour to weigh the cattle. On that day the sun set at ten minutes after seven o'clock. Had the weighing commenced at five minutes before six, it would have been certainly completed more than a half hour before sundown.

It seems from the bill of exceptions that on this day, the 21st day of May, the cattle were two miles south of Bradshaw. There is no evidence as to where they were at the time of the making of the contract, nor as to what "feed lots" were contemplated by the use of that language in the contract. True, it would be presumed that the cattle were, on the 21st day of May, in the same feed lots as at the date of the contract, were it not that on the 7th day of April, as shown by exhibit K, plaintiff in error wrote to Garrow Bros., among other things, "My feeder leaves middle of next week, and I must move the cattle then." The language of the contract providing for the delivery of the cattle "at Bradshaw station on or before May 20," and again "said steers to be weighed at feed lots any time in afternoon before 6 o'clock," would seem to me, in the absence of any explanation, to indicate that the steers were then in feed lots at Bradshaw station.

It must be borne in mind that the plaintiff in error had

received three hundred dollars of the purchase money for the cattle in question. This money he claims as a forfeit by reason of his having complied with the terms of the contract in every particular on his part, while the defendants in error have failed to comply with the terms of the contract. By the terms of the contract he agreed to deliver the cattle at Bradshaw station on or before May 20, 1883, at buyers' option. He could not technically comply with this contract without having the cattle at Bradshaw station ready to be delivered on that day, or that day being Sunday, on the next day, unless he was prevented by some act of the defendants in error. And had the defendants in error failed to be present either in person or by agent at the time fixed upon by another clause of the contract for weighing the cattle, would that be such an act or omission on their part as would enable the plaintiff in error to claim the fulfillment of the contract on his part without having the cattle at Bradshaw station at all? Possibly there may be something in the usages or necessities of the business of buying and selling fat cattle to take the case out of the general rules and principles of law, but if so, it is not indicated by the language of the contract, or shown by the evidence.

Upon the trial the defendant moved to strike out certain matter from the plaintiff's petition as irrelevant and redundant, and the overruling of this motion is assigned for error. Without discussing the question whether this court would reverse the judgment for the overruling of said motion by the district court, even were it never so erroneous, I think that the said motion was properly overruled. The theory of the motion seems to be, that the plaintiff having referred to the contract, and attached a copy of it to the petition, then any statement of the terms of the contract in the petition was irrelevant and redundant. The practice of attaching copies of written instruments to petitions doubtless is based upon the provisions of section 124 of

the Code. But even in cases where, under the provisions of that section, it is necessary that a copy of an instrument be attached to a pleading, and filed therewith, the pleader is not necessarily thereby excused, much less precluded, from stating the facts upon which his action or defense is predicated.

The demurrer was also properly overruled. There were five causes of demurrer alleged therein. Four of them are abandoned, or at least not relied on in the brief. The third ground, "That said petition does not state facts sufficient to constitute a cause of action," cannot be sustained. The allegation of the petition, "That at the time said cattle were to be delivered plaintiffs went to Bradshaw station, where said cattle were to be delivered, and not finding the defendant or the cattle there, went to his, defendant's, house and yard, and there demanded of him said cattle so sold to them, and then and there offered to pay him for the same, but defendant then absolutely refused to let plaintiffs have said cattle or any part thereof, and wholly failed and refused to keep his said contract, and he has ever since failed and refused, and now refuses, to comply with said contract," etc., is a good assignment of a breach of the contract by the defendant, and of willingness and readiness on the part of the plaintiffs to comply with their part of it. The law of *tender* does not arise in the case.

With other instructions given by the court to the jury on the trial the following were given, which are assigned for error by plaintiff in error :

"10. In an action for breach of an executory contract to deliver personal property, in the absence of fraud or stipulation to the contrary, the rule is actual compensation. The injured party may recover his loss sustained.

"11. In such case, if the value of the property sold has advanced, the damage is the difference between the contract price and the market price at the time and place of deliv-

ery, and in case of payment by the buyer of all or part of the purchase price he is entitled to such difference between the contract and market prices, in addition to the sum paid on the contract, and seven per cent interest on the sum paid on the contract from the breach thereof."

Whatever might be said of the 10th instruction, as standing alone, and as applicable to a different state of proof, upon the evidence in this case, and considered in connection with the 11th instruction, it fairly expresses the law, as I understand it.

Plaintiff excepts to instructions 5, 6, and 12, and makes the point in his brief that in them the court calls the attention of the jury to only a part of the facts introduced to make out the defendant's case, and excludes other facts material to the issue made by the defendant. Instructions 5 and 6 refer to the claim on the part of the defendant that he had bought the cattle back from the plaintiffs. But I do not think that there was any evidence of a second contract between the parties to go to the jury. But if there was, and the defendant was dissatisfied with the charge submitting that part of the case to the jury, on the ground that it did not comprehend the whole of it, or go far enough, he should have presented an instruction to the court embracing the law applicable thereto as he understood it. Upon such instruction being presented and refused, the point could be presented to this court, otherwise I don't think it can.

As to instruction number 12, it simply tells the jury that in case they find for the plaintiffs they shall assess the amount of their recovery according to the rule announced in the last instruction (No. 11).

Plaintiff in error makes the point that the court ought also to have instructed the jury as to the measure of damages applicable to the counter-claim of defendants. Upon that point, in addition to what is above stated as to the necessity of a party who is dissatisfied with an instruction,

for the reason that it does not go far enough, of presenting a proper instruction to the court to supply such deficiency, I will add that, as in my view the evidence did not even tend to prove the defendant's counter-claim, for the court to have laid down rules for the guidance of the jury in case they should find for the defendant on such counter-claim would have tended to mislead and confuse, and not to assist them in the discharge of their duty.

Plaintiff in error also complains of the refusal of the court to give in charge to the jury the following instruction requested by him:

"It is a rule of law that in sales of property, unless otherwise expressed, it is implied that the seller may retain the possession until the price is paid, and where a day certain is fixed upon within which the consideration is to be paid and the property delivered, payment or a tender thereof within the time limited must be made, or the seller cannot be compelled to part with his property; and the court therefore instructs the jury that if they find from the evidence that the plaintiff did not make a tender of payment until after the 20th day of May, 1883, at 6 o'clock in the afternoon of said day, then the tender of plaintiffs was too late, and gave them no right to take the cattle, and the jury should find for the defendant."

There are many good reasons for the refusal to give this instruction. It is not applicable to the evidence in the case. It assumes that the contract should have been executed on the 20th, although that day was Sunday; and it assumes that it was the duty of the plaintiff to make a tender to the defendants after he had refused to weigh the cattle and declared the contract at an end. We have already seen that such is not the law.

Having carefully examined the points made by plaintiff in error in his brief upon the several questions of the admission and rejection of testimony, whether the verdict

is sustained by the testimony, and whether the damages are excessive, I find no reversible error.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN JOHNSON, ADMINISTRATOR OF THE ESTATE OF OLE NILSSON, PLAINTIFF IN ERROR, v. THE MISSOURI PACIFIC RAILWAY COMPANY IN NEBRASKA, DEFENDANT IN ERROR.

1. **Pleadings: AMENDMENT: PRESUMPTION.** Where amended pleadings are filed in the district court and properly certified to the supreme court as a part of the transcript, it will be presumed that such pleadings were filed regularly and with the knowledge or permission of the district court, and they will be treated as properly in the record.
2. **Trial: QUESTION FOR JURY.** If the evidence introduced tends in any degree to sustain all the allegations of the petition, the cause should be submitted to the trial jury, and it is error to instruct them to return a verdict for defendant.
3. ———: ———. Though it is true in many cases that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury, this is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from them. And whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should be left to the jury. *A. & N. R. R. Co. v. Bailey*, 11 Neb., 332.
4. **Damages: QUESTION FOR JURY.** In an action for damages alleged to have been sustained by the next of kin to a deceased, whose death is alleged to have been caused by the negligence of the defendant, the question as to the amount of damages sustained by reason of such death is for the jury to determine, under such testimony as to the measure of damages as may be submitted to them.

18 690
37 250
18 690
39 614
18 690
41 126
18 690
43 272
18 690
53 741

5. **Railroad: NEGLIGENCE: ACCIDENT TO EMPLOYEE ON SUNDAY.** Where a railroad company finds it necessary to run its trains on the first day of the week, commonly called Sunday, and also finds it necessary for its employes to labor on that day in keeping its track in proper order and repair for the use of such trains, and while so engaged an employe is injured or killed by the negligence of such railroad company, the fact that the accident occurred on that day will not exonerate the company from liability.
6. ———: **NEGLIGENCE A QUESTION FOR JURY.** In an action for damages caused by a personal injury, resulting from the alleged negligence of the defendant, and some testimony is adduced tending to prove such negligence, the question as to whether the defendant was or was not guilty of negligence must be decided by the jury, and therefore all evidence bearing upon that subject should be submitted to them.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Congdon, Clarkson & Hunt, for plaintiff in error.

1. Defendant can not exonerate itself upon the proposition that the accident resulted from the act of God, unless it shows that it was guilty of no act which contributed to the accident. *Shearman & Redfield on Neg.*, p. 6, § 5. *Pruitt v. Han. & St. J. R. R.*, 62 Mo., 527-541. *Hutchinson on Carriers*, p. 145, § 186. *Michaels v. N. Y. Cen. R. R.*, 30 N. Y., 564. *Read v. Spaulding*, 30 N. Y., 630. *Bostwick v. B. & O. R. R. Co.*, 45. N. Y., 712. *Condict v. Ry. Co.*, 54 N. Y., 500. *Wolf v. Am. Ex. Co.*, 43 Mo., 421-425. Nor upon the proposition that intestate was working upon Sunday, contrary to the laws of this state. *Comp. Stats.*, p. 703. Repairing a railroad should certainly be regarded as a work of necessity, and if it were not, the weight of law is against the position of defendant. *McGatrick v. Wason*, 4 O. S., 566. *Sutton v. The Town of Waunatosa*, 29 Wis., 21, and cases cited. *Knowlton v. Mil. City Ry. Co.*, 59 Wis. 278. Nor upon the propo-

sition that road was operated by another corporation, or that another corporation controlled the rolling stock. *Abbott v. Johnstown Horse R. R. Co.*, 80 N. Y., 27. *Nelson v. Vt. & Can. R. R. Co.*, 26 Vt., 717. *Railroad Co. v. Brown*, 17 Wallace, 445. Rorer on Rys., Vol. 1, p. 607 and cases cited. *Ill. Cent. R. R. Co. v. Barron*, 5 Wallace, 90.

2. The court below found as a matter of law that Nilsen was guilty of contributory negligence. He was an ignorant Swede, but just arrived in this country. He was inexperienced. He had been ordered by his section boss to place the hand-car on the track for the purpose of going back to Talmage. All supposed the road before them clear. No train was due for hours. He was obliged to hold the hand-car; the storm was severe; and in its rush and fury, with his superior almost within reach, whose duty it was to warn him against any possible danger, he lay down under the car and met his death. It does not follow that because he was killed while in that position, that, under the circumstances of this case, he was guilty of contributory negligence as a matter of law. The question should have been left to the jury. *A. & N. R. R. Co. v. Bailey*, 11 Neb., 332. *C. St. P., M. & O. R. R. Co. v. Lundstrom*, 16 Neb., 254. *Gray & Bell v. Scott and wf.*, 66 Pa., 345. *Corey v. N. P. Ry. Co.*, 21 N. W. Rep., p. 479. *McKean v. B. C., R. & N. R. Co.*, 55 Ia., 192. *Morris v. C., B. & Q. Ry. Co.*, 45 Ia., 29. *Berry v. Cen. Ry. Co.*, 40 Ia., 564. *Bucklew v. Cen. Ia. Ry. Co.*, 21 N. W. Rep., 103. *Pringle v. Chi. & R. I.*, 21 N. W. Rep., 108. *Crowley v. Burlington C. R.*, 20 N. W. Rep., 467. *Buell v. N. Y. Central*, 31 N. Y., 314. *Miller v. U. P. Ry.*, 4 McCrary, 115. *Miller v. U. P. Ry.*, 5 McCrary, 300. *Bohan v. Mil., I., S. & W. Ry. Co.*, 58 Wis., 30. *Ferguson v. Wis. Central Ry. Co.*, 23 N. W. Rep., 123. *Knowlton v. Mil. City Railway Company*, 59 Wis., 278. *N. W. Railway Company v. Bayfield*, 37 Mich.,

205. *Walsh v. Peet Valve Company*, 110 Mass., 23. *Strahlendorf v. Rosenthal*, 30 Wis., 674. *Coombes v. New Bedford Cordage Company*, 102 Mass., 572.

Charles Ogden and Everest & Waggener, for defendant in error.

1. There is no allegation in the pleadings nor proof upon the trial that defendant company had in its employ any incompetent servants; therefore the law implies that all legal duties in examination and inspection of the car in question had been exercised and complied with before the accident complained of. 135 Mass., 201. 50 Iowa, 680. 1 Am. & Eng. Rwy. Cases, 101. 2 Id., 140. 5 Id., 480. 11 Id., 193. 54 Wis., 257, pp. 267-282.

2. There is no allegation or proof that the car in question was defective, unsafe, or imperfect when received. *Kidwell v. Railway Co.*, 3 Wood U. S. C. C., 313.

3. Defendant company had the right to imply and rely upon it; that when the deceased entered its employ he was a person of ordinary understanding, care, and caution, and would exercise ordinary care to prevent injury to himself. The company could not be required to anticipate that he would place himself in any unnecessary peril or in any unnecessary perilous position. *R. R. Co. v. Plunkett*, 25 Kansas, 201.

4. The allegations of plaintiff's petition were, that the negligence of defendant company, which caused the injury, was in leaving the car in question on defendant's track, unwatched, and with the brakes unset, on down grade. This the plaintiff had to prove by preponderance of evidence, and to prove the negligence in the manner alleged. *Manuel v. Ry. Co.*, 56 Ia., 655. *Haines v. Ry. Co.*, 41 Ia., 227. *Muldowney v. R. R. Co.*, 32 Ia., 176. *Owen v. Owen*, 22 Ia., 270. *Waldhier v. R. R. Co.*, 71 Mo., 514. *Edens v. R. R. Co.*, 72 Mo., 212. *Price v. Ry. Co.*, 72

Mo., 414. *Ry. Co. v. Troesch*, 68 Ill., 545. *Ry. Co. v. Foss*, 88 Ill., 551.

5. The invariable rule is, that a party whose negligence is the proximate cause of the accident cannot recover for the injury sustained. *Fleming v. R. R. Co.*, 49 Cal., 253. *De Ville v. R. R. Co.*, 50 Cal., 383. *Potter v. R. R. Co.*, 21 Wis., 372. And where, as in this case, the facts are clearly settled and the course which common prudence dictates can be clearly discerned, it was the duty of the court to decide the case as a matter of law. *Sherman & Redfield on Negligence*, § 11, p. 13. *Glassey v. R. R. Co.*, 57 Penn. St., 172. *R. R. Co. v. McClurg*, 56 Penn. St., 294.

6. While some of the authorities hold that contributory negligence on the part of the plaintiff is a matter of defense to be proved by the defendant, still this rule does not prevent the trial court from directing judgment as in case of nonsuit, if the evidence introduced by plaintiff established the defense of contributory negligence. *Hoth v. Pelers*, 55 Wis., 405. *Schuchardt v. Allens*, 1 Wallace, 370. *Parks v. Ross*, 11 Howard, 362. *Bliven v. N. E. Screw Co.*, 23 Howard, 483. *Improvement Co. v. Munson*, 14 Wallace, 442. *R. R. Co. v. Miller*, 25 Mich., 274. *Abbott v. Ry. Co.*, 30 Minn., 482.

7. The rule is well settled, that where it appears by plaintiff's evidence when he rests his case, that his own negligence contributed to the injury for which he sues, that it is the duty of the court to grant a nonsuit. *Express Co. v. Nichols*, 33 N. J. Law, 434. *R. R. Co. v. Moore*, 4 Zabriskie, 824. *Aycriggs Ears., v. R. R. Co.*, 80 N. J. Law, 460. *Harper v. Ry. Co.*, 32 N. J. Law, 88.

REESE, J.

Counsel for defendant in error, both by his brief and in the oral argument, called the attention of the court to the alleged fact that the amended petition of defendant in error

attached to the record was filed without his knowledge, and without permission from the district court, and presents the case in this court upon the original petition alone, disregarding the amended petition. By an examination of the record we find the amended petition copied into the transcript, duly certified by the clerk of the district court, and treated in all respects as the other proceedings in the case. This being the case we must treat the amended petition as being properly in the transcript and properly filed in the district court. If objection is made to pleadings or other papers on file in the district court, the correction must be there made. All presumptions are in favor of the regularity of the proceedings. Irregularities cannot be presumed. They must affirmatively appear, and such irregularity must pertain to the action of the lower court, and not to its officers over which it has control and whose mistakes and errors, if any, it is the province of that court to correct.

This action was instituted by plaintiff in error, as the representative of Ole Nilsson, deceased, for the recovery of damages alleged to have been sustained by reason of a personal injury inflicted upon the said Nilsson, and by which he was killed. The cause was tried to a jury, who, after hearing the testimony offered by plaintiff, under the direction of the court returned a verdict in favor of defendant; the learned judge sitting at the trial holding that the facts proved did not constitute a cause of action in favor of plaintiff. Plaintiff excepted to the instruction of the court, and now, among other things, assigns the same as error. The testimony, as shown by the bill of exceptions, consists in part of the testimony of witnesses before the court and jury, in part by depositions, and in part by a stipulation of facts filed in the case and read to the jury.

The question presented is, whether or not the court, upon the close of plaintiff's testimony and upon motion of defendant, erred in instructing the jury to find for the defendant, upon the theory that the testimony introduced did not

Johnson v. M. P. R. R. Co.

make a case upon which the jury should pass. This question was before this court in *Smith v. S. C. & P. R. R. Co.*, 15 Neb., 583. In that case it is said that, "by the interposition of the motion the defendant admitted not only the truth of the evidence but the existence of all the facts which the evidence conduces to prove, as well as inferences to be drawn from it. The only question is, whether all the material facts alleged in the petition have been supported by some evidence, however slight. It matters not how slight this evidence may have been, if any was produced the motion should have been overruled, because it is the right of a party to have the weight and sufficiency of his testimony passed upon by the jury." See also *Ellis & Morton v. Ins. Co.*, 4 O. S., 646. *Stockstill v. R. R. Co.*, 24 Id., 86. *Way v. R. R. Co.*, 35 Iowa, 586. *Davis v. Steiner*, 14 Penn. St., 275.

The petition, in stating the facts of the accident, alleges, in substance, that at the time of the injury the deceased was in the employ of the defendant, working with other laborers in and about the road-bed of defendant as a section hand, under the supervision and direction of a foreman or boss, who was in defendant's employ, and under whose orders the deceased labored. That in connection with said work, and for the purpose of transporting themselves and tools to the work, the said foreman and laborers used and operated a hand-car owned by defendant. That after they had gone to their labor, at a point on the line of the railroad about one mile south of Talmage, a station on the road, and had removed the hand-car from the track, a violent wind and rain storm came up and forced them to desist from their work. That by order of the foreman the hand-car was placed back upon the track, boarded by the laborers, including deceased, and they all started back to Talmage. That defendant had carelessly left standing upon the side track a freight car, the brakes of which were so out of order and broken that they could not be set, and

of which defendant had notice, and that by force of the wind this car was driven from the side track onto the main track of the railroad and down a descending grade onto and over the hand-car and those thereon (they being so blinded by the storm as to be unable to see it), and by which the deceased was injured, and soon thereafter, from the injuries, died. The petition also negatives any negligence on the part of the deceased.

The stipulation of facts, as well as the testimony, shows substantially that when the storm became violent the workmen quit work. The foreman ordered the hand-car to be replaced upon the track, but at that time the storm was so violent that it could not be propelled against it, and that the deceased then, of his own volition, with several other section men, got under the hand-car and laid down on or between the rails with their faces downward, for the purpose of holding the hand-car from being driven south before the storm, and to shelter themselves from the severity of the wind and rain, and while lying in this condition a freight car which had been left standing upon the side track at Talmage was driven by the storm onto the main track and on a downward grade at a rapid rate toward where the deceased and other workmen were, and that it, by force of the storm, was driven onto and against the hand-car with such violence as to cause the death of deceased. The testimony shows that the freight car was standing a distance of from ten to twenty feet from and south of the other cars upon the side track, that the brakes were not set, and could not be set owing to the condition of the brake, it being out of repair. As to how long the brake had been broken the testimony does not show, but it is fully proven that on the day previous the car was unloaded and the brake at that time was broken so that it was useless. The switch connecting the side track with the main line track was what is known as a split switch, and permitted the car to pass out onto the main track.

The condition in which this car was left would be sufficient evidence of negligence to warrant the court in submitting that question to the jury, under proper instructions, under the rule in *A. & N. R. R. Co. v. Bailey*, 11 Neb., 332. But it is insisted that the action of the deceased in placing himself under the car under the circumstances which he did was contributory negligence upon his part to such a degree as would prevent his recovery, no matter what the proof of negligence as to the defendant in error might be, so long as it was not wanton or willful. A majority of the court instruct me to say that in their opinion the question of negligence on the part of deceased was also one which ought to have been submitted to the jury. At the time of the accident there was no train due. It was on Sunday and no regular trains were run on that day, yet irregular trains used in the construction and reparation of the road were liable to pass, ordinarily, at any time. Deceased was under the command of the section boss. By his order the hand-car was placed on the track for the purpose of going back to Talmage. He had charge and supervision of deceased so far as to control his actions in and about the employment. Why he did not direct the hand-car to be removed from the track is not shown. He remained standing near the track, and within six feet of the hand-car until the approach of the freight car. Deceased might to some extent depend upon him and others standing by for notice of an approaching train or other danger, the position of deceased being such that he could not. Deceased was inexperienced and not acquainted with the English language, which was known to the foreman or section boss. Under the circumstances of the case it was for the jury to say whether the conduct of the deceased amounted to negligence. *Gray v. Scott*, 66 Pa., 345. *McKean v. R. R. Co.*, 55 Ia., 192. *Morris v. R. R. Co.*, 45 Id., 29. *Bohan v. R. R. Co.*, 58 Wis., 30. *A. & N. R. R. Co. v. Bailey*, *supra*. *R. R. Co. v. Stout*, 17 Wall., 657. *R. R. Co. v. Kirk*, 90 Penn. St., 15.

It is contended that the proof does not show that deceased was under the direction of the foreman Courtney, and that under the evidence he, Courtney, sustained no such relation to deceased as vice principal of defendant. It is true the testimony upon this point is meager, but enough is shown by the stipulated facts to amount to at least *some* evidence upon this point, the stipulation being to the effect that the intestate, in company with others, "went to their work under the direction of Owen Courtney, defendant's section boss," and that the hand-car was placed upon the track under his direction, etc. This was enough to submit the question to the jury.

It is claimed by defendant in error that no pecuniary injury resulting from the death is shown by the evidence. The action was brought under the provisions of the act of May 1st, 1873, Compiled Statutes, chapter 21. By the second section of that act it is provided that, "the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars," etc. The testimony shows that the deceased was an unmarried man, that his mother was dead, and his father is the next of kin. It is shown by the testimony of the father that he had received no aid from the deceased since the arrival of deceased in this country, the father being a resident of Sweden. It is also shown that the deceased had been in this country but a short time. We think the question here presented can have application only to the measure of damages. If it should appear upon trial that the father suffered no damage in the death of the son, it is probable there could be a recovery only for nominal damages. But, it is said that the word "pecuniary" as used in our statute is not construed in a strict sense. The damages are largely prospective, and their determination committed to the discretion of juries.

upon very meagre and uncertain data. A parent may recover for loss of expected services of children not only during minority, but afterwards, on evidence justifying a reasonable expectation of pecuniary benefit therefrom. Neither is it essential that this expectation of pecuniary benefit should be based on a legal or moral obligation on the part of the deceased to confer it, but it may be proved by any circumstances which render it probable that such benefit would, in fact, be realized. And as a right of action is given whenever the injured person, had he lived, could have maintained an action, at least nominal damages may be recovered. 3 Sutherland on Damages, 182, 183. *City of Chicago v. Scholten*, 75 Ill., 468. *Johnson v. R. R. Co.*, 7 O. S., 336. *R. R. Co. v. Killer*, 67 Penn St., 300. *McIntyre v. R. R. Co.*, 37 N. Y., 287. *R. R. Co. v. Kirk*, *supra*. *R. R. Co. v. Shannon*, 43 Ill., 338. *R. R. Co. v. Barron*, 5 Wall., 90. *Grotenkemper v. Harris*, 25 O. S., 510.

The accident occurred on a Sunday. It is claimed "that no damages could be recovered by plaintiff for injuries suffered by his intestate while engaged in the performance of an illegal act," common labor on the Sabbath day being prohibited by section 241 of the Criminal Code.

It is true that, subject to the exception named in the statute, ordinary labor on the first day of the week is in violation of law, but we cannot hold that under the circumstances of this case this statute will destroy the right to recover. One of the exceptions of the statute is that of railway companies running necessary trains. If railway companies assume to decide what trains are necessary, and in the exercise of that right find it necessary to run construction and material trains, as shown by the testimony of their engineer, and for the purpose of enabling them to do so require the labor of their track men to keep the track in a passable condition, it would require a stretch of imagination and a severe twisting of legal principles to hold that

under such circumstances they would not be liable for negligence resulting to an employe engaged in what they themselves held to be a work of necessity.

During the trial the witness Conger, who had moved the car on Saturday, was asked if at the time he moved the car the brakes on it were set. This was objected to by defendant as immaterial, irrelevant, and incompetent. The court decided that if the witness examined the brake and could state any facts tending to show that the brake was imperfect, he might state them. Plaintiff then offered to prove the fact of the brake being unset, the objection to which was sustained. This ruling is assigned for error. Under the rule laid down in *R. R. Co. v. Bailey*, 11 Neb., 332, it would seem that the question should have been answered by the witness and the testimony allowed to go to the jury for them to pass upon. It is true that the fact sought to be proved is of minor importance, yet in a remote degree it would have some bearing as a circumstance tending to throw light upon the question of negligence on the part of defendant.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

The other judges concur.

HENRY PARRISH, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

DISSENTING opinion in case reported, *ante* p. 405.

REESE, J.

I cannot adopt the conclusion of the majority of the court in this case, and will, very briefly, give my reasons for such dissent.

First. I do not believe the instruction complained of was erroneous. It was clearly the province of the jury to decide as to whether there were "explanatory circumstances proven," or not. It is not my purpose to enter into an analysis of the testimony in the case, but will say that, as I read it, it presents a case of the magnitude, at least, of murder in the second degree. From the whole record it seems to me that the killing of the young man, Parker, was cruel and inhuman. His crime was that of trying to induce a drunken father to leave town and go home, and in trying to defend him from the attacks of a number of persons, in whom plaintiff in error was one. All the circumstances were before the jury. It was their province to pass upon them. It was then proper for the jury, if they found "from the evidence that Henry Parrish, the defendant, did kill and slay Elmer E. Parker," which, by their verdict, they did, and if there were no circumstances proven of an explanatory nature to reduce the degree of the crime, the presumption would be that it was murder in the second degree. Under the evidence I think the instruction was correct.

Second. But my principal objection to this decision is to the second point presented by the opinion of the majority. I have examined the motion for a new trial, petition in error, motion for a rehearing, and brief thereon, as well as the brief of the plaintiff in error upon the final

submission of the case, and in no single instance do I find any objection to the verdict of the jury, nor do I find any language which, by any rule of construction or distortion, could be so construed as to present even a hint that the plaintiff in error was not fully and entirely satisfied with the form of the verdict.

I do not believe it is the province of the supreme court to dispose of causes upon proceedings in error upon any other questions than those presented for adjudication, except when the question of jurisdiction or human life is involved. I do not believe the judgment in this case was void. I believe the verdict did confer "power on the court to pass sentence on the accused," unless he objected to that verdict. He had the right to waive the objection if he wanted to, and when he has deliberately elected so to do I know of no authority to deprive him of that right.

In *Walrath v. The State*, 8 Neb., 18, Judge LAKE, in writing the opinion of the court, says: "The evident intention in requiring the motion for a new trial to be in writing was to fully apprise the judge to whom it might be addressed of the matters claimed to be erroneous, and on which the party complaining relies for a new trial. * * The proceeding (error) by which this is here is one of review only. Under it the only questions proper for our consideration are those that have been first ruled on in the court whose record is before us, and the record itself must show the questions to be such. The presumption is that no prejudicial error has been committed, and it is not too much, indeed good practice demands it, to require a party who complains of such errors to point them out so distinctly in his motion for a new trial as to advise the court of just what he relies on. The rule in this particular is the same as in civil cases."

In *Dodge v. The People*, 4 Neb., 228, the present Chief Justice MAXWELL, in writing the opinion of the court, says: "In this country the almost uniform practice has been to

extend to criminal cases, so far as the revision of verdicts is concerned, substantially the same principles which have been established in civil cases; and by statute in this state after a verdict of guilty a defendant may move for a new trial on any or all of the points therein set forth; and it is his duty in such a case to bring before the court, by his motion, all the reasons which are known to exist for setting aside the verdict and granting a new trial. There is no reason why the same rule in that respect should not apply in criminal as in civil cases."

This doctrine has been uniformly applied to civil cases by this court. We do not know of a single exception. See *M. P. R. R. Co. v. McCartney*, 1 Neb., 398. *Mills v. Miller*, 2 Id., 317. *Cropsey v. Wigenhorn*, 3 Id., 117. *Wells, Fargo & Co. v. Preston*, 3 Id., 444. *Horbach v. Miller*, 4 Id., 43. *Singleton v. Boyle*, Id., 414. *Horacek v. Keebler*, 5 Id., 356. *Hosford v. Stone*, 6 Id., 381. *Stanton County v. Canfield*, 10 Id., 390. *Russell v. The State, ex rel. Armor*, 13 Id., 68.

It will be observed that in the case at bar the cause was submitted on the first hearing upon just such a record as the plaintiff in error saw proper to present. The cause was decided, and I think rightly, and the judgment of the lower court affirmed. Now, years afterward, when plaintiff in error and his counsel, who is the same as on the first hearing, have had time to fully decide what they desire, and have presented the question upon which they want the court to pass, but, as in every stage of the case, make no complaint as to the verdict, I think, in view of uniform holdings in this state, the case should be disposed of upon the questions presented and no others. I furthermore view with some solicitude this step in the direction of opening up old judgments, and especially upon questions which are not presented for decision by the record. If this custom were to prevail there is no telling where the end would be, for very many of the records of conviction are as imperfect as the one in this case.

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2. Record constructive notice to those only who trace their title through grantor. *Id.*..... 195

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1. Liability for damages by reason of defective streets, sidewalks, etc. *City of Lincoln v. Gillilan*..... 119
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2. A person who passes along a public street open to travel has a right to presume that it is in a reasonably safe condition, and if in the exercise of reasonable care he falls into an excavation in the street which was not adequately protected, and sustains injuries, he may recover therefor in a proper case. *City of Lincoln v. Walker*..... 250

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1. Unnecessary, taxed to party making them. *State v. Saline County*..... 423
2. A party complaining of the taxation of costs in the dis-

- trict court must file a motion in that court to retax the same. The ruling on the motion to retax is subject to review. *Whitall v. Cressman*..... 508
3. Effect, on costs, of offer to confess judgment. *Ross v. Peck*..... 529

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1. Funding bonds with those issued previously cannot exceed ten per cent of valuation. *State, ex rel. Wiant, v. Babcock*..... 141
2. Have no authority to issue bonds for jail. *State v. Lincoln County*..... 283
3. Duty and power of commissioners relative to bridges. *Brown v. Merrick County*..... 355, 356
4. Liability for support of insane. *State v. Douglas County*.. 601
5. Payment of taxes in unorganized counties. *Fremont, etc., E. E. Co. v. Brown County* 516
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7. Removal of county officers; jurisdiction of county board in counties under township organization; complaint; judgment of board not controllable by mandamus; trial before the board; right of respondent; quorum of board sufficient; costs. *State v. Saline County*..... 422

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1. Has jurisdiction to revive dormant judgment. *Hunter v. Leahy & Co.*..... 80
2. May assign widow's dower; and in order to oust it of such jurisdiction the right of the applicant to such dower must be disputed by presenting an issue of fact, which, if established by proof, would defeat her claim of dower, and such issue must be one which the county court by its organization is unable to try. *Guthman v. Guthman* 98
3. May assign homestead on settlement of estate. *Id.*..... 98
4. Judgment made lien on real estate by filing transcript in office of clerk district court. *Id.*..... 562

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1. Increase of number of judges of district court. *State v. Stevenson*..... 416

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1. Pleading not amendable in supreme court on original motion. *Spellman v. Frank* 110
2. But where an action is brought upon a contract instead of a *quantum meruit*, and all the proof introduced without objection, showing the right of the plaintiff to recover, the supreme court will, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause

to the district court for such amendment. *Homan v. Steele, Johnson & Co.*..... 652

3. If evidence on each side is of nearly equal weight, and the only objection to the finding and judgment is that they are against the weight of evidence, they will not be set aside. *Doolittle v. Wheeler* 136
4. Leave given plaintiff to require the defendant to marshal securities and exhaust those upon which the plaintiff has no lien, before resorting to the latter. *Traphagen v. Irwin*, 196

Creditor's Bill.

1. Judgment debtor removed to another county, and after removal execution issued and returned unsatisfied, *Held*, That creditor's bill would lie, without issuance of execution to county where defendant resided at the time, if bill allege that debtor has no property subject to execution. *Sayre v. Thompson* 33
2. Creditor's bill to subject a judgment to payment of creditor's judgment; *Held*, Under the facts stated that the owner of the judgment is estopped to set up and claim as a defense that the plaintiff in creditor's bill obtained satisfaction of their claim by attachment of goods of debtor. *Id.*..... 33
3. Attorney's lien not affected by creditor's bill against judgment which they obtained. *Id.*..... 34

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1. Verdict of lower degree of homicide on first trial set aside, accused may be convicted of higher grade on second trial. *Bohanan v. State*..... 57
2. Opinion of juror founded on newspaper reports does not disqualify. *Id.*..... 57
3. In a trial for murder a verdict of guilty which does not ascertain whether it be murder or manslaughter, as required by section 489 of the Criminal Code, confers no power on the court to pass sentence on the accused. *Parish v. State* 405
4. Prosecution by information; construction of statute; proceedings exclusive. *Jones v. State*..... 401
5. When jury is impanelled state must proceed with prosecution. *State v. Shuchardt*..... 455
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1. How considered in arriving at worth of services of real estate agent. *Lansing v. Johnson*..... 175

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1. By stock; facts stated, and owner, *Held*, Not liable for damages done, and that there was no question of negligence to submit to jury. *Holmes v. Irwin*..... 313
2. Instruction to jury to "assess to plaintiff such damages as from all the evidence you shall find he has sustained by reason of illegal taking and detention of personal property," *Held*, Vague and misleading. *Morehead v. Adams*, 570
3. For detention of property in replevin cases. *Romberg v. Hughes* 579
4. In action for breach of executory contract to deliver personal property. *Post v. Garrow*..... 687
5. Rule in cases of amercement. *Crooker v. Melick*..... 227
6. Injuries to person. *City of Lincoln v. Walker* 244
7. Rule of, where buildings are not erected according to contract. *Morrissey v. Schindler*..... 681
8. Where in an action for damages resulting from personal injuries a physician, being a son of plaintiff, was permitted to testify, over the objection of defendant, to the opinions expressed by consulting physicians who were called to examine plaintiff as to the results of the injury, it was *Held*, To be error, the testimony being incompetent and hearsay. *Village of Ponca v. Crawford*..... 551
9. Verdict in favor of plaintiff not set aside at his instance because not large enough, where cause of injury is matter of conjecture. *Benzon v. B. & M. R. R. Co*..... 559
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1. Presumption from absence; presumption of, from circumstances. *Cox v. Ellsworth* 664

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1. To answer which constitutes a defense should be overruled. *Manafeld v. Avery* 478
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1. As to one defendant during trial. *Morrissey v Schindler*.. 672

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1. The order of introducing evidence is discretionary with the trial court. *Village of Ponca v. Crawford*..... 551
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Divorce and Alimony.

1. Wife, upon decree, entitled to dower; if she do not demand it, and trial court awards sum in gross in nature of permanent alimony, claim for dower will be barred. *Tatro v. Tatro*..... 395
2. Decree for permanent alimony bars further claim of wife against estate of husband. *Id.*..... 396
3. Conveyance by husband to defeat decree of alimony; burden of proof on grantee to show valuable consideration. *Atkins v. Atkins* 474

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1. Where answer of defendant put in issue title of plaintiff, but alleged no equitable defense, a finding and judgment for the plaintiff upheld, notwithstanding there was evidence which, under proper allegations, would have tended to establish an equitable defense. *Uppfalt v. Nelson*..... 533

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1. Mere refusal of a treasurer to pay an order, warrant, or draft on him by proper officers does not constitute. *Chaplin v. Lee* 440
2. To constitute embezzlement it is essential that the owner should be deprived of the property alleged to be embezzled by an adverse use or holding. *Id.*..... 440

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1. Decree set aside for mistake, etc., and defense allowed to be made. *Buchanan v. Griggs*..... 121

Error Without Prejudice.

1. A judgment will not be reversed nor a verdict set aside for an error which has been committed without prejudice to the party complaining. *Village of Ponca v. Crawford*... 551
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1. Garnishee estopped in case stated from attacking regularity of proceedings. *B. & M. R. R. Co. v. Chicago Lumber Co.*..... 303

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1. Preponderance only sufficient, but where jury are instructed that if a claim is established by a "fair" preponderance of the evidence, the use of the word "fair" is not prejudicial. *Dunbar v. Briggs* 97
2. Conflicting as to damages must be submitted to jury. *E. V. R. R. Co. v. Fink & Wykoff* 89
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tents of written instruments or records by parol testimony does not preclude oral testimony of the existence of such instruments or records preliminary to their introduction or proof of their loss or destruction. <i>Village of Ponca v. Crawford</i>	551
4. Hearsay inadmissible. <i>Id.</i>	551
5. Legislative journals; certificate of presiding officer. <i>State v. McClelland</i>	236
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7. To vary contract by parol. <i>Id.</i>	673
8. Of work and labor. <i>Id.</i>	673
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1. Plaintiff must prove criminal prosecution to have been without probable cause and malicious by preponderance of evidence; but where want of probable cause is clearly shown, and all the facts and circumstances of the case are before jury, they may find from the facts showing a want of probable cause that prosecution was malicious. <i>Casbeer v. Rice</i>	203
2. When proof of real facts may be shown for purpose of showing want of probable cause and malice. <i>Id.</i>	204

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1. *Held*, Not to have full force and effect. *Tessier v. Englehart & Co.*..... 167

Forfeiture.

1. Of money advanced on contract. *Post v. Garrow*..... 683

Fraud.

1. The representation of a fact in the future, and not a mere promise which has been acted upon and turns out to be false, will entitle the injured party to the same remedies as fraudulent misrepresentations of an existing fact. *Abbott v. Abbott*..... 503
2. Mere sale to relative of stock of goods is not of itself a badge of fraud. Such a sale made in good faith upon sufficient consideration, and not to hinder or defraud creditors, will be sustained. *Lininger v. Herron*..... 450
3. Where a bill of sale of a stock of goods was made to the mother and brother of the debtor to pay debts owing by him to them, *Held*, That as against other creditors the grantees acquired only the right to have a sufficient amount of the goods sold to satisfy their claims, and the balance was a trust fund for the benefit of other creditors, and the grantees must account. *Id.*..... 450
4. Conveyance while suit is pending; burden of proof. *Atkins v. Atkins*..... 474
5. Promise in case stated, *Held*, Not within statute of frauds. *De Witt v. Root*..... 567

Garnishment.

1. After judgment, under sec. 249, Code; order of court that garnishee pay amount due enforced by execution. *B. & M. R. E. Co. v. Chicago Lumber Co.*..... 303
2. Garnishee in case stated, *Held*, Estopped to question regularity of proceedings. *Id.*..... 303
3. Garnishee, *Held*, Not liable on facts stated. *Code v. Carlton*..... 328

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1. Not to be summoned unless judge direct. *Jones v. State*, 401

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1. Liability of guardian for negligence in care of ward. *Nelson v. Johansen*..... 180

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1. Failure to appoint, where real estate is sold by administrator, not fatal. *McClay v. Foxworthy*..... 295

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1. Taker up acquires no lien unless he comply with law. *Deirks v. Wielage*..... 176

2. Owner may replevy stock if taker up refuses to appoint his arbitrator. *Id.*..... 178

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1. May be assigned by county court on settlement of estate. *Guthman v. Guthman*..... 98
2. Tenant in common not entitled to right as against cotenant for value of his interest. *Lynch v. Lynch*..... 586

Homicide.

1. Where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial. *Bohanan v. State*..... 57

Housebreaking.

1. Evidence. *Seling v. State*..... 548

Husband and Wife.

1. Conveyance by aged husband to wife in trust for his support and that of the family not set aside because of disagreement and separation of parties. And if wife convey to other parties, upon their separation, equity will require an accounting, and make such decree as will protect interests of both the husband and wife. *Austin v. Austin*... 306, 309
2. Where land was conveyed by husband and wife by warranty deed to trustees appointed by the will of her father, for the "sole and separate use and benefit" of the wife, etc., the consideration being derived from the father's estate, a provision in the deed that the husband "shall have the right to occupy, farm, and control said lands for her (the wife)" does not create any estate in him, where there is no fraud. *Pemberton v. Pollard*..... 435
3. Where husband conveys real estate while wife is a non-resident, she has no dower interest therein. *Atkins v. Atkins*..... 474
4. Conveyance by husband to defeat alimony. *Id.*..... 474
5. Liability of husband for libelous letter written by wife. *Mills v. State*..... 575

Indictment. See INFORMATION.

1. Corrupting witness. *Chrisman v. State*..... 107

Infant.

1. Contracts of an infant, other than for necessities, are voidable only, and upon coming of age he may affirm or avoid in his discretion. *Philpot v. Sandwich Manuf'g Co.* 54
2. If an infant purchase personal property and give his promissory note therefor, he cannot, upon arriving at the

age of twenty-one years, retain the property and plead infancy as a defense to the note. *Id.*..... 54

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1. Construction of statute allowing prosecution to be by information. *Jones v. State*..... 401

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1. Liens to permit destruction of osage hedge fence by a stranger to the inheritance. *Sapp v. Roberts*..... 299
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3. Does not lie to restrain payment to contractor for erection of public bridge, after work is completed, and contractor has incurred liabilities. *Brown v. Merrick County*.. 356

Injuries to Person.

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1. Appointment of matron of Hospital lies in governor. *In re Board of Public Lands and Buildings*..... 340
2. Tax for support (Comp. Stat., Ch. 40) not unconstitutional. *State v. Douglas County*..... 601
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Instructions to Jury. See COMMISSIONERS.

1. Where objection is made that the instructions of the court to the jury are not sufficiently explicit, the remedy is to request instructions which are satisfactory. *R. V. R. R. Co. v. Fink* 89
2. Party dissatisfied with instructions, on ground that they do not comprehend the whole case or go far enough, must present instruction embracing the law as he understands it. *Post v. Garrow*..... 688
3. Not error to refuse to repeat; not error to refuse to re-instruct on same proposition, but with the addition of a clause limiting the force of the instruction when such limitation would be against the interest of the party asking the instruction; or, if error, it would be error without prejudice. *City of Lincoln v. Gillilan*..... 114
4. Should be confined to issues. *Id.*..... 114
5. When upon a jury trial an instruction is asked by which it is sought to cover the whole case made by the party asking it, all the essential elements of the case should be embodied in the instruction, otherwise it is not error to refuse it. *Nelson v. Johansen*..... 180

6. Must be applicable to testimony; restricted to actual questions at issue. *U. P. R. R. v. Ogilvy*..... 639
7. Examined and *Held*, Not indefinite. *Gibson v. Sullivan*.. 590
8. Right to require written instructions waived if no exception taken at time oral charge is given. *Gibson v. Sullivan* 558

Insurance.

1. Contract defined; on facts stated, *Held*, That defendant was a mutual insurance company, and as such must comply with statute before transacting business. *State v. Farmers Benevolent Association*..... 276
2. Not necessary for plaintiff in action on policy to allege or prove title to property insured. *Western Ins. Co. v. Scheidle*..... 495
3. Waiver of payment of premium. *Id*..... 495
4. Authority of general agent to employ sub-agent; evidence conflicting on question of employment must be submitted to jury. *Equitable Life v. Brobst*..... 526

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1. A party receiving funds deposited in court, to which he is entitled, is not chargeable with interest thereon. *Cressman v. Whitall*..... 508

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- Attorneys in action of tort cannot intervene and assert attorneys' lien. *Abbott v. Abbott*..... 505

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1. No bonds for, can be issued by county. *State v. Lincoln County*..... 283

Jeopardy.

1. Prisoner in jeopardy when jury has been sworn. *State v. Shuchardt*..... 455

Judgment.

1. The judgment of a foreign court against a person domiciled in this state, where it appears by the record that no personal service of process was had upon such defendant, and that he made no appearance to the action, will not have full force and effect in this state. *Tessier v. Englehart & Co*..... 167
2. Not a lien upon equitable interest in real estate of debtor. *Nessler v. Neher*..... 649
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1. Notice must be published during the thirty days before sale. *Lawson v. Gibson*..... 137
2. Purchaser not affected by subsequent opening of decree under section 82, Code. *Watson v. Ulbrich*..... 186
3. Where a decree is vacated under section 82 of the Code, and an answer filed by the defendant denying the facts stated in the petition and praying for a dismissal of the action, the subsequent dismissal of the suit by the plaintiff will not affect the title of a purchaser in good faith while the decree was in full force. *Id.*..... 186
4. Purchaser must pay price bid; payment by check; drawer stopped payment; order of court requiring payment by purchaser of money in thirty days, *Held*, Proper. *Gregory v. Tingley*..... 318
5. Objections to confirmation must be made in trial court and before the confirmation. *Gregory v. Tingley*..... 320

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1. Plea in abatement to jurisdiction of court must present an issue of fact; it cannot arise by implication. *Guthman v. Guthman*..... 104
2. Titles to real property acquired under proceedings of courts having jurisdiction cannot be attacked in collateral proceedings. *Trumble v. Williams*..... 144
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1. In action on note, note itself is a sufficient bill of particulars. *Phoenix Ins. Co. v. Lemke*..... 184
2. If note is in possession of justice and no affidavit filed by defendant or denying its execution, nor any defense to action, justice may render judgment on it, though plaintiff fail to appear. *Id.*..... 184
3. Jurisdiction in suit on note to extent of \$200. *Strang v. Krickbaum*..... 365
4. Where attachment is brought before justice against non-resident, and his property attached and sold; justice will be liable if cause of action is not founded on contract, judgment, or decree. *Wright v. Rouss*..... 234

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1. A libelous charge made by A against B contained in a letter written and mailed in this state to C, residing in another state, is sufficient to render A liable in this state for the offense. *Mills v. State*..... 575
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1. An attorney is not entitled to a lien before judgment upon a cause of action for tort, which in case of the death of the parties would not survive. *Abbott v. Abbott*..... 503

Limitation of Actions.

1. Limitation of one year within which action may be reviewed does not apply to judgment. *Hunter v. Leahy & Co.*, 81
2. The statute prescribing time within which a civil action may be brought under the code of civil procedure has no reference to time within which delinquent taxes may be collected by distress, and is not applicable thereto. *Price v. Lancaster County*..... 199
3. Statute does not run against tax lien until title acquired by tax deed has failed. *Otoe County v. Mathews*..... 466
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Liquors.

1. Pauper dependent for support on relative may maintain action for loss of such support against liquor seller selling liquor which caused death of such relative. *McClay v. Worrell* 44

2. Joint defendants entitled to no more peremptory challenges than where action is against a single defendant. *Id.*, 44
3. Each person furnishing the means of intoxication is liable, severally and jointly, for legal damages resulting from such intoxication, whether it be the first or last glass. *Id.*, 52
4. Not necessary to recovery that death or damages should be natural and logical result of the act of furnishing the liquor, or that the traffic of the seller should be the proximate cause. *Id.*..... 52
5. "Slocumb law" constitutional; legislature may require that licensee shall be a resident of the state. *Mette v. McGuckin*..... 323
6. Provisions of statute relative to hearing of remonstrance against issuance of license are mandatory. *State v. Reynolds*, 431
7. Upon an application for a mandamus to compel the appointment of a time for the hearing of a remonstrance it is no defense to allege, nor will this court inquire as to, the falsity of the facts alleged in the remonstrance. It is sufficient if one is filed. *Id.*..... 431

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3. Transfer of part of property by consent of mortgagee in payment of debts of mortgagor will not of itself render mortgage fraudulent and void against creditors. *Chicago Lumber Co. v. Fisher*..... 334
4. Property not subject to sale on execution against mortgagor; remedy by garnishee process or such proper proceeding as would reach the interest of mortgagor after debt due mortgagee was paid. *Id.*..... 334
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1. Conveyance of real estate by minor to father; mortgage afterwards given will not disaffirm deed; mortgage given by father foreclosed after son has attained his majority, he being a party to suit, bars son and all persons claiming under him; and where, during the pendency of the suit to foreclose the mortgage executed by the father, the son executes a mortgage to a third party, such third party will also be barred by the foreclosure proceedings. *Buchanan v. Griggs*..... 121
2. Grantee of mortgagor may avail himself of bar of statute of limitation if mortgagor could. *Baldwin v. Boyd*..... 449

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